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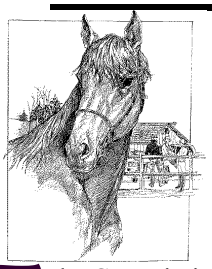
Memorandum to Clients

July, 2004 | *News and Analysis of Recent Events in the Field of Communications* | No. 04-07



Locking the barn door as the horse scampers free?

FCC Looking Into "Localism"

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

The Commission has issued a Notice of Inquiry (*NOI*) looking to develop a record concerning the extent to which broadcasters are serving the interests and need of their communities. Apparently stung by claims that local communities are not being adequately served and that the FCC has contributed to that condition, the Commission appears to be trying to deflect further criticism by considering what, if any, further steps it might take to promote localism in the radio and television industries.

The *NOI* solicits comments on a wide-range of very general topics. For example, how can the FCC "further broadcasters' communication with communities"? And how are broadcasters currently serving the needs of their communities (including "all significant segments" of those communities), and can/should the FCC do anything more to ensure that broadcasters air programming to serve their communities' needs and interests? Other topics include the broadcast of disaster warnings and political programming, network affiliation rules, payola, sponsorship identification, voice-tracking and national playlists. Beyond those specifics, the Commission also asks whether there are ways to "strengthen" the license renewal process to ensure past and future performance.

Comments are currently due by September 1; reply comments are due by October 1.

> *The FCC may be trying to convey the message that it may be prepared to re-impose long-abandoned rules and policies designed to promote "localism".*

The *NOI* is just the latest example of the FCC's increased attention to matters of "localism". That issue moved to the front burner during the summer of 2003, in the aftermath of the slugfest concerning revision of the ownership rules. Opponents of further relaxation of the ownership rules argued that the current rules have already resulted in a diminution of attention to local concerns by broadcasters. In an effort to appear responsive to those complaints, Chairman Powell created a Localism Task Force, which has since been gadding about the country, holding open meetings and supposedly gathering useful information. Further underscoring its new-found devotion to localism, last fall the Commission started issuing fines to renewal applicants who were unable to certify that they had complied in all respects with the local public inspection file rules.

And now the Commission has underlined, italicized and boldfaced its concern with the issuance of the *NOI*.

What is striking about the *NOI* is its seemingly blithe disregard for the fact that it was the Commission itself which, over the course of the last 20 or so years, dismantled the regulatory devices which it used both to encourage and to monitor "localism". For example, while the *NOI* suggests that the main studio rule promotes localism because it requires that each station's studio be "in or near" the community of license, the Commission neglects to point out that that really isn't true – unless you really think that a studio located 25 miles away from the community is "in or near" the community. The main studio rule expressly permits location of the studio anywhere within 25 miles of the community of license, or anywhere within the station's city-grade contour. Using that latter standard, a station with a city-grade contour having a radius of 40 miles could conceivably locate its studio more than

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The Scoop Inside

Petition for rulemaking gaining traction?

FM Translator Owners Seek Immediate Displacement Relief

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

An organization representing FM translator owners and operators has petitioned the FCC to amend the FM translator rules to permit an FM translator "displaced" from its current operating channel by a new or modified full-power FM station to immediately apply to move to any available FM channel and not have to wait for the next FM translator application filing window to file the application.

FM translator stations, which generally operate at much lower power than full-power FM stations, are licensed by the FCC as secondary to full-power FM stations. When a new full-power FM station commences broadcasting or an existing full-power FM station modifies its coverage contour, existing FM translators causing interference to the new or modified full-power stations must immediately cease broadcasting and are "displaced" from their current operating channels. FM translators receiving significant new interference from new or modified full-power FM stations are similarly "displaced" as their signals can no longer be heard.

Under the existing FM translator rules, a "displaced" FM translator may immediately apply to move to only a limited number of adjacent channels, none of which may be available. Before the "displaced" FM translator can move to non-adjacent available channels, it must cease broadcasting and wait several years for the FCC to open an FM translator modification application filing window and process and grant the numerous applications filed during the window. Meanwhile, the public loses the broadcast service being provided by the FM translator.

The National Translator Association (NTA) last Fall asked the FCC to change its rules to give FM translators a break. In particular, NTA proposed that existing FM translators forced to cease operating because they are causing interference or receiving interference should be permitted to immediately apply to move to ***any*** available FM channel. NTA's proposal would afford the same opportunity for permittees of authorized but unbuilt FM translators precluded from commencing operations because they are expected to cause interference or receive interference. The NTA also asked that applicants for new FM translators expected to cause interference or receive interference be permitted to immediately amend their applications to propose available FM channels. In June, the FCC requested comments regarding NTA's request. Comments filed in response have generally supported NTA.

Whether and when the FCC may move on to actually propose and adopt rule amendments to assist "displaced" FM translators remains to be seen. Certainly the problem which the NTA's proposal seeks to address is likely to become more aggravated in the near term, as more FM translators are likely to be "displaced" when the FCC auctions new FM channels and authorizes new full-power FM stations to operate on the channels. The current rules provide virtually no relief to affected translator licensees and permittees. While they are entitled to file "displacement" applications, they cannot do so until a new filing window for such applications opens. It may be years before the FCC opens its next FM translator modification application filing window. The last such window opened in March, 2003, and in the intervening 16 months the FCC has still processed only a small amount of the thousands of FM translator applications filed in that window.

Still, the fact that the Commission has invited comments on the NTA proposal must be seen as at least some cause for optimism on the part of NTA. That invitation suggests that this matter may be moving toward the front burner, which is a necessary first step before any actual changes can occur.

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, Gina Beck, Harry F. Cole, Vincent Curtis, Anne Goodwin Crump, Paul Feldman, Stephen T. Lovelady, Lee G. Petro, R.J. Quianzon, Michael Richards, Alison J. Miller and Liliana Ward

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Focus on FCC Fines

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

FCC, Defenders of the First Amendment - Although the FCC has a long history of punishing broadcasters who air sexually explicit programming which does not (at least presumably) involve inflicting pain, the FCC believes that it can do nothing to broadcasters who encourage listeners to beat up other people. Citing "the freedom accorded broadcasters by the First Amendment", the FCC issued two orders recently stating that there was nothing that they could do when radio station personalities encouraged listeners to injure or kill certain groups of people.

In one case, several radio shows across the country told listeners to single-out and injure bicycle riders. The radio personalities provided pointers for injuring bicyclists. Listeners were told that they could pull their cars in front of bicyclists and then slam on the brakes. Another radio show suggested that listeners pull in front of bicycles, open their car doors and then slam on the brakes. Another show advised its listeners to simply run bicyclists off of the road. All of the shows promoted throwing bottles or objects at passing bicyclists.

In the other case, a Boston FM talk show host encouraged genocide in America, and particularly killing followers of a certain religion. The talk show host claimed that there was a conspiratorial element among people who practiced the religion in America and advised listeners that "we should kill them". The talk show host went on to encourage bombing followers of the religion. Needless to say, within three months, the FCC received more than eighty complaints about the broadcast.

The FCC found that no enforcement action was warranted in either case because neither involved language which constituted a "clear and present danger". Accordingly, the FCC felt that there was nothing it could do about the programming in question. The FCC reminded the complaining listeners of its long-standing policy that the Commission will not characterize a broadcast as an incitement to violence or illegal action unless a local court has already made such a determination. The FCC's policy is that local authorities are better positioned to know and assess community circumstances in making a decision as to whether particular language presents a clear and present danger.

In declining to act here, the FCC wrapped itself in the cloak of First Amendment principles which, according to the FCC, protect speech "which may be even highly offensive to those officials who thus protect the rights of others to free speech." It is more than slightly ironic that the FCC would be so self-righteous here in justifying its protection of speech which may be "highly offensive" to the FCC – ironic because the Commission's anti-indecency crusade is based exclusively on the notion that the FCC can and should impose on broadcasters and the public the FCC's own sense of what is "offensive". Not surprisingly, the FCC steered clear of explaining why a clear and present danger standard should not have been applied to prevent its numerous recent indecency enforcement actions.

FCC Orders Hearing for License Renewal – The good news for the noncommercial California FM licensee is that the FCC has, after seven long years, finally gotten around to processing its 1997 renewal application. The bad news is that the Commission has designated that application for a full-blown hearing to determine if the licensee/renewal applicant is qualified to retain its license. Questions concerning the licensee's qualifications may come as a surprise to many, since the licensee is none other than the San Francisco Unified School District.

The FCC may pull the plug on the station's license because the licensee checked a "YES" box on its renewal applications when it probably should have checked "NO". At issue is the certification on the renewal form that asks whether the station's public file is complete. A petitioner alleged that the station's public file was not properly kept and that when the licensee checked the "YES" box indicating that the public file was up to date, the licensee knew that that was not accurate and was thus engaging in misrepresentation to the FCC. The FCC will convene a hearing to review evidence, take testimony and hear arguments as to whether the station should be allowed to stay on the air.

As with many cases before the FCC, the station claims that the complainants are just a bunch of disgruntled former employees. While that claim may indeed be true, former employees, gruntled or otherwise, can still present credible factual claims based on their own first-hand knowledge. And sure enough, here the complaints were accompanied by affidavits from former employees who had personally reviewed the station's public file. According to those former employees, they told the station manager that the public file was a disorganized, incomplete mess prior to the renewal applica-

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Checkbook Alert I

2004 Reg Fees Announced

This Year They're Due in AUGUST

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

It's July, which means that the Commission has released its Report and Order on the Assessment and Collection of Regulatory Fees for Fiscal Year 2004. The Report and Order was published in the Federal Register on July 7, 2004, and the fees will become effective on August 6, 2004.

There were no major surprises on the fee-front. But the FCC ***did*** surprise us by requiring this year's regulatory fees to be paid ***in August*** -- one month earlier than in previous years. This year, regulatory fees must be received by the FCC beginning **August 10 through August 19th at 11:59 p.m.** ***Payments not received by Mellon Bank by 11:59 p.m. on August 19 will be assessed a 25% late payment fee.***

As usual, fee payments must be accompanied by a completed FCC Form 159 (Fee Remittance Advice). To fill out that form you will need to know your FCC Registration Number (FRN), the taxpayer identification number (TIN or EIN) of the person or entity making the payment, and the payment type code for the particular fee you are paying. Fees can be paid on-line again this year, starting August 1.

The 2004 regulatory fees are as follows:

Fee Category	Annual Regulatory Fee (USD)
TV VHF Commercial	
Markets 1-10	60,375
Markets 11-25	41,475
Markets 26-50	29,175
Markets 51-100	17,575
Remaining Markets	4,050
Construction Permits	4,650
TV UHF Commercial	
Markets 1-10	17,775
Markets 11-25	16,175
Markets 26-50	9,300
Markets 51-100	5,550
Remaining Markets	1,650
Construction Permits	5,675
Low Power TV, TV/FM Translators/Boosters	385
Other	
Broadcast Auxiliary	10
Earth Stations	200

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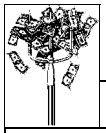

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Satellite Television Stations	
All Markets	1,050
Construction Permits	520

FY 2004 Schedule of Regulatory Fees for Commercial Radio Stations

Population Served	AM Class A	AM Class B	AM Class C	AM Class D	FM Classes A, B1 & C3	FM Classes B, C, C1 & C2
<=25,000	600	450	350	425	525	675
25,001 -75,000	1,200	900	525	625	1,050	1,175
75,001 -150,000	1,800	1,125	700	1,075	1,450	2,200
150,001- 500,000	2,700	1,925	1,050	1,275	2,225	2,875
500,001 -1,200,000	3,900	2,925	1,750	2,125	3,550	4,225
1,200,001- 3,000,000	6,000	4,500	2,625	3,400	5,775	6,750
>3,000,000	7,200	5,400	3,325	4,250	7,350	8,775
AM Radio Construction Permits			465			
FM Radio Construction Permits			1,650			

If you would like our assistance in paying your reg fees, ***please fax us a copy of your regulatory fee postcard as soon as you receive it from the Commission***. If you have any questions about regulatory fees or need assistance preparing the filing, please contact the attorney with whom you regularly work or contact Ali Miller at 703-812-0478 or via email at miller@fhhlaw.com.

Checkbook Alert II

Revised Applications Fee Schedule Announced

New Fees Take Effect August 10

By: Gina Beck
703-812-0511
beck@fhhlaw.com

The Commission has announced its new Schedule of Application Fees based on its biennial review. The new fees are currently slated to go into effect on August 10, 2004. Broadcast fees for license renewals, ownership reports, STAs, and short form transfers of control (Form 316) increased by $5 each while fees for long form transfers of control (Form 315) increased by $30, from $800 to $830. Construction Permits increased between $115-$145 for broadcast stations, depending on the type of station. Translator CP applications increased from $600 to $625 with other translator-related fees increasing by $5 each.

Most fees for wireless services, including private operational fixed microwave, broadcast auxiliary and multipoint distribution service (MDS) increased between $5-$10.
A complete listing of Application Fees is available on the FCC's website at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-150A1.pdf.

In announcing the new application fees, the Commission also reminded its regulatees about a new rule that was discussed in last month's Memo to Clients. Effective October 1, 2004, the Commission will withhold action on applications and other requests for benefits if the Commission determines that the applicant is delinquent in its non-tax debts owed to the Commission. After 30 days, the Commission will dismiss these applications or requests if the debt is not paid or arrangements for payment are not made.

Pick one from Column A, one from Column B . . .

FCC Opens Inquiry Into A La Carte Pricing for Cable and Satellite TV

By: Paul J. Feldman
703-812-0403
feldman@fhhclaw.com

The FCC has recently commenced an inquiry looking, in essence, for answers to that oft-asked question: "If I want my MTV, why do I have to pay for the History Channel as well?" As ordered by Congress, the FCC is seeking comments on and investigating the issues surrounding the offering of satellite and cable TV programming on an "a la carte" basis. The inquiry is not limited merely to cable-originated programming services, but also includes broadcast channels carried pursuant to retransmission consent and must-carry.

Cable TV operators offer most of their programming in bundled packages such as "basic" and "enhanced basic" tiers. These packages contain anywhere from 30 to 120 channels. Of course, most subscribers do not regularly watch programming on the vast majority of these channels, a fact that they keenly recognize when contemplating rapidly rising cable TV rates.

An a la carte arrangement could affect the must-carry rights stations currently enjoy.

Members of Congress have long stated that issues involving television programming typically generate a large percentage of their constituent mail, and thus it was not surprising that, when cable rates increased by an average of five percent in the last year, Congress recently held hearings looking into the causes. In May of this year, a bipartisan group of the House Commerce Committee asked the FCC to review the feasibility of a la carte cable program pricing, and to report its findings back to the House Committee. Senator McCain, a long time critic of the cable TV industry, made a similar request. "A la carte" in this context would mean providing cable subscribers the opportunity to pick and choose each individual channel of the programming they receive, irrespective of any "bundling" the cable provider might have offered historically.

In addition to concerns over service costs to consumers, another issue driving this inquiry is viewer resentment over the levels of sex and violence on TV. Some consumers apparently believe that one solution would be to gain the ability to choose the individual cable channels to which they subscribe.

In a recent Public Notice, the FCC sought comments on a number of issues, including (1) contractual limitations on the ability of cable and satellite operators to offer programming on an a la carte basis; (2) the potential impact on rates for individual channels and on diversity of programming; and (3) set-top box and system equipment necessary to move the industry to an a la carte basis. In addition, the Commission inquired as to whether the must-carry rules allow cable operators to offer ***must-carry broadcast stations on an a la carte basis***, and as to the impact of networks and affiliate groups using the retransmission consent process to leverage carriage of affiliated cable programming networks. While certainly not the initial focus of the a al carte option, the interplay of that option with the must-carry rules could raise important and difficult issues which could seriously affect television broadcasters who may have viewed the a la carte debate as a limited skirmish between consumers and cable operators.

The positions of most parties are pretty well known at this point. The operators of cable programming channels oppose a la carte out of fear that viewers will not affirmatively choose to subscribe to their channels. The large cable operators also oppose a la carte pricing, stating that limited subscription to most individual channels will require increased pricing per channel, with the result of consumers getting fewer channels at higher overall cost. It should be noted that the major cable operators also are the owners of many major cable programming channels. Interestingly, some associations of small cable operators have stated support for providing subscribers at least the option to purchase programming on an a la carte basis, along with the option of purchasing the current packages. The Consumers Union has supported this approach. Television broadcasters do not appear to have made major statements on the issue, though, as noted above, the potential impact of some a la carte arrangement could affect the must-carry rights stations currently enjoy; as a result, broadcasters can be expected to show considerably greater interest as this proceeding develops.

The FCC is hosting a symposium on the issues on July 29th, and reply comments in response to their Public Notice are due on July 30th. The Report back to Congress is due in mid-November (after the elections). It will be interesting to see how the Commission handles this complex and politically loaded topic.

Court approves basic points, but balks at FCC's final analysis

Split Decision On Ownership Rules

By: *Lee G. Petro*
703-812-0453
petro@fhhlaw.com

In June the United States Court of Appeals for the Third Circuit issued its long-anticipated decision on the FCC's June, 2003 overhaul of the multiple ownership rules. In an exhaustive, and exhausting, 200-page opinion, the Court upheld the FCC's rationale in a number of important respects, but still remanded the case to the Commission for reconsideration of a number of crucial points. In the meantime, the Court maintained the stay on the new FCC rules that has been in place since September 2003. Thus, the Commission's former ownership rules – *i.e.*, the ones which were in effect prior to the Commission's June, 2003 ruling – remain in effect pending further FCC action and (almost certainly) another trip to the court of appeals.

The Court's opinion emerges as a carefully-reasoned effort which arguably awards the big-picture points to the FCC while curiously quibbling about issues which, while important, are seemingly less far-reaching in their significance.

Interestingly, the Court indicated that the parties could ***not*** seek rehearing of its decision by the entire court – a process known as "*en banc"* review. The Third Circuit consists of a total of 14 judges (not including "senior" judges); the June decision was issued by a panel of three of those judges. Normally, such panel decisions can be appealed to the full court, but in this case, apparently because of a high level of recusals by other judges on the court, *en banc* review won't be available. That means that parties unhappy with the panel decision can either seek rehearing by that same panel, or try to convince the U.S. Supreme Court to review the matter. If Supreme Court review were to be sought, implementation of new FCC ownership rules could be delayed for a year or more.

The following is a summary of the panel's decision on each of the major issues.

With respect to the national television ownership limits, the Court acknowledged that Congress, by taking steps to reduce the national television ownership cap, had mooted the FCC's decision in that area. In its 2003 decision the Commission had increased that cap to 45% of the national audience. But Congress then passed legislation earlier this year rolling the national audience cap back to 39%. Because of that intervening legislation, the Court concluded that the challenges raised by various parties to the FCC's 45% cap were moot. The Court also reasoned that Congress intended to retain the UHF discount since, in specifying the 39% cap, Congress said nothing to indicate that it intended to alter that discount.

Also on the television front, the Court affirmed the Commission's decision to maintain the limitation that no one party could control two television stations ranked within the top four stations in a local television market. However, the Court remanded the Commission's numerical caps on the number of stations that could be owned in a local market, finding that the Commission had not provided sufficient basis for the number of stations permitted.

On the radio front, the Court affirmed the Commission's decision to use Arbitron-market definitions where available to define local radio markets, along with its decision to include non-commercial stations in counting the number of stations in a local radio market. The Court also upheld the Commission's decision to prevent the transfer of radio station clusters that do not conform with the Commission's new rules. Finally, the Court affirmed the Commission's decision to hold radio Joint Sales Agreements attributable under the Commission's local ownership rules. On the other hand, the Court remanded to the Commission its determination that the 1996 numerical caps should not be changed, again questioning the basis for this ruling.

Finally, the Court affirmed the Commission's decision to repeal the newspaper/broadcast cross-ownership ban. However, the impact of this decision is undermined by the fact that the Court rejected the "Diversity Index" calculator with which the Commission determined the number of each type of media that could be owned in a particular market. The Court did not agree with the Commission's respective weighting of media sources in calculating the number of each media and, as a result, remanded the matter to the FCC for further consideration.

For now, then, we must all await the next round of proceedings. As noted above, that may involve either rehearing by the same panel of the Third Circuit, or an appeal to the U.S. Supreme Court, or in the absence of any further judicial proceedings, the Commission's reconsideration of the remanded matters. Since the Court has left its previous stay in place, the "old" rules remain in effect to the

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One more nail in the "backfill" coffin

FCC Affirms Abandonment of "Backfill" Device in Allotment Proceedings

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

When it comes to proposed changes in the FM table of allotments, the Commission has long disfavored community of license modifications that result in the removal of a community's sole local radio service. For many years, however, petitioners who proposed the removal of a town's only operating station were able to skirt that particular pitfall by proposing to replace the channel with a vacant, or "backfill", allotment. In such cases, the petitioners argued, the availability of a vacant channel meant potential future service which would, at least in theory, someday provide the community with "local" service in place of the station which was being removed at the request of the petitioner.

In February of last year the Commission, expressly backing away from that argument, directed the Bureau to cease its former practice of relying on vacant "backfill" allotments to preserve local service as a justification for community of license changes by existing stations. According to the FCC, "a rulemaking petitioner may rely on a backfill allotment only when the backfill involves a currently licensed and operating station, and when the backfill reallotment itself complies with local service floor requirements; that is, the level of broadcast service that must be maintained subsequent to any deletion or reduction in facilities."

This past month the Commission reaffirmed that decision, denying the reconsideration of the earlier decision which involved a 1998 request for relocation based on the old backfill policy. Petitioners argued that the relocation was necessary because a suitable site was not available to build the station pursuant to the current construction permit in the current community of license; thus a change in community of license was necessary to accommodate the facilities that could be built. The Commission replied that the issue was not construction of equivalent or maximum facilities. Instead, the focus is coverage of the original community of license. To that end, the Commission observed that the "Bureau has traditionally allowed licensees great flexibility in operating from temporary facilities." Because petitioner had demonstrated that there were possible solutions to their temporary siting problems, an STA was preferable to the loss of service to 70,000 listeners in the original community of license.

The Petitioners also argued that, because of the anticipated auction of FM channels, a backfill permittee would likely initiate service in the near future. The Commission rejected this argument too, pointing out that, even if the auction is held as planned, any construction permit granted will likely have a 2008 construction date, not taking into account possible technical or legal challenges which could delay that date further. In other words, the likelihood of immediate, or even prompt, initiation of service on the vacant backfill channel appears relatively slim.

The Commission has now eliminated backfill allotments as a means of assuring service to a community which would otherwise lose its sole operating station in the reallotment process.

Finally, Petitioners argued that the new "no backfill" rule impermissibly modifies an existing rule without notice and comment. The Commission rejected that argument as well, noting that the Bureau's previous willingness to rely on backfill proposals was never codified as part of the Commission's rules, nor has it been adopted through notice and comment rulemaking procedures. Rather, it was developed through case-by-case adjudications. Consequently, the Commission retains the authority to change this policy through adjudications based on its determination as to whether the policy continues to be consistent with the public interest.

And the Commission has now exercised that authority by eliminating backfill allotments as an acceptable means of assuring service to a community which would otherwise lose its sole operating station through the reallotment process.

The only ray of hope – and a slim ray it is – for backfill proponents is that, in reviewing waiver requests from Petitioners seeking to rely on backfill channels, the Commission did acknowledge that there may be "rare circumstances where removal of a [sole] local service might serve the public interest. . ." In other words, the Commission appears to be invoking the classic "never say never" approach. But from the tenor of the remainder of the FCC's most recent opinion, it would probably be wise to assume that when the FCC refers to "rare circumstances", it really does mean "rare".

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foreseeable future, so as a practical matter, broadcasters should not notice much different from the way things were prior to June, 2003.

The Court's decision is very interesting in the seemingly contradictory signals it sends. Statements made by the Commissioners in response to the decision suggest that the Commissioners viewed the decision to be a major defeat for the FCC. A number of press reports seemed to echo that sentiment. But analyzed more carefully, the Court's opinion emerges not as a lop-sided, beat-up-on-the-FCC romp, but rather as a carefully-reasoned effort which arguably awards the major, big-picture points to the FCC while curiously quibbling with the agency about issues which, while important, are seemingly less far-reaching in their significance.

The Court's reversal of the FCC would appear to embroil the Court in the determination of regulatory details usually thought to be well within the FCC's proper discretion.

On the one hand, the Court sides with the Commission on a number of important points establishing the FCC's authority to regulate in certain ways in certain areas. But on the other hand, the Court finds that the manner in which the FCC has exercised that authority is so flawed as to warrant further deliberations. This is precisely the opposite of how reviewing courts often treat agency decisions. Courts generally tend to be more inclined to reverse with respect to questions relating to the agency's authority, while they accord substantial deference to the agency with respect to the decisions the agency makes pursuant to its proper authority.

So when the Third Circuit agrees that the FCC can properly regulate media ownership along the general lines the FCC has chosen, that would normally be viewed as the first step in a slam dunk victory for the Commission. Because of that, the Court's reversal of the FCC with respect to the details of its new ownership rules is somewhat surprising, particularly because that reversal would appear to embroil the Court in the determination of regulatory details usually thought to be well within the Commission's proper discretion.

Of course, the seeming novelty of the Third Circuit's decision may be attributable to the fact that most appellate review of FCC decisions comes from the U.S. Court of Appeals for the District of Columbia Circuit. Observers may be more accustomed to the D.C. Circuit's approach to such matters, and the somewhat different approach taken by the Third Circuit may thus come across as at least slightly aberrant. But unless the Supreme Court weighs in on the matter, the Third Circuit's decision is the law of the case. And since the Supreme Court normally agrees to review a tiny fraction of the cases presented to it, the odds suggest that the Third Circuit's approach is the one that will govern the future of the ownership rules.

FHH - On the Job, On the Go

Kudos and congrats to **Jen Wagner** and husband Mickey on the birth of John "Jack" Wagner on July 12. Mother and son are both doing well.

Frank Montero spoke about the formation of the Independent Spanish Broadcasters Association at the Minority Media and Telecommunications Council's "Building and Financing Minority Broadcast Companies Conference" in Washington. **Frank M.** will also be speaking on radio ownership at the National Association of Hispanic Journalists UNITY conference in Washington on August 6.

Frank Jazzo will conduct an FCC Update session with **Roy Stewart**, Chief of the FCC's Office of Broadcast License Policy, at the annual convention of the Arkansas Broadcasters Association in Little Rock on August 6 from 10:00-11:30 a.m.

Howard Weiss and **Harry Martin** will attend the annual convention of the Texas Association of Broadcasters in Austin on August 11-13. Harry will join **Roy Stewart** in presenting a renewal seminar at 10:00 a.m. on August 12.

Vince Curtis, **Frank J.** and **Roy Stewart** will present a license renewal seminar at the annual convention of the New Mexico Broadcasters Association in Albuquerque from 2:00-5:00 p.m. on August 27.

(Continued from page 3)

tion, which (if true) would indicate that the licensee knew or should have known that its contrary representation in the renewal application wasn't accurate. The FCC staff informally investigated this matter over the past seven years and found numerous inconsistencies which supported the former employees's claims.

Designation for renewal hearing is the regulatory equivalent of a thermonuclear bomb. The license itself is the target, which is reason enough to be alarmed. But over and above that, the hearing process necessary to defend the license is itself an extraordinarily expensive and time-consuming ordeal involving the full range of trial procedures – discovery, live testimony, cross-examination and more pleadings than you can shake a stick at. The cost of a hearing in legal fees alone can easily run into six figures, without even beginning to calculate the cost at the station level of lost time, distraction and low morale, or the possible need for appeals in the event of a bad decision following trial. While this particular case may be unusual in certain respects, it does serve to reinforce an important message: confessing truthfully to a public file violation (by answering the renewal application certification "no") is likely to be far cheaper than trying to breeze by with a less than truthful response. Renewal applicants who answered "no" have been hit with fines under $10,000 – in many cases only $3,000 – and their licenses have been renewed. Offering the FCC anything less than the truth can be a risky, and expensive, proposition.

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Former Owners Haunted by Stations -- Many broadcasters who have either purchased or sold FCC stations know that there are restrictions against a seller retaining an interest in the license being sold. Still, some sellers continue to participate in limited station operations after the sale of the station. Two recent cases illustrate the perils which await a former owner who wants to come back into the picture when the station's buyer runs into problems. In one case, the FCC fined the old owner $8,000; in the second case, the FCC found nothing wrong with the way the former owner chose to re-enter the scene.

In the first case, the seller of a Georgia AM station entered into an LMA after selling the station to the new buyer. While a properly structured LMA or other time brokerage agreement may be permissible under FCC rules, this case strayed well outside the permitted boundaries. The seller had sold the station and had taken back an installment note in return. A few months after closing, the buyer could not make the payments on the note and the Seller helped out by agreeing to operate the station pursuant to a short term LMA. But then the buyer apparently gave up trying to make its new business work and instead simply gave the station back to the seller, stopping paying on the note. The seller continued to operate the station as it had before the deal. But oops, nobody bothered to tell the FCC about it – and, in particular, the Seller neglected to get FCC approval to re-assume control over the station. The Seller must now pay an $8,000 fine (and the FCC has assigned the license back to the original licensee). So this is clearly ***not*** the way to handle this kind of situation.

In the second case, the defaulting buyer of a California AM station caused a great deal of trouble when the seller tried to take the station back. This case involves a couple of California courts, the FCC, three bankruptcies and a Court-appointed trustee. The buyer purchased the station in exchange for a promissory note given to the seller. The assignment was properly authorized by and reported to the FCC. Much like the Georgia case above, the buyer defaulted on the installment payments. However, in this case, the seller took the buyer to court to try to shake its payments out of the buyer. The buyer settled the case and signed a new note with the seller that included a provision allowing the seller to take back the station in case of a default.

Of course, under normal circumstances, the FCC does not permit a seller to include a provision in its sale to take back a station upon default.

After the first lawsuit was settled and the secondary promissory note signed, the buyer – and this should be a big surprise – defaulted on its payments again. This time, several more lawsuits were filed and the buyer declared bankruptcy three times. The seller, trying to pull the trigger on the default provision, sought a court order to allow him to do just that, and sure enough, a court-appointed trustee was authorized by the court to sign the FCC assignment application to move the license back to the original seller.

The buyer (obviously not a quitter) then challenged that application, arguing that the provision in the second note which required the buyer to sell the station back in case of default violated FCC rules (an interesting argument, since by signing onto the deal in the first place, the buyer, too, was complicit in the violation he was alleging). The FCC agreed that it has rules prohibiting such an interest at the time of sale. However, the FCC pointed out that the interest did not exist at the time of sale. Instead, the seller took the interest as part of a renegotiation of the note after the

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75 miles away – is that "in or near"?

Similarly, the Commission long ago abandoned its program origination and ascertainment rules, both of which could be said to have encouraged "local" programming. And the Commission also abandoned its program logging rules, which afforded both licensees and the Commission the ability to review each station's programming performance to see how much "local" programming was being aired.

So while many broadcasters have over the years doubtless continued to provide ample "local" service to their communities, they have not done so because the Commission was forcing them to do so, or even encouraging them to do so.

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It is difficult to determine precisely where the *NOI* is heading at this point. The Commission seems to be trying to convey the message that it has re-embraced, with heartfelt enthusiasm, the traditional notion of "localism", and that it may be prepared to re-impose long-abandoned rules and policies designed to promote that notion. (And in a separate proceeding involving a proposal to require all broadcasters to record 16 hours per day of their programming, the FCC is underscoring this re-regulatory bent. *See* the related article on Page 13.) All of this may in fact be a harbinger of actual – possibly burdensome – re-regulation on the horizon.

But it also may just be mainly for show, an effort by the FCC to create the impression of activity so that it can say with a straight face to whatever Congressional committee may ask, "why sure, we're incredibly devoted to localism – in fact, we're currently engaged in an extensive and meaningful review of precisely that topic". It is impossible to tell, of course, but bear in mind that, in the localism proceeding, the Commission released only an *NOI*, not a "notice of proposed rulemaking" (*NPRM*). Before the Commission can adopt new rules, it will have to issue an *NPRM*, which will include a further invitation for comments, reply comments, etc. Even if the proceeding were placed on a super-fast track, it is extremely unlikely to result in any actual regulatory changes for at least a year, and likely much longer.

In any event, the Commission has issued its *NOI* and interested parties should be sure to respond to it. If you would like any help in preparing comments or reply comments, you should feel free to contact the FHH attorney with whom you normally work.

(Continued from page 10)

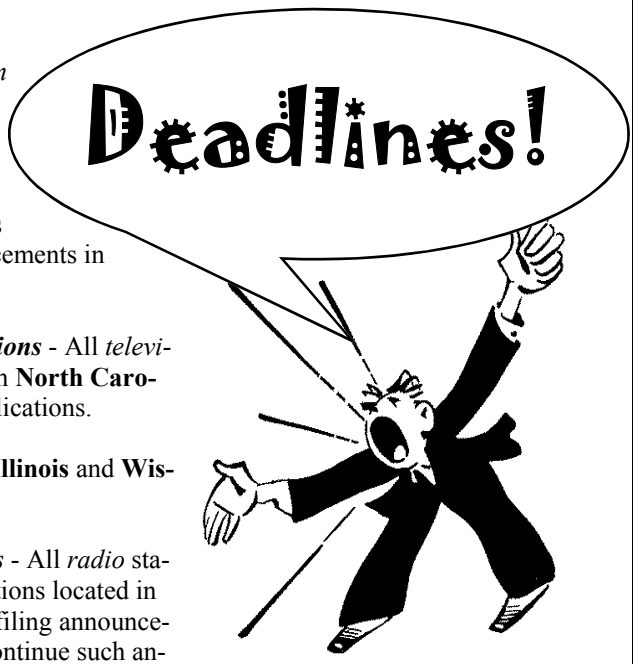
first lawsuit. Because this was not part of the original sale, the FCC's rules against a seller retaining an interest were not applicable. In other words, this approach ***does*** provide a valid way to handle this situation.

Pirates, Fences and EAS To complement this month's interesting cases regarding the First Amendment, station sales and public files, the FCC kept up the heat on its now ever-present fence and EAS enforcement. In addition, the FCC fined a California radio pirate $20,000 and a Florida pirate $1,000.

Fences - A **Florida AM** station was fined **$1,000** for not having a fence after the station's general manager told the FCC inspectors they could get closer to the tower by avoiding the main gate and walking around to the side that had no fence. Another **Florida AM** station was fined **$7,000** for not having its gate locked. An **Arkansas AM** was fined **$4,400** for having numerous openings in its fence; the FCC was not impressed with the station's argument that a "No Trespassing" sign served the same purpose. A **Texas AM** station was **admonished** for fencing, as well as lighting and EAS, violations; an FCC agent inspected the station, advised the owner to put up fencing and returned one week later to find a construction webbing fence sagging to the ground and still allowing access to the towers. The Texas station was initially fined $25,000 but the fine was removed due to the station's bankruptcy. Finally, a **Colorado AM** was fined **$7,000** for having a wooden fence with broken pickets through which "children and small adults" could pass; it is unclear if the fine would have been larger if large adults could have fit through.

EAS - A **California TV** station was fined **$2,000** for failing to conduct EAS tests. In addition to power and registration violations, a **New York AM** station was fined **$10,000** for monitoring only one EAS source (stations are required to monitor two sources) and not having conducted an EAS test for several weeks. Finally, a **Class A** television station was fined **$6,400** for having absolutely no EAS equipment.

August 1, 2004



Television Renewal Pre-Filing Announcements - *Television* stations located in the **Florida**, **Puerto Rico**, and the **Virgin Islands** must begin pre-filing announcements in connection with the license renewal process.

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

Television/Class A/LPTV/TV Translator Renewal Applications - All *television, Class A TV, LPTV*, and *TV translator* stations located in **North Carolina** and **South Carolina** must file their license renewal applications.

Radio Renewal Applications - All *radio* stations located in **Illinois** and **Wisconsin** must file their license renewal applications.

Radio and Television Renewal Post-Filing Announcements - All *radio* stations located in **Illinois** and **Wisconsin** and all *television* stations located in **North Carolina** and **South Carolina** must begin their post-filing announcements in connection with the license renewal process, and continue such announcements on August 1 and 16, September 1 and 16, and October 1 and 16..

EEO Public File Reports - All *radio and television* stations with more than five (5) full-time employees located in **California**, **Illinois**, **North Carolina**, **South Carolina**, and **Wisconsin** 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.

Radio and Television Ownership Reports - All *radio* stations in **Illinois** and **Wisconsin**, and all *television* stations located in **North Carolina** and **South Carolina** 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.

August 6, 2004

FM Auction No. 37 - Short form applications on FCC Form 175 must be filed by 6:00 p.m. EDT for all those interested in participating in the auction for vacant FM allotments as listed. Applicants may begin filing applications on July 22, 2004, at 12:00 noon EDT.

August 10-19, 2004

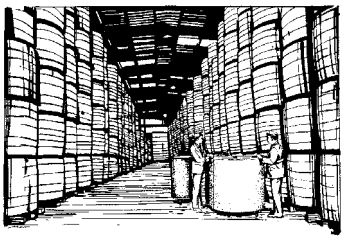
Regulatory Fees - All regulatory fees must be paid by 11:59 p.m. on August 19 to avoid a 25 percent late payment penalty. The filing window opens on August 10, but early payments will be accepted.

August 27, 2004

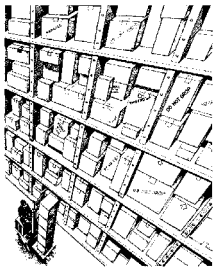
Taping of Programming—Comments on the FCC's proposal (MB Docket No. 04-232) to require broadcasters to record their programming to assist in the enforcement of the prohibition against indecent broadcasts are due.

September 24, 2004

FM Auction No. 37 - Applicants participating in the auction must submit a sufficient upfront payment by 6:00 p.m. EDT.



Giving new meaning to the term "bureaucratic red TAPE"



Proposed Rule Would Require Recording of All Programming From 6:00 a.m.-10:00 p.m.

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

Remember back in the 1960's and 1970's, when you had to keep detailed program logs of all the material that you aired? And remember how you occasionally had to pull out portions of your log collection from time to time, subject it to detailed analysis, and then bundle the whole thing up and ship it to the Commission, so the folks in Washington could doublecheck your work? And remember in the 1980's, when the Commission concluded that that program-logging requirement was ***not*** really necessary, and that the Republic would ***not*** crumble into chaos if such records were not readily available? And remember how that conclusion appears to have been accurate, since 20 years after the abandonment of program logging the country, and the broadcast industry, appear to be faring reasonably well?

Well, you can forget all that.

Adopting an aggressive "forward into the past" philosophy, the Commission surprised the broadcast industry in early July by proposing a new record-keeping requirement that would dwarf the long-ago-abandoned logging rules. Under the proposal, ***all*** broadcasters would be required to retain a recording of "all material they air during the hours of 6 a.m. and 10 p.m." The FCC isn't sure over what period of time such material should be retained, but it suggests 60 or 90 days.

The purpose of the proposal is supposedly to "increase the effectiveness of the Commission's process for enforcing restrictions on obscene, indecent, and profane broadcast programming." The FCC also suggests in passing that the recordings might also be used in enforcing the children's television and sponsorship identification rules.

Historically, the FCC required a complainant alleging broadcast indecency to provide a tape or transcript of the matter complained of. In recent years, as the Commission has ramped up its indecency enforcement effort, that requirement has been relaxed considerably, to the point where the complainant is no longer required to provide a tape or transcript or even an especially detailed description of what the complainant recalls was contained in the programming. As long as the complainant provides at least some information suggesting that indecency, etc., may have occurred, the Commission can shift, and on occasion has shifted, the burden to the licensee to disprove the allegation. That puts stations in the difficult, if not impossible position of proving a negative, *i.e.*, proving that no indecency occurred.

Since many stations do not record their programming, and thus have no conclusive evidence demonstrating the absence of objectionable material, the result in some cases has been a battle of "did-too/did-not" affidavits, with complainants confidently asserting that bad things were broadcast and licensees denying those assertions with equal confidence.

While the FCC's theory may be unassailable, its proposal plainly smacks of overkill.

The FCC's recording proposal appears to reflect an effort by the Commission to avoid such situations by essentially guaranteeing that, when an indecency complaint rolls in, the Commission will have access to the best possible evidence -- the programming itself.

While the FCC's theory may be unassailable, its proposal plainly smacks of overkill. It is somewhat akin to a proposal to make enforcement of speed limits easier by requiring all cars to be equipped with devices which record the vehicle's speed at all times. The excessive nature of the Commission's proposal is especially highlighted by the fact (stuck in a footnote in the notice of proposed rulemaking (*NPRM*)) that, of the 14,379 complaints received by the FCC between 2000 and 2002, only 169 of them – representing a meager 1.2% – were denied or dismissed for lack of a tape, transcript or "significant excerpts". It therefore appears that the Commission is proposing to impose a major league recordkeeping requirement on ***all*** broadcasters in order to avoid a problem which has, over a three-year period, cropped up in only 1.2% of the relevant cases.

That hardly seems right.

And aside from these conceptual difficulties, the FCC's proposal also lacks much practical explanation. The Commission does not propose any particular means of recording

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*Annual employment reports still need **not** be filed yet, but . . .*

Reminder: Broadcasters Must Be Keeping EEO Records

As we reported in last month's Memo to Clients, the Commission has adopted rules requiring that broadcasters maintain adequate records to reflect their employment profiles for pay periods commencing as of July, 2004. Those records do not have to be filed with the Commission . . . yet. That's because, at least as of this writing, the new EEO reporting forms have not yet been approved by the Office of Management and Budget. But the FCC has made clear that it expects licensees to retain sufficient information to permit them to fill in those forms for the period July-September, 2004, once the forms are approved.

You can get a copy of the previously-approved version of the form (FCC Form 395-B for broadcasters, FCC Form 395-A for MVPD's) from the FCC's website (http://www.fcc.gov/formpage.html). The new form may differ slightly from the version currently posted, but we understand that the employment profile information to be included on the new form will be essentially identical to that of the current form.

And further on the EEO front, earlier this month the U.S. Court of Appeals for the D.C. Circuit denied an effort mounted by broadcasters to obtain a stay of the obligation to respond to the spate of EEO audit inquiries issued in May (which demanded responses by the end of June). The FCC had rejected a similar request in June. With no stay in place, responses to the audit had to be filed.

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and maintaining programming. Tape? Digital recording to CD or DVD? Some other means? Who knows – the notice of proposed rulemaking offers no guidance.

And, as that gap might suggest, the Commission appears to have no clue about how much its recording requirement would cost the industry. The costs would include: acquisition, installation and maintenance of the equipment necessary to make the recordings; the necessary media (*e.g.*, tape, cassettes, CD's) on which to store the recordings; storage space sufficient to accommodate, say, 1,440 hours' worth of programming (*i.e.*, 16 hours a day – from 6:00 a.m. to 10:00 p.m. – for 90 days); and some way to catalog those recordings so that, should a complaint be filed, the station would be able to locate allegedly offensive programming without too much difficulty. Each station would also have to establish some standard operating procedure for handling the recordings and, presumably, erasing them at the end of the retention period.

The NPRM may be an effort by the FCC to create the impression that it is taking aggressive steps in the fight against indecency.

The *NPRM* asks for comment on these and a variety of other questions – including whether the proposal raises any First Amendment issues.

The Commission apparently didn't think that the preparation of responsive comments should take much time, though, since the original deadline for comments was July 30, about three weeks following initial release of the *NPRM*. Such an abbreviated turn-around time is highly unusual, especially when the FCC is proposing to impose substantial regulatory burdens and has previously compiled no factual record to guide the design and imposition of those burdens. A week before that deadline, though, the Commission (at the request of the Arizona and Kentucky Broadcasters Associations) extended the deadline to August 27, with the reply comment date moved back from August 30 to September 27. And you will also have the opportunity to file comments on the proposal with the FCC and the Office and Management and Budget, which must approve any proposals for new "information collection" burdens.

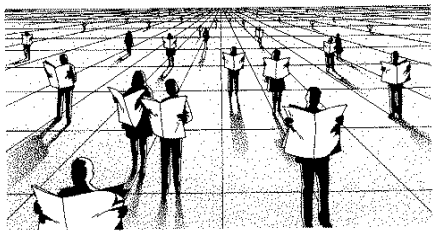
If we had to guess, we'd say that the *NPRM* is an effort by the Commission to create the impression that it is taking aggressive steps in the fight against indecency. Sure, it has already fined Clear Channel a couple of million dollars, but repeatedly fining a single licensee loses its impact after a while, and may not send an adequate signal to the rest of the broadcast community. So what better approach than to threaten to impose an industry-wide requirement whose impact would likely exceed any of the old program logging requirements which the Commission itself gladly threw out 20 years ago?

If you would like additional information about the *NPRM* or any comments filed in response to it, or if you would like help in submitting your own comments, please feel free to call on us.

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

Updates on the News

Return of the Flag. One of the quirkier aspects of the FCC's approach to ownership questions in recent years has been the "flagging" process. Several years ago, the staff – without so much as an informative public notice, much less a rule making proceeding in which the public could participate – started undertaking a preliminary assessment of the potential impact which proposed assignments might have on competition and diversity. If initial review by staff economists indicated that any proposed assignment could have a significant adverse impact, then that application was accepted for filing, but the public notice reflecting that acceptance included language advising the public that the application raised competition and diversity questions. The notice also invited comments on those questions. That notice was referred to as a "flag".



Since the flagging process appeared to be largely a seat-of-the-pants mechanism with few, if any, hard and fast standards, it led to considerable confusion, delay and frustration. And in July, 2003, with the release of the Commission's new ownership rules, the Commission expressly announced that it was abandoning the flagging process.

But then that pesky Third Circuit stayed the effectiveness of the new rules. In so doing, though, the Court appeared to direct the Commission to apply only its former ***rules***, and ***not*** any policies ancillary to those rules, during the pendency of the stay. In other words, while the old rules were to remain in effect, the flagging policy should not.

The Commission's staff appeared to concur with this reading. While the staff declined to act on applications which had been flagged before the adoption of the new rules, the staff advised at least some of those applicants that, if the old, flagged application were to be dismissed but then re-filed, the flag would be lifted and the staff could proceed to act on the application. While this novel bit of regulatory legerdemain might be viewed by some as a parody of legitimate decision-making, a number of affected applicants didn't care as long as they could get their applications granted.

But apparently some re-filed applications were still just too flaggable for the staff to grant, and for months those applications sat, unprocessed. When one of the affected applicants went to court to try to prod the FCC into action, lo and behold, the FCC reacted by . . . issuing a public notice with revised flag language. Gone from the flag is any reference to "diversity" and any reference to data from BIA, two features of the previous flag notices. But the notice is still undeniably a flag.

The return of the revised flag process may not affect huge numbers of applicants, but the threat that any assignment application might get stuck in that process should be a concern to anyone seeking to buy or sell a station. The flag process, never subject to extensive explanation or justification by the staff, has become even more mysterious, featuring new language and being applied after all indications were that the flag had been struck for good.

RF certifications for FM renewals – FCC typo raises questions. Those FM licensees among you who had filed renewal applications prior to July of this year have the FCC scratching its head. But it's not your fault. It turns out that the RF worksheets in the renewal application form (FCC Form 303-S) contained a typographical error which came into play for stations where the RF exposure at ground level exceeded 20%. The worksheet provided that, in those cases, it was necessary to determine if the existing fence was adequate, which in turn required the applicant (if you've done your own taxes, this should sound familiar) to insert a number on Line 17 and then insert the square root of that number on Line 20. But whoops, the proper entry onto Line 20 should have been the square root of the number on ***Line 19***. This was not a small problem, since performing the worksheet calculation as it appeared on the form (*i.e.*, using the root of Line 17) meant that the licensee would be able to certify RF compliance as long as the distance to the fence was at least one meter. In other words, virtually anyone completing the form as incorrectly set out would conclude that they could certify compliance.

Hats off to our pal, Jack Mullaney, for bringing this to our attention, and to the attention of the staff. We understand that the form has been corrected as of July 16, so future renewal applicants should not have to worry about this. The real question is what the FCC will do with respect to the several thousand renewal applications which were filed using the old form. While many, if not all, of those applicants who certified RF compliance are no doubt really in compliance, the validity of their certifications is at least subject to question because of the flaw in the FCC's form.

Who writes this stuff anyway? Our selection for the Best Headline From An FCC Public Notice for the past month: "FCC ADOPTS ALL-OR-NOTHING RULE TO REPLACE PICK-AND-CHOOSE RULE". Seems like a pretty dramatic shift in policy to us.

FM ALLOTMENTS ADOPTED –6/22/04-7/20/04

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
WY	Centennial	80.3 miles SW of Cheyenne	248A	03-258	None
WY	Newcastle	69.1 miles SW of Rapid City SD	258C0	03-258	None
WY	Pine Haven	110.2 miles NW of Rapid City, SD	260A	03-258	None
WY	Warren AFB	4.3 miles S of Cheyenne	225C2	03-258	None
NE	Gering	91.1 miles NE of Cheyenne	226C1	03-258	None
NE	Scottsbluff	93.0 miles NE of Cheyenne	231C1	03-258	None
AL	New Market	17.8 miles N of Huntsville, AL	227C2	03-244	None
CA	Amboy	192.9 miles NE of Los Angeles	237A	02-124	TBA
CA	Lincoln	30 miles N of Sacramento	280A	04-24	None

FM ALLOTMENTS PROPOSED –6/22/04-7/20/04

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
FL	Daytona Beach Shores	4.7 miles S of Daytona Beach	258A	04-240	Cmts - 08/19/04 Reply-09/03/04	Drop-in
WI	Stoughton	15.8 miles SE of Madison	240A	04-239	Cmts - 08/19/04 Reply-09/03/04	Drop-in
AR	Gassville	83.5 mies S of Springfield, MO	224A	04-237	Cmts - 08/19/04 Reply-09/03/04	Drop-in
MA	Nantucket	105.28 miles SE of Providence RI	249A	04-238	Cmts - 08/19/04 Reply-09/03/04	Drop-in
AZ	Parker	102.9 miles N of Yuma	252B1	04-252	Cmts - 08/30/04 Reply-09/14/04	Drop-in
FL	Big Pine Key	109.1 miles S of Miami	281C1	04-248	Cmts - 08/30/04 Reply-09/14/04	NCE
MS	Benton	46 miles N of Jackson	226A	04-249	Cmts - 08/30/04 Reply-09/14/04	Drop-in
NE	Broken Bow	207.9 miles W of Lincoln	237C2	04-203	Cmts - 09/07/04 Reply-09/21/04	Drop-in
NE	Maxwell	265 miles W of Lincoln	253C1	04-203	Cmts - 09/07/04 Reply-09/21/04	Drop-in
UT	Levan	49.5 miles S of Provo	229C	04-258	Cmts - 09/13/04 Reply-09/28/04	1.420 (i)
UT	Richfield	106.4 miles S of Provo	244C	04-258	Cmts - 09/13/04 Reply-09/28/04	1.420 (i)

Noncommercial Reservations

Last fall the Commission invited proposals to reserve vacant FM channels for noncommercial use. In April the FCC issued notices of proposed rule making concerning the proposed reservation of a number of channels, and this past month it concluded those proceedings by reserving for noncommercial use a number of channels. Since the proposals would not alter the basic distribution of allotted FM channels, we are not including them in the usual monthly list of proposed channel changes. However, since the possible change in status of these channels — from commercial to noncommercial — may be of interest to our readers, we are providing an additional table, below, separately listing newly-reserved NCE channels.

FORMERLY COMMERCIAL FM ALLOTMENTS NOW RESERVED FOR NCE USE –6/22/04-7/20/04

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
AL	Anniston	68.4 miles E of Birmingham	261C3	04-79	NCE
AZ	Somerton	9.3 miles SW of Yuma	260C3	04-83	NCE
CA	Sutter Creek	44.5 miles NE of Stockton	298A	04-85	NCE
CA	Westley	16.2 miles SW of Modesto	238A	04-86	NCE
CO	Olathe	211 miles NE of Boulder	270C2	04-87	NCE
CO	Olathe	211 miles NE of Boulder	293C	04-88	NCE
FL	Horseshoe Beach	67.3 miles SW of Gainesville	234C3	04-89	NCE
FL	Live Oak	91 miles W of Jacksonville	259A	04-90	NCE
IA	Asbury	5.3 miles W of Dubuque	238A	04-91	NCE
IA	Keosauqua	70.6 miles SW of Iowa City	271C3	04-92	NCE
IA	Moville	22.4 miles SE of Sioux City	246A	04-93	NCE
IA	Rudd	58.3 miles NW of Waterloo	268A	04-94	NCE
ID	Weiser	54.3 miles N of Nampa ID	280C1	04-95	NCE

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.