FLETCHER, HEALD & HILDRETH, P.L.C.

Memorandum to Clients

February, 2004 | *News and Analysis of Recent Events in the Field of Communications* | No. 04-02

The candidates are coming! The candidates are coming!

New Political Rules Now In Effect

By: Liliana E. Ward
703-812-0432
ward@fhhlaw.com

The Bipartisan Campaign Reform Act (BCRA) is finally official. As reported in our December, 2003 issue, the U. S. Supreme Court upheld all major provisions of BCRA late last year, including those provisions that affect television and radio stations. Specifically, BCRA contains new certification and sponsorship identification requirements for federal candidates and additional public file requirements.

The new rules require that federal candidates or their authorized committees provide a broadcast station with a written certification stating whether or not the programming refers to another candidate for the same office to receive the benefit of a station's lowest unit charge (LUC). This certification must be provided to the broadcast station at the time the programming is purchased.

As we head into the fast-approaching election season, it is increasingly important to understand and comply with the intricacies of the political broadcasting laws.

If the programming does refer to an opposing candidate, the certificate for a radio spot must state that the programming will include a message, in the candidate's voice, identifying both the candidate by name and the office being sought, and expressly stating that the candidate approved of the broadcast.

For a television spot that refers to an opposing candidate, the certificate must state that the programming will include a clearly identifiable photographic or similar image of the sponsoring candidate simultaneously displayed with a legible printed statement which identifies the candidate and states that (a) the candidate approved the broadcast and (b) the candidate or the candidate's authorized committee paid for the broadcast. This image must appear in an unobscured full-screen view for at least four seconds at the end of the political spot.

This provision, while originally intended to reduce "attack" ads, broadly applies to any mention of an opposing candidate, regardless of the context. A candidate who fails to provide this certification forfeits all rights to the LUC for all programming aired during the remainder of the political window.

In addition, the broadcaster's political file must now contain all requests for time by anyone (including non-candidates) who seeks to communicate a message that refers either to a legally qualified candidate, or to any election to federal office ("election message request"), or to a national legislative issue of public importance ("issue request"). In addition to disposition of the request and details of the order (including rate charged), the record must show the name of the candidate to which the advertising refers (if applicable), the office that candidate is seeking, and the election or issue to which the ad refers. It must also show the name of the person purchasing the time, the name, address and phone number of a contact person, and a list of the chief executive officers or governing board. Please note that while most of BCRA's provisions refer solely to candidates for federal office, the language in the public file provisions should be read to include all candidates

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Late Breaking News

FCC Seeks Comments on UHF Discount

Now that Congress has raised the national TV cap to 39% (or reduced it from 45% as specified in the now-stayed ownership rules), the Commission has opened a limited window for comments to "refresh" the record with respect to the UHF Discount. Specifically, the Commission seeks comment on whether the 39% cap enacted by Congress serves as a legislative "stamp of approval" by Congress of the FCC's decision to retain the UHF Discount. The dates for comments and reply comments in this proceeding have not been established.

Helping you find the problem before the problem finds you . . .

FCC Implements New Tower Construction Notification System

By: Jennifer Wagner
703-812-0511
wagner@fhhlaw.com

The FCC has adopted a Tower Construction Notification System which is intended to help guide broadcasters through the oft-times difficult process of determining whether the site they have selected for a new tower is, in fact, taboo because of any number of historic, cultural or Indian tribal considerations.

The voluntary system is designed to facilitate review of proposed tower sites and to alert new tower proponents if their proposed construction might be affected by the site's proximity to site(s) of historic, cultural or Indian tribal religious significance. The new system is not intended to supplant the government-to-government consultation process with federally recognized tribes. That process is mandated by the National Historic Preservation Act (NHPA). Nor does the new process alter the FCC's antenna structure registration process. Rather, the new process provides a tool to assist tower companies (and others, including broadcasters, who find themselves involved in the tower construction process) in ensuring that their proposed construction complies with all applicable federal, state, local, and Tribal rules. The FCC reviews proposed tower construction under the NHPA.

The system allows anyone proposing to build a tower to submit an electronic notification to the Commission about the proposed construction. The Commission will then provide this information to the relevant entities on a weekly (by e-mail) or monthly (by snail mail) basis. Those entities may then submit responses back to the Commission, and the Commission will forward those responses back to the notifier. Information regarding any proposed tower construction site nationwide will be sent to every Tribe unless a Tribe asks the FCC to limit notifications to a specific geographic area. Each State Historic Preservation Office will receive notifications relating to proposed tower construction at locations in their own state and any adjacent states.

Despite the fact that the FCC is adding − rather than cutting − a middle man, the new system (in theory) should help abbreviate the often lengthy historic preservation review process. The system streamlines the process, providing a kind of "one stop shopping" for tower proponents: they provide the FCC with the notification, and the Commission then handles the dissemination of that information to organizations which might be affected by the proposed construction. This replaces the alternative, hit-and-miss, system in which would-be tower builders attempt to identify and contact all parties that might hold an interest in the historic, religious or cultural value of its proposed site. The FCC's new clearinghouse method should reduce the time committed to review, and broadcasters may therefore reduce the time, effort and money invested in a tower construction project.

Note that this new system is *voluntary*. You are *not* required to submit notification of a proposed tower. But whether or not you do provide a notification, you will in any event be required to comply with the NHPA, even if you are not aware of any sites near the proposed tower which might be of any historic or cultural or tribal religious significance. So while the new system is not a free pass around the statutory obligations relating to protection of certain culturally significant sites, it may help unsuspecting tower proponents avoid the unpleasant surprise of learning at the last minute that their construction cannot proceed as planned because of NHPA-related concerns.

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Fletcher, Heald & Hildreth
A Professional Limited Liability Company

1300 N. 17th Street - 11th Floor
Arlington, Virginia 22209
***Tel*:** (703) 812-0400
Fax: (703) 812-0486
***E-Mail*:** Office@fhhlaw.com
Web Site: fhhlaw.com

Supervisory Member
Vincent J. Curtis, Jr.

Co-Editors
Howard M. Weiss
Harry F. Cole

Contributing Writers
Ann Bavender, Harry F. Cole, Vincent Curtis, Anne Goodwin Crump, Donald J. Evans, Lee G. Petro, R.J. Quianzon, Michael Richards, Alison Shapiro, Jennifer D. Wagner and Liliana Ward

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Focus on FCC Fines

By: R.J. Quianzon
703-812-0424
quianzon@fhhlaw.com

FCC Cracks Down On Indecency - In several recent cases, all five FCC Commissioners agreed to strongly punish television, FM and AM stations for indecent broadcasts. The FCC votes were taken prior to the now infamous Super Bowl show (see related article on page 6), but they continue the latest trend in strict indecency regulation undertaken by the FCC and its staff.

Clear Channel faces a three-quarter million dollar fine for broadcasts on four of its Florida radio stations. The fines are for several broadcasts of "Bubba the Love Sponge" from 2001 - - the issue of the timeliness of these fines appears not to have been raised. The broadcasts contained numerous segments in which the on-air personalities held lengthy discussions about sex and varied sexual acts (FCC transcripts of the broadcasts are nearly 30 pages long). Although four of the five FCC Commissioners agreed to the maximum $27,500 fine per incident, one Commissioner dissented. Long-time indecency hawk Commissioner Copps proposed that the FCC undertake a full scale investigation into whether the Clear Channel licenses should be completely revoked. Clear Channel has until late February either to pay the fine or to show why the penalty should not be imposed.

Television was no stranger to indecency fines this month either. FCC Commissioners were not modest when they whacked a station with the maximum fine for a "fleeting" image of a performer's penis. Performers from the stage production of "Puppetry of the Penis", which features the manipulation of male genitals for comic effect, were invited to appear on a morning news hour. Cheered on by one of the television show hosts and a few off-camera station employees, the performers turned their backs to the cameras and demonstrated genital manipulation to the hosts. However, one of the performers accidentally revealed his penis to the camera for what the FCC indicates was less than one second. All five Commissioners agreed to a $27,500 fine for what they described as a foreseeable situation for which the station should have taken precautions. This FCC decision was issued prior to Janet Jackson's "wardrobe malfunction" at the Super Bowl and is likely indicative of how the FCC will handle that incident.

FCC staff also imposed fines on an FM station for indecent broadcasts. A Chicago licensee was fined for a segment of its "Mancow Morning" show. The show played the lyrics of a song which included numerous sexual references. The station argued that the lyrics were merely suggestive and innuendo and did not rise to the level of language which should be fined. FCC staff sternly responded that they were "confident that many, if not most, 17 year-olds" would understand the sexual meaning of the suggestions and innuendo of the song. (The song, by the way, was a delightful ditty named "Smell My Finger" which featured such eloquent lyrics as "smell that stank finger ya'all".) The FCC justifies its regulation of broadcast indecency by citing the public interest in protecting minors, *i.e.*, those under the age of 18 years. Although the FCC has the authority to levy a fine of up to $27,500, the staff chose to fine the station $7000 for the innuendo and suggestive indecency.

All clients should be aware of the heightened scrutiny which the FCC is applying to its indecency standards. The latest FCC fines and public statements by Congress and the Commissioners, as discussed elsewhere in this newsletter, indicate that indecency has become an area of potentially serious liability for broadcasters. That potential is likely to increase, as audience members, perhaps emboldened to file complaints as a result of the massive publicity being given to this issue, bring more and more allegations of indecency to the Commission's attention.

Towers and EAS - Lest our readers think that the FCC is focusing solely on indecency, FCC field agents continued to scour stations in search of other, technical violations. Most prominent this month are Tower and EAS violations.

From California to Florida, the FCC issued thousands of dollars in fines this month to stations that did not have properly lighted towers, improperly labeled towers and inadequate fences around towers. A Florida AM station was fined $7000 for having a portion of its tower's fence knocked down; a North Carolina AM station was fined $6000 for not properly lighting its towers at night; and the FCC hit two stations in Kentucky and California with $3000 penalties for failing to register their towers.

FCC agents also fanned out across the nation in search of EAS violations. The FCC publishes an EAS handbook which all broadcasters are required to keep readily available at their stations (a copy of the Handbook can be found on the FHH website at http://www.fhhlaw.com/articles_eas_resources.asp). Frequent testing and supervision of EAS equipment and signals is also required by FCC rules. FCC agents in New York, Illinois and Kentucky spent several days recently surveying stations to make sure that all EAS rules were being

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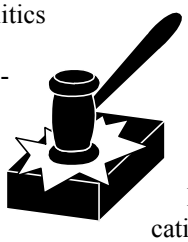
Meet the new boss. Same as the old boss?

Texan Joe Barton Next In Line For House Commerce Committee Chair As Billy Tauzin Leaves Office

By: Michael Richards
703-812-0456
richards@fhhlaw.com

The buzz from Capitol Hill is that media industries are not going to see big changes should Rep. Joe Barton (R-Texas) become chair of the House Commerce Committee, as expected. Long-time chairman Billy Tauzin has announced that he is leaving elected politics to enter the lucrative world of industry lobbying. Tauzin's support has made Barton the likely successor to head the committee, which has jurisdiction over the FCC.



Like Tauzin, Barton is known to favor the easing of media ownership limits. He has been cool to efforts to legislate a rollback of recent FCC rule changes that eased some of those limits − rule changes that are now temporarily suspended as a result of a court challenge. As chair, Barton could use his power to hinder any rollback bill, as his Committee must normally review legislation before it is the House can vote on it.

Unlike Tauzin, Barton is not known as a media industry expert. Barton, an oil patch Congressman, is well known for his expertise on energy issues, which also fall under the Commerce Committee's jurisdiction. Barton, who has an engineering background, previously worked in the energy industry. In Congress for nearly two decades, Barton had not introduced a major bill dealing with broadcasting since a 1993 effort to rescind the 1992 Cable Act. He is a co-sponsor of a measure to increase tenfold the fines for broadcast of indecent material.

Barton has been outspoken on the telecommunications side of FCC regulation. He has been a leading critic of rules requiring incumbent local phone companies to sell network access to competing resellers at wholesale prices.

Typically, Congress takes up few communications law initiatives in a presidential election year. Broadcasters will not likely see Barton's mark on the regulatory landscape until sometime next year − and, then, only if the Republicans maintain control of the House.

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for any federal or non-federal public office.

Finally, broadcasters should be aware that electioneering communications limits are now in place. "Electioneering communications" are any paid broadcast, cable or satellite programming that refers to a federal candidate, is aired 60 days prior to a general or 30 days prior to a primary election, and reaches 50,000 or more persons. BCRA prohibits certain entities (*i.e.*, corporations and labor organizations) from making electioneering communications. Any reporting obligations regarding electioneering communications lie with the person or entity making the electioneering communication and ***not*** with the broadcaster or other media outlet airing the communication. However, media outlets may be asked by potential advertisers whether their communications will reach an audience of 50,000 to comply with their reporting requirements.

To assist broadcasters in responding to such queries, the Commission has created an Electioneering Communications Database. It is available on the FCC's website (http://gullfoss2.fcc.gov/ecd/) and enables a user to determine whether a communication sent via broadcast station, cable system and/or satellite system can or cannot reach 50,000 or more people in a particular Congressional District or State. If the database has no information regarding the audience for a particular station, the advertiser may rely on information received directly from the media outlet.

As we enter the final stages of the primary season and head into the summer conventions and, in the Fall, a presidential election, it becomes increasingly important to understand and comply with the intricacies of the political broadcasting laws. Advanced preparation is particularly important because often candidates raise complaints about perceived non-compliance during the heat of the campaign, when time is usually of the essence and when emotions run high. Because it is reasonable to expect that any compliance questions that may arise will likely come up at an inconvenient time in time-sensitive circumstances, the more familiar the broadcaster can become with the rules in advance, the better off she or he will be when crunch time occurs. We have prepared a primer on the political broadcasting rules which covers the traditional rules as well as the most recent twists described above. Copies are available for a modest charge. Call the FHH attorney with whom you usually work or the author at 703-812-0432 or ward@fhhlaw.com.

Royalty Rates for Commercial Webcast Streamers Now Effective

But calculating payments may be tricky

By: Alison J. Miller
703-812-0478
miller@fhhlaw.com

After months of delay, the royalty deal commercial AM/FM broadcasters cut in 2003 has become effective. The deal, which sets the fees for streaming of musical programming on the internet from January 1, 2003 though December 31, 2004 (and, on an interim basis, into 2005, subject to later adjustment), gives nonsubscription streamers − *i.e.*, the group which includes broadcasters streaming their signals onto the internet at no charge to the on-line listener − two options: they can pay on either a "per performance" basis or an "aggregate tuning hour" basis.

The "per performance" option would cost the streamer 0.0762 cents ($0.000762) per performance for all digital audio transmissions, with the term "performance" defined as "per song per listener". The total number of performances (minus 4% of that total number which are considered to be royalty-fee to account for songs that did not reach an actual listener due to technical reasons or channel switching) is multiplied by the rate of 0.0762. So a station streaming ten songs with ten on-line listeners for each song would figure its gross royalty liability as 10 songs x 10 listeners (*i.e.,* 100 performances) x 0.0762 cents, or a total of $0.0762, or 7.62 cents.

Under the "aggregate tuning hour" option, rates are calculated based on the number of on-line listeners per hour, with the term "tuning hour" being defined as one listener listening for one hour. Broadcasters electing this option for their network streams are subdivided into two categories: (a) stations "reasonably classified" as news, talk, sports or business programming; and (b) conventional AM and FM music programming. Royalties for the former, non-music, stations are 0.0762 cents ($0.000762) per Aggregate Tuning Hour. Royalties for conventional music stations are 0.88 cents ($0.0088) per Aggregate Tuning Hour. For example, a station with 10 all-day listeners which provides music programming 20 hours of the day and news/talk 4 hours of the day would figure its gross royalty liability as 20 hours x 10 listeners x 0.88 (for the portions of the day devoted primarily to music) ***PLUS*** 4 hours x 10 listeners x 0.0762 (for the news/talk portions), for a total of $1.79.

The Copyright Office has suggested that, until final requirements are in place, webcasters should be prepared to report the following information for each song streamed during a certain period of time during each calendar quarter: (1) artist; (2) song title; (3) album name; (4) marketing label of the of the song; and (5) total number of times the song was streamed during the relevant reporting period. The Copyright Office has indicated that the final requirements will be far more comprehensive than the ones suggested here.

The minimum nonsubscription fee is $500 per calendar year per station or, in the case of a licensee which owns and streams more than five separate stations, $2,500.

The final regulations codifying the rates were published in the *Federal Register* on February 6, 2004. Streaming broadcasters must make their payment election (*i.e.,* "per performance" or "aggregate tuning hour") within 30 days of that publication − that is, no later than **March 8, 2004.** The election must be made by submitting a completed *Notice of Election for Eligible Nonsubscription Transmission Service* to SoundExchange in Washington, DC. The *Notice of Election* can be retrieved from the SoundExchange website at http://www.soundexchange.com/licensee/documents/Notice_of_Election_ NonsubscriptionService_2003-2004.pdf. SoundExchange's address is included on the form. The election will remain in effect for the entire two-year term. ***The default option – i.e., the option which will apply if you do not make an affirmative election – will be the per-performance basis.***

The first payment, for January 1, 2003, through February, 2004, is due no later than **April 14, 2004**.

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The FCC plans to send the first batch of proposed tower construction notifications received through its new system to the relevant parties during the first week of March. .

If you wish to utilize the notification system, go to http://wireless.fcc.gov/outreach/notification/index.html and click on the "notify" button. You will then be prompted to provide an FCC registration number (FRN) and associated password, after which you will be required to provide information about yourself and your proposed construction.

Further information about the system is available on the Commission's website at http://wireless.fcc.gov/outreach/notification/index.html or through the Commission's Tribal homepage at http://www.fcc.gov/indians.

Thanks for the mammary?

Hot, Hot, Hot: Indecency Moves to the Front Burner

By: Harry F. Cole
703-812-0483
cole@fhhlaw.com

With breathtaking speed and intensity, the issue of broadcast indecency streaked to the forefront of the regulatory agenda in Washington this month.

While it may be easy to ascribe this phenomenon to the flash of Janet Jackson's breast during the Super Bowl half-time show, in fact that flash was simply the spark that ignited an already highly combustible situation.

Broadcasters, perhaps responding to the competitive pressure to attract audiences, have for years been pushing the envelope, airing material that would have been virtually unthinkable even 20 years ago. And less than a week ***before*** the Super Bowl, the Commission had reacted to that trend. Perhaps responding to Commissioner Copps' seemingly constant chiding about the need to stop the "race to the bottom", the FCC had issued nearly $800,000 in fines for indecency. (See related article on page 3.) And let's not forget that we find ourselves in an election year, when all politicians are on the look-out for a bullet-proof issue in which to cloak themselves. Indeed, also the week ***before*** the Super Bowl, the House Telecommunications Subcommittee held a hearing on the FCC's indecency policies during which the laxness of those policies was repeatedly criticized.

When Ms. Jackson's wardrobe malfunctioned, it merely catalyzed a predictable reaction.

So when Ms. Jackson's wardrobe malfunctioned, it merely catalyzed a predictable reaction.

And what a reaction! The day after the Super Bowl, each of the five Commissioners felt compelled to express his or her personal outrage about *L'affaire Jackson*. The Chairman sent letters to broadcast ***and*** cable honchos strongly suggesting that a private code of practice – a concept once in place but abandoned long ago – be reinstituted by the media. Hearings were convened by subcommittees in both Houses of Congress. Media commentators had a heyday. It was all reminiscent of the moment in *Frankenstein* when the villagers grab their torches and pitchforks and assault the castle to slay the monster.

While all this makes for excellent and entertaining theatre, the unpleasant reality is that the brouhaha over indecency is not likely to go away soon. Since the FCC (and Congress) will have the searchlights trained on broadcasters for the foreseeable future, straining their regulatory eyes and ears for any hint of "indecency", broadcasters would do well to understand how the FCC currently analyzes complaints about indecency.

We plan to have a detailed primer on the FCC's indecency policy available in early March. For the time being, the following summary should suffice, particularly because it is reasonable to anticipate further developments in this area on a week-by-week basis.

When the Commission learns of programming which might be indecent (usually from a complainant), the Commission makes two determinations. First, does the programming in question include descriptions or depictions of sexual or excretory organs or activities? Second, is the programming "patently offensive as measured by contemporary community standards for the broadcast medium"?

As to the first determination, you might think it simple to make the call. After all, it's normally pretty clear when someone is describing sexual or excretory organs or activities. But wait. What about when someone uses coarse language in a non-sexual or excretory manner? For example, in 2003 Bono, the lead singer for U2, dropped the "f" bomb during an acceptance speech at the Golden Globe awards ceremony televised on the Fox Network. He exclaimed, "this is really, really, fucking brilliant" and, later, "this is fucking great". While the "f" word is commonly associated with sexual activity, Bono's use of the word as an adverb (not, as the FCC claimed, an adjective) appears to have been completely non-sexual in meaning.

And so the FCC's Enforcement Bureau held in October, as we reported back then. That holding was consistent with an earlier decision in which use of the term "pissed off" was held not to be indecent because it referred to an irate state of mind, not the act of micturition.

But already that take on the policy has come under attack. In Congressional hearings earlier this month the Commissioners and their representatives strongly suggested that

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terms which are associated with sexual or excretory organs of activities will be deemed to meet the first element of the indecency analysis ***regardless*** of the fact that those terms may not, in the particular use in question, have anything to do with sex or excretion.

So for the time being, broadcasters wary of staying on the safe side of the indecency line should steer clear of any language at all that may be said to be commonly descriptive of sexual or excretory organs or activities.

As to the second element of the analysis, the Commission claims that it considers the "full context" of the material. In particular, the FCC supposedly focuses on: (a) the explicitness or graphic nature of the description; (b) whether the material "dwells on or repeats at length descriptions of sexual or excretory organs or activities"; and (c) whether the material appears to pander or is used to titillate or shock. No one of these three factors is necessarily more important than the others. Rather, the Commission claims to weigh and balance them on a case-by-case basis. But no matter how much weighing and balancing the Commission may claim to do, the bottom line of the analysis has got to be whether the programming is "patently offensive as measured by contemporary community standards for the broadcast medium". And that call is made on the basis of the FCC's "knowledge of the views of the average viewer or listener" and its "general expertise in broadcast matters".

Whether any particular programming is "patently offensive as measured by contemporary community standards for the broadcast medium" is determined on the basis of the FCC's "knowledge of the views of the average viewer or listener" and its "general expertise in broadcast matters".

This presents a problem for broadcasters, who don't have access to the FCC's particular knowledge and "general expertise" in this area. That problem is aggravated when a broadcaster believes in good faith that his or her audience does ***not*** find certain terms offensive. Indeed, it is probably safe to say that some audiences routinely use, in everyday conversation, many of the words that the Commissioners themselves would automatically deem "offensive". But that does not appear to make any difference, because the final determination that programming is or is not "offensive" is made by the Commissioners, not the audience.

So the FCC's indecency policy is less than a model of clarity and predictability.

That's where matters stand as of this writing, in the middle of February. As uncertain as that situation may seem in many respects, there are changes on the horizon which could create further uncertainty about potential penalties for indecency.

At least two bills are wending their way through Congress. One would increase the maximum fine for indecency violations from a paltry $27,500 per violation to a much heftier $275,000 per violation (with a cap of $3,000,000 for any single act). A second bill would define as "profane" eight distinct words or phrases (including all other grammatical forms of those words and phrases, including verb, adjective, gerund, participle, and infinitive forms). The words and phrases include six of the "seven dirty words you can't say on the radio" made famous by George Carlin in the 1970s, as well as one other two-word term (asshole) which is listed twice in the bill, once as a single word and once as a two-word expression. It is not clear why the author of the latter bill chose to characterize these words as "profane" rather than indecent.

And at the FCC, the Commissioners are considering re-defining the notion of an indecency violation to consist of each time any "offensive" word or term is broadcast. Historically, the Commission has declined to parse programming as narrowly as that, and has treated each overall discussion of "offensive" material as a violation, regardless of the number of times any particular word(s) or expression(s) might appear in each such discussion. From public statements made by various Commissioners, it appears that they now view that historical approach as too lax. The result of a more rigorous enforcement approach would, of course, be significantly higher fines, even if Congress does not increase the limit on fees ten-fold – and at this point the smart money expects the enactment of that ten-fold increase to be an odds-on mortal lock.

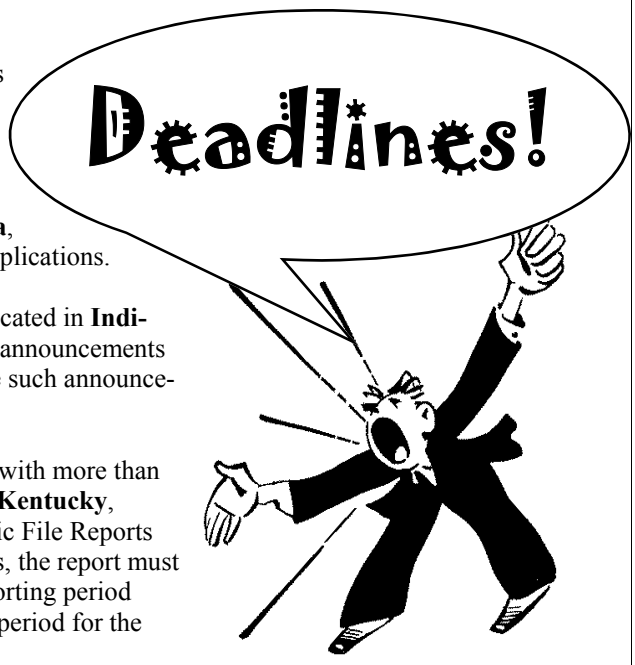
Also, as noted, the Commission has strongly indicated that the decision of the Enforcement Bureau concerning use of the term "fucking" as a non-sexual adverb will be reversed.

Of course, many broadcasters – that is, those broadcasters who decline to air any language remotely approaching potential indecency – doubtless need take no more than an academic interest in the foofaraw surrounding the indecency issue. But there are certainly many others who, while wishing to avoid violations of the Commission's rules, nevertheless believe that it is appropriate to provide their audiences with programming much closer to the line, wherever that line may be. To those in the latter category, we couldn't say it better than Bette Davis: "Fasten your seat belt, it's going to be a bumpy night."

April 1, 2004

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

Radio Renewal Pre-Filing Announcements - Radio stations located in **Ohio** and **Michigan** must begin pre-filing announcements in connection with the license renewal process.



Renewal Applications - All radio stations located in **Indiana**, **Kentucky**, and **Tennessee** must file their license renewal applications.

Renewal Post-Filing Announcements - All radio stations located in **Indiana**, **Kentucky**, and **Tennessee** must begin their post-filing announcements in connection with the license renewal process, and continue such announcements on April 1 and 16, May 1 and 16, and June 1 and 16.

EEO Public File Reports - All radio and television stations with more than five (5) full-time employees located in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, **Tennessee**, and **Texas** must place EEO Public File Reports in their public inspection files. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

Ownership Reports - All commercial and noncommercial radio stations in **Indiana**, **Kentucky**, and **Tennessee** 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 75 percent of the video programming of the analog channel on the DTV channel. This requirement supersedes the allowance for operation with a reduced schedule.

April 10, 2004

Children's Television Programming Reports - For all commercial television stations, the reports on FCC Form 398 must be filed electronically with the Commission, and a copy must be placed in each station's local public inspection file.

Issues/Programs Lists - For all commercial and noncommercial radio, television, and Class A television stations, a listing of each station's most significant treatment of community issues must be placed in the station's local public inspection file. The list should include a brief narrative describing the issues covered and the programs which provided the coverage, with information concerning the time, date, duration, and title of each program.

FHH - On the Job, On the Go

Frank Jazzo and **Ali Miller** will be attending *Satellite 2004* in Washington, D.C., March 3-5. They will also be attending the Society of Satellite Professionals International's Gala 2004 in Washington, D.C. on March 3.

On February 21, **Scott Johnson** spoke on "Negotiating the Deal" at the NABEF Broadcast Leadership Training Program in Washington, D.C.

And we bid a fond farewell to **Jennifer Wagner**, who will be leaving FHH on February 29 to devote her full time and attention to the care of young Wagners. We wish her and her family all the best.

One small step for LPFM

Mutually Exclusive LPFM Applications Accepted for Filing

By: Alison J. Miller
703-812-0478
miller@fhhlaw.com

The Commission has finally released its Public Notice announcing the acceptance for filing of certain mutually exclusive LPFM applications from the first, second, and third filing windows. The Notice lists the mutually exclusive LPFM applications that remain on file and groups them by state and channel number. The Notice also includes mutually exclusive applications for which no settlement was filed or for which the settlement was determined to be deficient and was dismissed on that basis. A link to the January 28, 2004 list may be found on the FCC's website at http://www.fcc.gov/mb/audio/lpfm/index.html.

In determining acceptability for filing, the FCC used a comparative process based on a point system. Under the system, each applicant was eligible for a maximum of three merit points which could be obtained as follows: (1) an applicant certifying that it had an established community presence of at least two years' duration is entitled to one point; (2) an applicant pledging to operate at least twelve hours per day is entitled to one point; and (3) an applicant pledging to originate at least eight hours of locally-produced programming per day is entitled to one point. The tentative winner in any mutually exclusive group is the applicant with the highest point total.

Applicants which are tied for the highest score could, by February 27, submit amendments to their applications incorporating voluntary time−share proposals. Each applicant must propose to operate at least ten hours per week. If a tie is not resolved through settlement or applicant-agreed time-sharing, applicants will be eligible for successive, non-renewable license terms of no less than one year each, spanning a total of eight years. In effect, the FCC has designed its system so that just about nobody goes away empty-handed – although some may question the practical value of a short-term, non-renewable license or the opportunity to operate on a share-time basis.

Petitions to deny any of the listed applications are also due to be filed by February 27.

Readers should note that while the FCC's list is supposed to be 100% accurate, it ain't necessarily so – we have already identified one application that was listed in the FCC's Public Notice in error. So if you have any reason to believe that the list either includes one or more applications which should have been omitted or vice versa, it may be wise to doublecheck with us or with the FCC.

But the devil is in the details

"Access to Local Television Act" Implemented

By: Donald J. Evans
703-812-0430
evans@fhhlaw.com

Three years after the passage of the Launching Our Communities Access to Local Television Act, the administrators have gotten around to prescribing the rules governing eligibility for loan guarantees and application procedures. The Act is intended to foster the provision of local TV signals in underserved areas which lie either (a) outside the Grade B contour of any TV station and have no non-broadcast delivery or (b) outside the Grade A contour of any broadcast station which is delivered by one or less non-broadcast systems. The guarantees support only the construction, ***not*** the operation, of a system for delivery of local TV signals to such areas. Applicants must show that they could not qualify for a loan without the guarantee, and also that they have a lender committed to make the loan *with* the guarantee. The feds have not made it particularly easy to get these guarantees: the minimum amount is a million dollars, non-refundable application fees range from $10-15,000, and loan origination fees and risk premiums will be assessed. Since these fees duplicate the fees that the borrower is likely to be assessed by the primary lender, the transaction costs can be significant. Nevertheless, for broadcasters or non-broadcasters planning major construction projects in rural areas, the theoretical availability of $1.25 billion in guarantees should not be overlooked. Applications for the first funding cycle are due no later than April 21, 2004.

FCC Wild West Show Hits San Antonio

Second FCC Localism Hearing Draws Protestors

By: Ann Bavender
703-812-0438
Bavender@fhhlaw.com

Yee-haw!! The broncs were buckin', the coyotes were howlin' and the dogies were gittin' along as the FCC rolled into San Antonio like sagebrush in the wind for the second of the five planned regional hearings on "localism in broadcasting". To put it mildly, the meeting attracted lots of attention. Four of the five Commissioners attended the hearing, ostensibly to gather information from consumers, industry, civic organizations, and others on broadcasters' service to their local communities. Two groups of panelists from the industry and various organizations were chosen to speak, while half the time was saved for remarks from the audience.

Things began to heat up the day before the hearing. Protestors, some who had participated previously in anti-globalization demonstrations elsewhere, gathered from around the U.S. They held a demonstration in front of the San Antonio headquarters of Clear Channel Communications objecting to media consolidation. The protestors, some dressed as pirates, set up a pirate radio station broadcasting anti-consolidation messages until it was shut down.

On the day of the hearing, several protestors demonstrated outside the meeting room, holding such anti-Clear Channel signs as "Clear Channel? More like Only Channel". Four organizations had obtained permits to stage demonstrations near the hearing site. Some labor and community groups scheduled "teach-ins" prior to the hearing to protest media consolidation.

Hopeful hearing speakers lined up early in the morning to get a seat at the evening hearing. Speakers criticized large corporate broadcasters for pursuing profits instead of airing local music and artists and news coverage of local events and activities. Some speakers objected to "voice tracking", the practice where a disc jockey in one location records programs for air on stations around the country. Others criticized music playlists controlled by corporate officials instead of local programming directors. Several speakers called for additional low power FM stations. Some asked for the return of the Fairness Doctrine, which prior to 1986 required stations to air contrasting viewpoints on controversial issues of public importance. Some speakers did compliment broadcasters for their assistance in local fundraising, finding missing children, and emphasizing community needs.

Two of the Commissioners responded by calling for a tightening of the license renewal process. FCC Chairman Powell and Commissioner Copps suggested that station involvement in community issues should be deemed a main factor in deciding whether to the station's license should be renewed. Commissioner Copps also called for stricter restrictions on sexual and violent programming, probably not realizing that less than a week later just about everybody in the country would be doing the same.

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followed. Subsequent to these visits, the agents issued letters to the stations notifying them of the violations and providing them with an opportunity to explain themselves prior to the issuance of fines. Again, every broadcaster should comply fully with the EAS rules; we have made the rules and the handbooks available to all of our clients on our internet website.

New approach to misconduct? Finally, we report on the case of a Michigan man who held an FM construction permit. Although the FCC was vague in details, it appears that the permittee filed for a license, advising the FCC that he had completed construction of the station as specified in the permit. A competitor apparently advised the FCC that the permittee's claims about completion of construction were not accurate, and that the permittee was engaging in intentional misrepresentation in order to retain the permit. After closed-door discussions, the permittee agreed to surrender his license and pay a "voluntary" contribution (otherwise known as a fine) of $20,000 to the government. In return, the FCC agreed that it would not pursue the man for misrepresentations to the federal government.

The Commission's approach in this case appears to be the first instance where the agency has used an enforcement technique in a broadcasting context which it has used several times in recent years in non-broadcast texts. Historically, when the FCC believed a broadcaster had engaged in serious misconduct, the Commission would either (a) issue a fine to the broadcaster or (b) put the broadcaster into a hearing to determine whether he or she was qualified to remain a licensee. A renewal or revocation hearing was serious business, as it gave rise to the possibility of a finding that the broadcaster was disqualified from owning ***any*** stations. While the Commission did retain the flexibility of allowing the broadcaster to retain some but not necessarily all licenses, the potential of a total license wipe-out was clear. Plus, the legal fees associated with such a hearing could easily run into the high five figures, and even six figures, with no guarantee of success.

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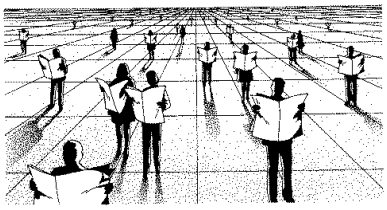
Stuff you may have read about before is back again . . .

Updates on the News

Ownership Update The emergence of indecency has had an effect similar to giving something shiny to a monkey – the Janet Jackson flap has proven to be quite the distraction from other issues which used to be front burner items, like the media ownership rules. But while the ownership question may have faded off the side of the radar screen, it is still out there. On February 11 the U.S. Court of Appeals for the Third Circuit heard marathon oral arguments in the various appeals of the rules. The argument lasted, according to some reports, to 6:00 p.m., even though the Court had initially anticipated that the argument would be concluded prior to 1:00 p.m. Amid all the hue and cry in the press about indecency, there has been precious little reported about just what happened during the oral argument. As best as we have been able to determine, it sounds like the court was critical of the new rules, particularly on the television side, suggesting that the court might remand the matter to the Commission for further consideration. The court apparently evinced skepticism about the FCC's "diversity index" which underlies those rules. While the court indicated that it would attempt to expedite its decision, many observers expect that the ruling won't be seen until early this summer, at the earliest.



Meanwhile, back at the Hill, the Resolution of Disapproval which passed the Senate last summer may at long last be gaining some traction in the House. The Resolution, introduced by Senators Dorgan and Lott in the Senate, would repudiate the new ownership rules. The matter flew through the Senate, but has been stalled out in the House for months. Some reports indicate, however, that some members of the House are now pushing again for consideration of the Resolution. We shall see.

TsunAMi? It has been reported that some 1,300 application for new AM stations and upgrades to existing AM's were filed during the brief window at the end of January. While the Commission's staff has been tight-lipped about this, we understand that they may have been expecting substantially fewer than 500 applications, so the actual total was something of an unwelcome surprise. The staff is reportedly hard at work on the applications now, sorting through them to identify singletons and MX groups. Don't expect to see a preliminary list of singletons for another month or so, at least. The MX list will almost certainly take considerably more time than that.

Death and the 175 Questions occasionally arise about what kinds of amendment may be filed to Form 175 applications prior to an auction. The rules prohibit making any major modifications to a short-form Form 175 after the deadline for the initial filing of such applications. But what about when the sole principal of the applicant dies after the application has been filed, but before the auction? The FCC has recently taken the common sense position that, in those unfortunate circumstances, an amendment reporting the death and substituting the applicant's estate as the applicant is ***not*** a major amendment and, therefore, that the principal's death does ***not*** require the dismissal of the Form 175.

And the Emmy for Creative Labeling Goes To . . . How about a standing O for Fox, which has been logging "This Week in Baseball" as "educational" for purposes of quarterly children's TV reports! As it turns out, though, that label looks legit. Fox claims that, since the show normally leads out of a time slot devoted to children's viewing, the show should contain educational elements. So, at Fox's request, a consultant from the National Association for Sport and Physical Education is reportedly assigned to make sure that such elements are indeed included. Examples of such elements are an explanation of the physics of a curve ball and a tour of a bat-manufacturing plant.

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Thus, the approach taken here is striking for several reasons. First, no hearing was held, and yet the permittee "voluntarily" coughed up his permit (and dismissed his license application). Second, the permittee – who owns other broadcast interests – was allowed to retain all those other interests, without any finding that he might be disqualified in those other markets. Third, the total fine levied was relatively low, at least to the extent that the permittee is believed to have engaged in misrepresentation. Fourth, because this matter was handled "privately" between the FCC and the permittee, it appears that the complainant was not permitted to participate in the matter.

It goes without saying that clients should only submit truthful information to the FCC not only because the FCC is inspecting stations but also, and perhaps more ominously, because competitors and disgruntled employees become excellent sources for FCC enforcement action. But should you find yourself on the wrong end of serious allegations of misconduct, it now appears that the Commission's Enforcement Bureau is willing to engage in a kind of "plea bargaining" which may allow you to avoid the ultimate unpleasantness of an expensive hearing that could threaten ***all*** your licenses.

FM ALLOTMENTS ADOPTED –1/21/04-2/17/04

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
KS	Shawnee	8 m SW of Kansas City	299C1	03-26	None
SC	Irmo	10 m NW of Columbia	221C3	03-8	None
MI	Coopersville	16 m NW of Grand Rapids	287B	02-335	None
MI	Hart	40 m N of Muskegon	231C3	03-335	None
CA	Big Sur	30 m S of Monterey	240A	01-248	TBA
MT	Park City	20 m SW of Billings	223C0	02-79	None
MT	Miles City	120 m E of Billings	222C	02-79	None
WY	Byron	70 m S of Billings	221C	02-79	TBA

FM ALLOTMENTS PROPOSED –1/21/04-2/17/04

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
AZ	Meadview	50 m E of Las Vegas, NV	300C	04-25	Cmts - 04/01/04 Reply-04/16/04	1.420
CA	Lincoln	30 m N of Sacramento	280A	04-24	Cmts - 04/01/04 Reply-04/16/04	1.420
MD	Cambridge	40 m SE of Annapolis	232B1	04-20	Cmts - 04/01/04 Reply-04/16/04	1.420

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.