



September 2008

Updates on the News

Automatic programmatic distribution — Anyone who has filed for a construction permit in the last several years has bumped up against (or at least should have bumped up against) FCC Form 620 and the related obligations to notify pretty much everybody on the face of the planet of the proposed construction. (We have described this clearance process in *e.g.*, the May, 2008, November, 2006, and February, 2005 *Memos to Clients*.) This requirement flows from the National Historic Preservation Act and the “Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission” (NPA). Essentially, CP applicants are required to analyze their proposals, prepare a report on that analysis, circulate the report to various offices and groups (including the relevant “State Historic Preservation Officer” and potentially-interested Native American tribes), and await their responses. In a worst-case scenario, applicants might find themselves having to prepare and submit a full-tilt Environmental Assessment. While exemptions to the rules may help avoid that fate, in many instances you still have to jump through a considerable number of hoops just to confirm that you’re eligible for an exemption.

Against this background it may be good to know that the Commission has established a new electronic mechanism through which applicants may submit Form 620 for distribution to all appropriate recipients. According to the FCC, this will “automate, expedite and facilitate” the process mandated by the NPA. As with many things, this could be a two-edged sword. On the one hand, having the FCC distribute your Form 620 may relieve you of some hassles and, more importantly, should shield you from any claims that the distribution was somehow lacking. But on the other, bear in mind that Form 620 does not necessarily have to be submitted to the Commission at this point in many cases. That is, the Form 620 is prepared and circulated, and on the basis of that initial effort it is often determined that the proposal raises no environment/historical problems. At that point you can just check the “yes” box in the environmental certification question on Form 301 (or 340), and that’s that. So the new automated system entails handing over to the FCC a bunch of information – that is, your Form 620 – that you otherwise might not have had to hand over.

The new system is not yet up and running. When it comes on line, we’ll check it out and report back to you.

Getting Sirius – When the Commission granted the XM/Sirius merger a couple of months back, it committed to start a proceeding looking into whether it should require

satellite radio receivers to be able to receive digital audio broadcasts (a/k/a/ “HD Radio”) as well – and vice versa. True to its word, the Commission has kicked off that inquiry. If you want to participate, comments are due by November 10, reply comments by December 9.

Backfill clarification – We have previously had occasion to describe the Commission’s “backfill” policy when it comes to moving FM channels around from city to city. In a nutshell, that policy prohibits the removal of an FM channel from the community to which it has been allotted if that removal would result in the loss of that community’s only local aural service. (See, for example, the May, 2007, or February, 2005 *Memos to Clients*). In a recent decision the Commission clarified that that policy requires that an actual licensed and operating station remain available in the community in question. That is, an outstanding construction permit will ***not*** do the trick.

This arose out in beautiful downtown Dripping Springs, Texas, where the only station in town wanted to move over to Bee Cave – and who wouldn’t? A CP for a new noncommercial FM in Dripping Springs had been issued but the station hadn’t been built yet. The guy who wanted to move went ahead and applied to move to Bee Cave anyway, arguing that the noncom was “near completion” and that the spirit of the backfill policy was satisfied. Covering his bets, the guy also asked for a waiver just in case the application needed one.

Good thing that he asked for that waiver. An objector popped up, arguing that a nearly-built CP is not the same as a licensed and operating station, and that therefore the Dripping-Springs-to-Bee-Cave application violated the backfill policy and shouldn’t even have made it through the front door at the Commission. And the Audio Division agreed – holding that reliance on the unbuilt CP “constituted an unacceptable backfill proposal”. Oops. But since the applicant had a right to request a waiver, the staff determined that the application could be accepted for filing in order to permit consideration of the waiver request. And in the meantime, the NCE station had been constructed and had commenced operation, thus mooting out the waiver request.

The moral of this story is two-fold. First, don’t count on unbuilt CP’s to get you past a backfill problem. And second, when in doubt, ask for a waiver and hope like heck that things turn your way before the Commission gets around to answering your request.

Let’s get right on that – And finally, we have the noteworthy Docket 91-259, an FM channel change matter commenced in 1991. The staff released its Report and Order (R&O) approving the various modifications proposed in that docket in 1995. Those modifications included a series of coordinated changes to a number of stations’ facilities. Those changes required the filing of Forms 301 or 302, all of which were – by the terms of the R&O – to be filed within 90 days of the R&O, *i.e.*, by the Fall, 1995. We are pleased to report that one of the participating licensees finally managed to get its 301

filed in February, 2008 – that’s right, more than 12 years after the deadline. In August, the Commission granted that application, but gave the licensee only six months (as opposed to the normal three years) in which to construct.

The proof is in the computing – Remember last year, when the FCC proposed to allow some AM stations to conduct their directional proofs using the “moment method”? (*See the May, 2007, Memo to Clients* for background.) Moment method computer programs (also referred to as NEC, or Numerical Electromagnetics Code, programs) permit the accurate calculation of actual performance based on certain internal antenna parameters, such as current and phase. In a relatively instantaneous 16 months, the Commission has adopted that proposal. Of course, the proposal to use computerized modeling techniques to replace the traditional hand-crank proof methods has been pending before the Commission for about 17 years, but really, who’s counting? The FCC’s decision to approve the moment method under some, but not necessarily all, conditions was released at press time, so we are not covering it in detail here. The new approach will not become effective until OMB approves the change, but it’s at least possible that the staff might entertain waiver requests in the meantime. Check out our blog (at www.CommLawBlog.com) for more details.