

Memorandum to Clients

And Then There Were Five . . .



Adelstein Confirmation Adds a Potential Friend for Broadcasters

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Like a rolling stone with no time to gather moss, harmonica-wielding South Dakotan Jonathan S. Adelstein has taken his place at the FCC Commissioners' table for a six-month tenure. He's hoping that's enough time for him to get out his message that the times, they are a-changin', and that the Commission must protect competition, diversity and localism or broadcasters will be singing the blues.

Adelstein (pronounced "ADD-dull-steen"), a Democrat, joins Republican Commissioners Kathleen Abernathy, Kevin Martin, Chairman Michael Powell, and Democrat Michael Copps. Although the White House nominated Adelstein for the position in November 2001, he sat in the wings for a year waiting for Congress to confirm that nomination in November 2002. The 40-year-old former senior legislative aide and his-



tory professor was sworn in on December 3, 2002. It will be short gig at first, though – he will complete the term of departed Commissioner Democrat Gloria Tristani, which expires June 30 of this year. It is assumed that he will then be reappointed for a full term.

Adelstein made his debut speech as a Commissioner at the Future of Music Coalition Policy Summit 2003 in Washington, D.C. on January 6. It was there that he accompanied R&B legend Lester Chambers on the harmonica and, as both a musician and a Commissioner, spoke of his soft-spot for community oriented broadcasters, his cautious approach toward media ownership, and his fear of the impact over-consolidation could have on diversity and localism. He also said in a statement on the date of his swearing-in that his goals include enhancing competition and efficiently managing the public spectrum. Additionally, he has emphasized the need for broadcasters to take advantage of technological advances such as broadband, wi-fi, satellite radio and digital cable to take their programming to more people and allow the marketplace of ideas to flourish.

While the Commission has not yet adopted any broadcast items since Adelstein became a Commissioner, he has put his pen where his promises are in the few Commission items in which he has participated. He joined Commissioner Copps in two joint statements, both related to telecom issues. In each, the pair said that the other Commissioners jumped to decisions about competition in particular markets without adequate research, likely to the long-term detriment of smaller telecom providers and ultimately consumers. Such an approach in the broadcast context would likely surface as opposition to concentration of ownership in broadcast markets.

For the seven years immediately preceding his Commission swearing-in, Adelstein was senior legislative aide to Senator Tom Daschle (D-SD), who was majority leader of the Senate

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They're Back! Biennial Ownership Reports Due

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Not only is it renewal time, but Ownership Reports must be filed in 2003. Refer to the chart below to see when yours is due. Remember that Ownership Reports *must* be filed electronically, so have your FRN (FCC Registration Number) and password ready when you log on to CDBS (Broadcast Radio and Television Electronic Filing System). For commercial broadcasters, the filing of the biennial Ownership Report requires a fee, so you should also be prepared with a credit card number and TIN if you plan to pay on-line. As a practical matter, on-line payment simplifies the process by eliminating the need for follow-up chores, which include printing out and mailing a Form 159 (Remittance Advice) along with the fee check, and then confirming that the check is in fact received and cashed by the Commission. If the FCC doesn't think that it has received the fee payment, it will not treat your report as having been filed.

While the Commission's rules specify that licensees may file a simple certification that there has been no change in their ownership since their last Ownership Report, we have been advised by at least one member of the processing staff that the certification option is not available as yet for electronic filing. We are looking into this seeming inconsistency and will report on our findings in a future Memo to Clients.

In any event, once the report has been filed, don't forget to print out a copy for your public file. Of course, if you would like help navigating the electronic filing system, give us a call. In the meantime, feel free to clip out the following chart for ease of future reference:

Ownership Report Due in:	For these States:
February 1, 2003	Arkansas, Kansas, Louisiana, Mississippi, Nebraska, New Jersey, New York, Oklahoma
April 1, 2003	Delaware, Indiana, Kentucky, Pennsylvania, Tennessee, Texas
June 1, 2003	Arizona, DC, Idaho, Maryland, Michigan, Nevada, New Mexico, Ohio, Utah, Virginia, West Virginia, Wyoming
August 1, 2003	California, Illinois, North Carolina, South Carolina, Wisconsin
October 1, 2003	Alaska, Florida, Guam, Hawaii, Iowa, Mariana Islands, Missouri, Oregon, Puerto Rico, Samoa, Virgin Islands, Washington
December 1, 2003	Alabama, Colorado, Connecticut, Georgia, Maine, Massachusetts, Minnesota, Montana, New Hampshire, North Dakota, Rhode Island, Vermont

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FCC Testifies that Enforcing its Rules is Crucial - During Senate testimony earlier this month, FCC Commissioners resoundingly reaffirmed their desire to strictly enforce Commission regulations and to levy significant fines in that process. Commissioner Abernathy supported a request by the FCC Chairman for Congress to raise the legal limit on forfeitures to \$10 million. Commissioner Copps expressed his desire to use subpoenas, cease-and-desist orders, and forfeitures as methods to enforce rules. The newest Commissioner, Jonathan Adelstein, testified that he believed enforcement was an important tool to protect consumers. Altogether, the FCC has reaffirmed that it will continue its aggressive approach to enforcement and all readers should be mindful that if they fail to follow all FCC regulations, they risk forfeitures. Some recent forfeitures include:

Making the Pirates Walk Close To The Edge Of The Plank - The FCC dealt with two FM radio pirates recently. In one case the Commission whacked a pirate with a \$10,000 fine for operating on 107.5 MHz in Naples, Florida. The pirate was visited by FCC agents and told to cease transmissions. The agents returned the next day to find the pirate still sending out signals. In response, the FCC sent the pirate a \$10,000 fine. Whether or not the pirate will ever have to pay that, though, is an open question, as demonstrated by the other pirate case. There, a Berkley, Michigan pirate had been fined for operating on 88.3 MHz. However, the pirate plead poverty and the FCC, after reviewing the pirate's financial situation, concluded that the pirate would be unable to pay a fine. The pirate was let off the hook.

Homeless Used as Chief Engineer - An FCC agent arrived at a Louisiana FM station to conduct an inspection and found the station with no public inspection file and no EAS system. The station responded later to the FCC that although they had a public inspection file, the file was not at the main studio because it had been in a desk which had been moved to another location. The Commission bought that claim and did not fine the station for the public file violation. In response to the EAS issue, the station advised the FCC that a homeless person

who lived around the studio was in charge of monitoring the transmitting equipment, Emergency Broadcast System Unit and the lead EAS station in the area. The station indicated that the homeless person was available 24 hours per day. The FCC wasn't satisfied with the station's homeless engineer claim, and hit the station with a \$22,000 fine and an admonition.

More EAS - The FCC also issued a \$12,000 EAS fine to a New York state combination station for failing to have operating EAS equipment. The FCC described the station as having no paper for the EAS equipment, no EAS logs, no record of testing the EAS equipment and an entire staff which could not recall the last time that an EAS test was conducted. Originally, FCC field agents proposed tripling the fine for the licensee because it was operating three stations from the central location. However, FCC staff in Washington decided to limit the forfeiture to \$12,000. Clients are reminded that simply owning EAS equipment is not sufficient to satisfy FCC rules - you must also ensure that equipment is operating and frequently tested and that thorough records are kept.

Habla Espanol? (F) Si, Si. Finally, a Massachusetts FM station was fined \$22,400 for telling dirty jokes in Spanish. A listener to a Spanish language station recorded several days of morning show material and submitted it to the FCC. By the time that the FCC had inquired about the broadcasts, the staff and personalities who had broadcast the material at issue no longer worked there. The station owner argued that there was no way to verify that the material on the tapes had in fact been broadcast on his station. The FCC wasn't buying that, however. It considered the tapes to be authentic and, since the tapes included numerous references to sex and excretory activities, fined the station \$22,400. As often noted in this column, listeners are a station's greatest asset, but an angry listener can create a great deal of problems.

Focus on FCC Fines
By: R.J. Quianson



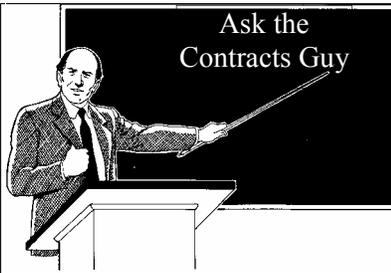
Wilkommen, Bienvenu, Welcome

Frank Montero Joins FHH as Of Counsel

Fletcher, Heald & Hildreth, P.L.C. is pleased to announce that **Francisco "Frank" Montero** has become Of Counsel to the Firm. Frank is an experienced communications attorney active in the area of Hispanic language media for the United States and Latin America. Frank has also been involved in FCC regulatory counseling, corporate finance, asset and security acquisitions and intellectual property. Frank recently held the position of Director of the FCC's Office of

Communications Business Opportunities. In that role, he worked extensively with industry, trade associations, financing institutions and governmental agencies to create business opportunities for entrepreneurs. Frank is fluent in Spanish.

We are confident that you will find Frank a tremendous asset to our team.



How to Enforce Your Rights Specific Performance and Other Remedies

By: Howard M. Weiss
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A contract is of little use if you can't enforce it. In order to accomplish that goal, you need to be sure the contract includes a strong remedies provision.

First, particularly with respect to the buyer, the contract should provide a right of specific performance in addition to damages. This language should guarantee that a buyer not in breach may compel a purchase and sale at the contract price through an equitable order by a court. The clause should explicitly recite that the seller agrees to such relief, acknowledges that the asset at stake is unique and irreplaceable, and that damages will not therefore be a sufficient remedy. This additional language is critical because specific performance is extraordinary "equitable" relief which a court will not grant if a remedy at law (like damages) will suffice. The buyer will also want to ensure that it can recover the costs of the lawsuit to secure specific performance, including attorneys' fees.

From the seller's perspective, the specification of what actions or inactions will trigger damages, and the nature of the damages, is important. If the buyer walks, the seller may be left with an unmarketable property, rendered non-viable by the loss of key employees and advertisers. This problem is exacerbated by a time brokerage agreement which typically integrates the station into the buyer's other stations before the sale happens – meaning that, if the buyer then fails to close, the seller is left holding the bag with what is essentially a start-up business. Yet, the buyer may want to limit damages by including a provision which specifies a cap which both parties agree to. Such a provision is ordinarily called a

"liquidated damages clause". It should be carefully negotiated so that it ensures a fair amount of damages that is truly compensatory and not overly punitive. It is also important that the circumstances under which damages are assessed be specified. For example, if a party is itself in default, it should not then be able to collect damages or secure other relief. Default should be defined as a "material breach", *i.e.*, a significant failure to comply with the terms of the contract. This does not necessarily mean that parties can engage in extensive minor, or non-material, breaches without running the risk of default. To address that consideration while still avoiding multiple disputes over non-material matters, a "basket" approach is often used. Minor breaches of contractual obligations will be deemed an actionable breach of the agreement only if they amount in the aggregate to a "floor" figure agreed to by the parties.

The remedies provision is one of the most important elements of a sales contract.



The laws governing contracts can vary from state to state. It is important to bear this in mind during the negotiation of the agreement, as some jurisdictions may be more inclined than others to enforce, for example, specific performance provisions, and some jurisdictions may require parties to include particular language relative to specific enforcement. If the parties agree to have their agreement subject to the laws of a particular state, it is advisable to doublecheck that state's contract laws to confirm that the contractual terms the parties have agreed to are likely to be deemed enforceable in that jurisdiction.

The remedies provision is one of the most important elements of a sales contract. In a litigious world, it pays to plan for potential conflict and disputes at a time before they arise.



**FHH - On the Job,
On the Go**

Frank Jazzo will conduct a seminar for the FCC's new EEO Rules for the Arkansas Broadcasters Association on February 12, 2003, at the Holiday Inn Select in West Little Rock, Arkansas.

Possible breakthrough on the digital cable front

Plug and Play Agreement Reached FCC Seeks Comment

By: Lee G. Petro
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Praising the efforts of the consumer electronics industry, the FCC released for public comment the Memorandum of Understanding ("MOU") reached by the industry with respect to technical standards for digital cable television receivers. Although the FCC has declined to develop any specific rules with respect to the implementation of the MOU, it is seeking comment on the standards proposed in the MOU.

The MOU addresses the issue of "plug-and-play" equipment. The goal is to reach a single uniform standard which will facilitate consumer access to cable services by assuring that the receivers which are commercially available will all be able to access the same video sources with the same types of generic connections and technical specifications.

According to the signatories of the MOU, the new standards will permit the development of receivers which can operate in conjunction with analog and digi-

tal cable services, but which will not be able to support bi-directional communications with the cable headend. For example, while the new technical standards would support the delivery of all forms of analog and digital cable, they will not permit the operation of video-on-demand services. Such services would still require the use of an external navigational device. The MOU calls for all receivers to be manufactured with an interface slot by which the cable operator would provide subscribers with a card that would permit the delivery of encrypted premium services. The first of these television sets (36 inches and greater) would be on sale by June 1, 2004, with most of the smaller television sets on sale by July 1, 2006.

While most of the proposed rules relate to the technical parameters of the equipment, invoking such terms as "SCTE 40 2001, as amended by DVS/535", comments on the MOU are due by March 28, 2003, with Reply Comments due by April 28, 2003.



(Continued from page 1)
for much of that time.

Daschle has spoken out on the need for universal service and provision of telecommunications services to every sector of society, especially rural areas, a position which Adelstein shares. Unfortunately, since Daschle has not focused as much energy on broadcast issues, we do not have much of a clue as to where his former aide may sit and on broadcast matters. It is noteworthy, though, that Adelstein has the strong support of the National Association of Broadcasters, whose president said in a published statement that Adelstein has both "a firm grasp of broadcasting and telecommunications issues" and a "commitment to public service."

During his speech at the Future of Music Coalition Policy Summit, Adelstein urged broadcasters to "turn it up!" when telling the FCC what they want and need. Broadcasters themselves might benefit if Adelstein, too, pumps up the volume.

Window for New FM Translator Applications May Open Soon

By: Jennifer D. Wagner
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We understand that the FCC may be opening a long-awaited FM translator window. If the Audio Division can resolve a number of electronic filing and other issues with the Wireless Bureau, the window could open soon. That would permit the filing of applications for new FM translators. That process has been stalled for almost two years as a result of a U.S. Court of Appeals decision in 2001 which raised questions about how the FCC should resolve mutually exclusive applications for broadcast stations, including translators, where the universe of competing applicants included both

commercial and noncommercial entities. The staff has indicated to us that it expects few mutually exclusive applications between commercial and noncommercial applicants during this window and, therefore, the staff expects the process to move along without too many hitches or delays. Presumably, any hybrid (commercial/noncommercial) situations which do arise can be handled separately from the rest, which should permit the staff to process singleton applications and mutually exclusive groups consisting exclusively of commercial applicants. We'll keep you posted.

**Breaking
News**



The Small Webcaster Settlement Act of 2002

Statutory Relief for Small Streamers . . . Or Not?

By: Alison J. Shapiro
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Late last year Congress adopted the Small Webcaster Settlement Act of 2002 (“SWSA”), which sets rates and terms for the performance of sound recordings by small commercial Webcasters. “Small commercial Webcasters” as defined by the SWSA may choose to operate under the statutory license pursuant to the rates and terms of in the SWSA rather than the rates and terms adopted by the Librarian of Congress. The rates and terms under SWSA do **not** apply to noncommercial broadcasters.

The SWSA defines “small commercial Webcaster” as an entity with gross revenues which do not exceed \$1.25 million in any year. For the 2003-2004 period, the SWSA rates are set at the greater of 10% of the small Webcaster’s first \$250,000 and 12% of any gross revenues in excess of \$250,000, or 7% of the Webcaster’s expenses. The minimum amount due under SWSA is \$2,000 per year if gross revenues are not more than \$50,000 and \$5,000 per year if gross revenues are more than \$50,000. For the 2003-2004 period, Webcasters must submit their SWSA election notices and pay half the minimum amount by **January 31, 2003**.

Webcasters who would otherwise be eligible to make

themselves subject to the rates and terms set out in the SWSA may be better off opting out of those rates and terms, however. Those who do not opt in to the SWSA will be subject to the rates for streaming which are to be established by the Librarian of Congress. While the Librarian’s rates covering 2003-2004 (*i.e.*, the same period covered by the SWSA terms described above) have not yet been established, the rates which the Librarian set for the 1998-2002 period required streaming broadcasters to pay a 0.07 cent fee per performance per listener and an 8.8% ephemeral recording fee of the total performance fee, with a \$500.00 minimum fee. That appears to be considerably less than – and therefore preferable to – the amounts which would be prescribed under the SWSA.

Since the Librarian has not announced the rates for 2003-2004, we can’t say with certainty what the best course will be. In view of the substantial difference between the SWSA’s rates and the last announced rates of the Librarian, however, it may make sense to roll the dice and decline to take the SWSA election. If you would like our help in deciding how to proceed in this area, please call us.

February 1, 2003

Ownership Reports - All commercial and noncommercial radio and television stations in Arkansas, Kansas, Louisiana, Mississippi, Nebraska, New Jersey, New York, and Oklahoma must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations) or certification of no change. **This year, all ownership reports must be filed electronically.**

February 27, 2003

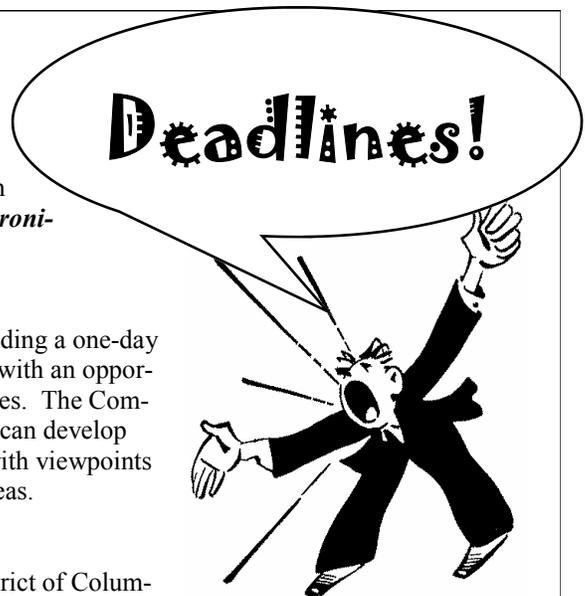
Field Hearing on Ownership Rules - The Commission will be holding a one-day field hearing in Richmond, Virginia, to provide the general public with an opportunity to voice opinions with regard to the broadcast ownership rules. The Commission is asking the public to offer comments on how the agency can develop broadcast ownership rules that will assist in providing the public with viewpoints from a diversity of sources and will enhance the marketplace of ideas.

April 1, 2003

Renewal Pre-Filing Announcements - Stations located in the District of Columbia, Maryland, Virginia, and West Virginia must begin pre-filing announcements in connection with the license renewal process.

Ownership Reports - All commercial and noncommercial radio and television stations in Delaware, Indiana, Kentucky, Pennsylvania, Tennessee, and Texas must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). **All reports filed on FCC Form 323 or 323-E must be filed electronically.**

DTV Simulcasting - DTV licensees and permittees must simulcast 50 percent of the video programming of the analog channel on the DTV channel. This requirement supersedes the allowance for operation with a reduced schedule.



Stuff you may have read about before is back again . . .

Updates on the News

Mark your calendars — new EEO rules become effective March 10, 2003 As reported and described in our recent Memo to Clients, the FCC has adopted new EEO rules. Those new rules will become effective **March 10, 2003**.

The new rules require the filing of a number of reports and the routine maintenance of a considerable number of records concerning your employment activities. In particular, a broadcast station must file a Broadcast Equal Employment Opportunity Program Report (FCC Form 396) with its renewal application. And annually on the anniversary date of its renewal application deadline, the station must place in its public file -- and on its website, if it has one -- an EEO public file report.

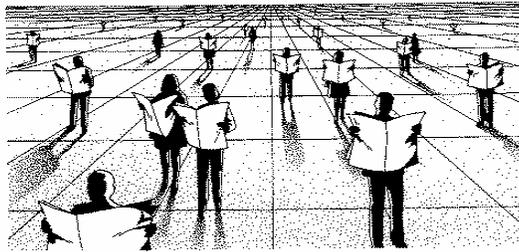
Since the next cycle of radio renewal applications begins on June 1 of this year (with a television renewal cycle to start soon thereafter), all licensees should be sure to get themselves up to speed on the requirements of the new rules as soon as possible.

We have prepared an EEO *Primer* which describes the various elements of the new rules and provides forms which you may find helpful in keeping track of recruitment activities. Let us know if you would like a copy of this *Primer*.

Spring Thaw Near For MX Applications? Our sources say that there is a proposal before the Commissioners to resolve the issue that has brought processing of mutually exclusive applications between commercial and noncommercial applicants to a screeching halt. As you may recall, no sooner had the FCC started to implement its auction processes for broadcast permits than the U.S. Court of Appeals in D.C. slammed the door on those processes as long as they contemplated that noncommercial applicants might have to participate in auctions. Word now is that the Media Bureau staff has presented to the full Commission a draft which, if adopted, could melt the freeze and start applications moving through the process once again. More on that as information becomes available.

New Freeze on Maximization Applications for Channels 60-69 Just as one freeze looks like it's heading for a spring thaw, another sets in. On January 24, the Commission announced that, effective immediately and until further notice, it will not accept any modification applications

that would increase a TV station's analog or digital service area on Channels 60-69 in one or more directions beyond the combined area resulting from the parameters defined in the DTV Table of Allotments, any outstanding license or CP, and any application on file prior to the release of the freeze notice. While waiver of the freeze is theoretically possible, the burden on anyone seeking a waiver is considerable.



If it's Thursday, February 27, this must be Richmond

In the on-going saga of the Commission's ownership proceeding, all eyes will be on Richmond, Virginia, on February 27, when the FCC convenes a field hearing to discuss

"issues and views" in the matter. The precise site in beautiful downtown Richmond has not yet been announced (although we might recommend Richmond International Raceway, the local NASCAR venue). Seating will be on a first-come-first-served basis, and the proceedings will be open to the public.

At a public hearing on media ownership held in New York City in January, Chairman Powell stated emphatically that "we will have broadcast ownership rules at the end of this proceeding", rules which will promote "diversity, localism and competition".

The FCC On-Line The Commission has launched a "simplified" version of its "very popular Electronic Comment Filing System." (No kidding — the FCC really said that.) The new "ECFS Express" (at least they didn't call it "ECFS Lite") is supposedly easy to use, requiring "minimal input" from consumers. It's "participation made easy".

We applaud the Commission's on-going efforts to make its processes available to one and all, and we hope that the public, too, will recognize those efforts and avail itself of the benefits. Of course, if the new system does prove successful in increase public participation, that could cause complications. It's easy to open the floodgates and stand back while an ocean of comments pours in; it's significantly harder to run each individual component of that flood through an evaluative analysis to determine how it could or should affect the outcome of the proceeding. The FCC's staff is no doubt aware of this, and they are to be commended for taking on the extra burden that increased public participation may entail.

FM ALLOTMENTS PROPOSED -12/20/02-1/22/03

State	Community	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
WV	Charles Town	252A	03-12	Cmts - 03/10/03 Reply-02/25/03	1.420
WV	Stephens City	252A	03-12	Cmts - 03/10/03 Reply-02/25/03	1.420
IL	Marion	297B	03-13	Cmts - 03/10/03 Reply-02/25/03	1.420
IL	Johnston City	297B	03-13	Cmts - 03/10/03 Reply-02/25/03	1.420
OH	Upper Sandusky	240A	03-7	Cmts - 03/10/03 Reply-02/25/03	1.420
OH	Caledonia	240A	03-7	Cmts - 03/10/03 Reply-02/25/03	1.420
SC	Saluda	221A	03-8	Cmts - 03/10/03 Reply-02/25/03	1.420
SC	Irmo	221C3	03-8	Cmts - 03/10/03 Reply-02/25/03	1.420
HI	Lahaina	266C	02-387	Cmts - 02/14/03 Reply-03/3/03	1.420
HI	Waianae	266C	02-387	Cmts - 02/14/03 Reply-03/3/03	1.420
OK	Buffalo	224C2	02-483	Cmts - 02/10/03 Reply-02/25/03	Drop-In

Notice Concerning Listings of FM Allotments

Consistent with our past practice, Fletcher, Heald & Hildreth PLC provides these advisories on a periodic basis to alert clients both to FM channels for which applications may eventually be filed, and also to changes (both proposed and adopted) in the FM Table of Allotments which might present opportunities for further changes in other communities. Not included in this advisory are those windows, proposed allotments and proposed channel substitutions in which one of this firm's clients has expressed an interest, or for which the firm is otherwise unavailable for representation. If you are interested in applying for a channel, or if you wish us to keep track of applications filed for allocations in your area, please notify the FHH attorney with whom you normally work.

FM ALLOTMENTS ADOPTED -12/20/02-1/22/03
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State	Community	Channel	Docket No.	Availability for Filing
FL	Jasper	298A	02-274	To be announced ("TBA")
WI	Tigerton	295A	02-275	TBA
SC	Hilton Head	300C2	02-198	Removed
SC	Hollywood	259C	02-198	None
SC	Port Royal	300C2	02-198	None
LA	St Joseph	257C3	01-19;01-27	TBA
LA	Clayton	266A	01-19;01-27	TBA
LA	Wisner	300C3	01-19;01-27	TBA
OK	Stuart	228A	02-287	TBA
TX	Blanket	284A	02-231	TBA
LA	Oak Grove	289A	02-321	TBA
TX	Ozona	289C1	02-261	TBA
TX	Iraan	269C2	02-261	TBA