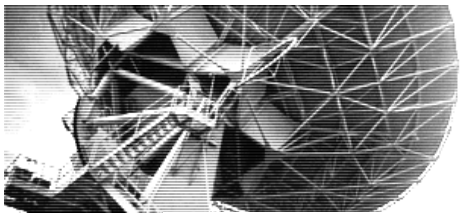

FLETCHER, HEALD & HILDRETH
Communications Law & Regulation

MEMORANDUM TO CLIENTS

News and Analysis of Recent Events in the Field of Communications

Movin' On Up To The East Side

Nevada and Wyoming TV Stations Propose to Pack Up, Head East

By Donald J. Evans
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Two small television stations have notified the FCC that they prefer the more populous environs of Delaware and New Jersey (their licensee's home for more than 30 years) to the wide open spaces of Nevada and Wyoming to which they are currently allotted. And, strange as it may seem, the law is on their side.

PMCM TV, LLC, a company privately owned by a group of radio (and former TV) operators from New Jersey, has notified the Commission that PMCM is agreeable to moving its two TV stations – KVNV, Ely, Nevada, and KJWY, Jackson, Wyoming – to Middletown Township, New Jersey, and Wilmington, Delaware, respectively. The basis for the move? A section of the Communications Act brought to PMCM's attention by its lawyers – Fletcher Heald & Hildreth – that specifically orders the Commission to bless a proposal such as this.

A section of the Communications Act specifically orders the Commission to bless a proposal such as this.

Some background here for the uninitiated.

When the FCC first doled out television channels, two states – New Jersey and Delaware – got short-changed as far as commercial VHF allotments were concerned. Neither state got any commercial VHF's. Recognizing the inequity, in 1982 Congress enacted Section 331(a) of the Communications Act. With clarity unusual in Federal legislation, that section mandates that it "***shall***" be the FCC's policy to allocate commercial VHF TV channels so that "not less than one such channel shall be allocated to each State, if technically feasible." And if a commercial VHF licensee notifies the FCC that the licensee is willing to have its channel reallocated to a community in a commercial VHF-less state, then the Commission "***shall***" (there's that mandatory word again) order the reallocation and grant the requesting licensee a new license.

The technical feasibility condition kept Delaware from obtaining any local VHF channels in the intervening 27 years because of the need to protect stations in nearby Baltimore, Philadelphia and New York. But New Jersey lucked out early on. In 1983, the owners of New York station WOR-TV, then on VHF Channel 9, were embroiled in a difficult license renewal contest. Taking advantage of Section 331, they asked the FCC to reallocate their channel from NYC to Secaucus, New Jersey. Bingo - their renewal problem went away, and New Jersey at last had its commercial VHF TV allocation.

Fast forward to 2009. The FCC has since re-shuffled the allocation of TV channels across the United States in anticipation of the conversion from analog to digital transmissions. Unaccountably, in setting up the DTV table of allotments, the FCC *again* didn't allot any commercial VHF channels to New Jersey or Delaware, despite the 1982 Congressional directive to do so. This meant that once the old Secaucus station moved from Channel 9 to its new home on DTV Channel 38, New Jersey would once again be bereft of

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June, 2009 **No. 09-06**

Inside this issue . . .

Lo-Po status on the rise

Court Affirms LPFM-Friendly Rules

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In a somewhat unexpected show of support for the LPFM service, the U.S. Court of Appeals for the D.C. Circuit has rejected the NAB's challenge to certain LPFM-friendly rules adopted by the Commission in 2007.

Back in 2007, the Commission:

- modified its "cease-operation" rule (Section 73.809) to provide that an LPFM station causing interference to a later-authorized (or later-modified) full service station would apply only to co-channel and first-adjacent channel situations, ***not*** second-adjacent situations;
- established new standards for waiving separation requirements when (a) a later-authorized/modified full service station would ordinarily displace an LPFM ***but*** (b) there are no alternate, rule-compliant channels to which the LPFM might relocate; and
- created a "rebuttable non-binding presumption" essentially elevating LPFM's over later-filed full service applications for change of city of license in the overall pecking order ***if*** the LPFM guy can demonstrate that it has "regularly provided at least eight hours per day of locally originated programming."

The NAB challenged these changes, pointing out that they seemed flatly inconsistent with other Commission rules, at least some of which had been mandated by Congress. For example, Congress has expressly insisted that the FCC maintain third-adjacent protection for full-service stations as against LPFMs. But if full-service stations are entitled to third-adjacent protection, doesn't that automatically imply that they should also be protected from the presumably more problematic second-adjacent interference?

The Court acknowledged that some of the NAB's arguments were at least "seemingly intuitive" – but in the end those arguments ran smack into Congress's language, which plainly did not support the NAB. Logically, of course, whittling away at second-adjacent protections does appear to be inconsistent with Congress's express mandate that ***third***-adjacent (*i.e.*, more attenuated) protections be maintained. However, the fact that Congress did not expressly mandate maintenance of second-adjacent protection was fatal to the NAB's argument. (As the Court saw it, the FCC's position was neither "demonstrably at odds" with the statute nor "contrary to common sense" – strong praise, indeed.)

The Court also disagreed with NAB's attack on the "rebuttable non-binding presumption" which (to the passing eye, at least) appears to be purely content-based, since it is triggered by the LPFM's claim of having provided "locally originated programming". But in the Court's view, the term "locally originated programming" refers to the "geographic location of the production of programming", ***not*** the "substantive content of the programs." (The Court did keep the NAB's content-based argument alive for another day by dismissing it as unripe because "there is no clear indication that the Commission will regulate content in applying the presumption".)

The bottom line is that the LPFM industry has survived this latest legal challenge and has come out arguably better positioned than it had been before. Meanwhile, in Congress, there continues to be interest in eliminating the third-adjacent interference protection standard as well. With a new set of Commissioners soon to take over the Commission, it will be interesting to see whether the LPFM folks continue to ascend in the hierarchy of broadcast services.

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Focus on FCC Fines

By R.J. Quianzon
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Texas FM operator stripped of license . . . again – Back in 2006, the FCC cranked up a hearing to determine if it should revoke an FM license held by a Texas man who had been convicted of a felony. The licensee didn't show up at the hearing and, because of that default, the presiding judge dismissed the licensee's then-pending renewal application. Following up on the Judge's decision in early 2007, the Media Bureau, noting that the station's license had obviously expired, terminated the station's authorization to operate and deleted its call sign.

Here's a quick summary of the licensee's felonious background. In 2002, the company which owned the station (an FM in Shamrock, Texas) was facing financial difficulties and was on the verge of shutting down. Along came the station's general manager, who offered to take over the station and pay its bills. The station agreed, the FCC approved the assignment, and the station manager became the owner of the new station.

However, it later came to light that part of the reason for the station's financial problems was the fact that the general manager himself had been stealing from the station. The manager stole from the station and then offered to take the station off of the old owners' hands in light of the financial problems (including the undiscovered thefts). When the thefts came to light, in 2004, the manager was sentenced to do time in the Texas big house for his earlier thefts. Despite the thefts, though, the manager kept the station license and did not have to return the station to his former boss (and victim).

After serving his time, the man left prison and continued to operate the station. In 2005, he filed a routine license renewal application, but – oops – forgot to mention anything about that whole felony conviction thing. Someone (perhaps a very unhappy former owner) filed a complaint with the FCC, disclosing the felony conviction. The FCC looked into the matter and figured it was time to put the guy into a hearing to see if he was qualified – which is what happened in 2006.

While you might think that the dismissal of the station's renewal application (in 2006) and the cancellation of its license (in 2007) might have put the wraps on this story, you have at least one more think coming.

This month the Enforcement Bureau released a decision that effectively digs up the license's dead corpse so that the Bureau can pound a stake into its possibly undead heart. Unusual begins to describe the Bureau's decision.

Apparently, the Bureau was moved to act because there had never been a formal determination that the licensee's felony record did, indeed, disqualify him from being a licensee. As noted above, the 2006 hearing never got off the ground (because the licensee failed to show up), so the issue of his qualifications was never reached. Instead, the renewal application was dismissed (for failure to prosecute). The judge did certify the matter to the full Commission, as required by the rules, but the full Commission has so far failed to take any action in response to the certification. So the Enforcement Bureau rolled up its bureaucratic sleeves and decided to clean house.

After briefly reviewing the available facts – culled largely from the records of the Texas courts – the Bureau concluded that the (former) licensee's criminal conduct reflected a "propensity to evade, rather than comply with laws and regulations that would include the Communications Act and the Commission's rules and policies." From there it was but a short hop, skip and jump to a finding that the guy is not qualified "to be or remain a licensee". Going further, the Bureau next concluded that revocation of the guy's license "is mandated but for the prior dismissal" of its license renewal application.

In other words, recognizing that the station's license renewal had already been dismissed and its authorizations terminated (more than two years ago!), the Bureau appears nevertheless to have felt it necessary to conclude that the non-renewed-and-long-since-terminated license should be revoked anyway – even though it probably can't be, because the license went away two years ago.

Precisely why the Bureau chose to attempt this gambit at this particular time is not clear from the decision. Possibly the Bureau just wanted to tie up a loose end or two resulting from the inconclusive conclusion of the hearing in 2006. The problem with that, though, is that, once the Bureau designated the matter for hearing in 2006, the Bureau relinquished jurisdiction. That is, upon designation the matter was out of the Bureau's hands and in the hands of the judge and, ultimately, the full Commission. Because of that, it's far from clear how the Bureau could yank the matter back into the Bureau's control for purposes of beating up on the licensee some more. Even more surprisingly, the Bureau's order now declares the hearing proceeding to be "dismissed", even though the hearing is technically still before the full Commission as a result of the judge's 2006 certification.

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Are You the Victim of a Facebook Squatting?

If so, act now!

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For a website that received over 222 million unique visitors in December, 2008 (stated another way, roughly 55,000 times the traffic at FHH's Commlawblog, or stated even another way, a traffic level that indicates that one in every five people who used the Internet that month made a trip to the site), Facebook doesn't do a great job of getting its own news out. Case in point: the effect on intellectual property rights that occur through the addition of "usernames" that will make it easier to find individual Facebook pages.

Granted, the proposal was announced less than a week before its 12:01 am, June 13 effective date, but most corporate (and many individual) users didn't take heed of the small notice in the upper corner of each Facebook page. Fewer understood that the new program carries the potential for rampant cybersquatting, and/or how to combat it.

The new "username" capability was introduced to make it easier to find individual users. Prior to June 13, the only way to find a person was to go to www.facebook.com and use the Search function to find a person or entity. Trouble is, despite the existence of various filters to narrow down a search, you still often end up with a dreaded message along the lines of "Displaying 1 - 10 out of over 500 results for: xxx", meaning that your real search was just starting.

Now, any individual or company – but not "groups" or "causes" – can, but does not have to, create a username which becomes part of that person's Facebook URL. What's the difference? Well, look closely the next time you visit the site (we know you do). If the person you're stalking – sorry, looking for – doesn't have a username, his or her personal page will simply be assigned a random number ID and the URL will appear as something like:

http://www.facebook.com/home.php#/profile.php?id=123456789&ref=nf

Not all that unique or helpful when you're trying to find someone or go directly to a particular page, is it?

Well, while I was on a cross-country flight the other night, I happened to be surfing the Internet (my review of Virgin America's in-flight wi-fi is a story for another article) and, lo and behold, I happened to be on Facebook right after midnight Saturday morning. So I figured, what the heck, I'll grab a username.

Now you can find me simply by typing:

www.facebook.com/kevinmgoldberg

That's a lot more direct, isn't it? It makes one's Facebook page much more akin to an actual "home page", especially since I've never bothered to register or develop www.kevinmgoldberg.com. It also distinguishes me from "Kevin I. Goldberg", another attorney in the D.C. area (and even if you have been friends with him for almost 20 years, you'd want to distinguish yourself, too, if he advertised on TV to those who "have been injured in an accident", asking them to call "1-800-HurtNow", but that, too, is a story for another article...).

There is a relatively minor restriction on username registration: A username must be at least five characters long and consist entirely of alphanumeric characters and periods/full stops. This means broadcasters with a Facebook presence will ***not*** be able to simply use a four-letter call sign as a username *unless* additional characters — maybe the station's frequency or an "AM", "FM" or "TV" suffix — are also included.

But while you can see the benefit of being easier to find, you can see the detriment as well, right? It's also possible for someone to cybersquat ***your*** Facebook page. And the Anti-Cybersquatting Consumer Protection Act and ICANN Uniform Domain Name Dispute Resolution Policy – to the extent you wish to invest the time and money to grab your domain name back from a cybersquatter – aren't really all that helpful, since the trademarks you're trying to protect really aren't part of the domain name itself. (For further information about such matters, check out our blog post at http://www.commlawblog.com/2007/06/articles/intellectual-property/protect-your-call-signs/.)

That's why we recommend that businesses who have established a Facebook page go ahead and take the few minutes to create a username which reflects their most prominent brand or registered trademark – the term that people are most likely to use to search for you on Facebook. If you don't have a Facebook pres-

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The DTV transition has left the building . . .

June 12 Comes, Goes

Sun continues to rise in East, dogs still not living with cats

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The fat lady has sung . . . the i's have been dotted, the t's crossed . . . the cookie has crumbled . . . the water has passed under the bridge, or maybe it went over the dam. Pick your own metaphor, but the underlying fact remains: Preceded by mournful bureaucratic and political keening that crescendoed to a mega-decibel, panic-inducing banshee wail, the DTV Transition arrived and then was gone, a non-event every bit as anticlimactic as Y2K.

To be sure, call centers, help desks and other resources set up by the Commission, NTIA and broadcasters fielded a surge of inquiries, but a substantial chunk of those calls related to installing and adjusting converter boxes – not a particularly dire threat to the nation's health and safety.

Thanks to the tireless efforts of broadcasters, consumer advocates and the staff at the FCC and NTIA, anyone who did have any DTV-related concerns had a wide range of help available to get them through the transition. According to FCC and NTIA officials, the free on-site installation assistance program was successful, and there were adequate numbers of converter boxes on hand to resolve localized shortage issues.

The Transition did produce a few surprises. The VHF drop-off, for example, particularly in urban areas. Some stations which opted to transition, on June 12, to their VHF channels for digital operation got a rude awakening when calls reporting signal loss started to pour in. That phenomenon had not been predicted when the Commission adopted the new DTV Table.

The FCC has sent its staffs to markets (including New York, Philadelphia, Chicago) where that has occurred, to investigate the nature and extent of the signal losses, and to determine whether power increases by the respective stations would solve the problem. One Philadelphia station has already filed for a power increase. The Commission has indicated that it will continue to monitor the situation and work with the broadcasters and the public to resolve these issues. (With the post-transition DTV Table now in place, one obvious solution would be to allow channel changes for stations adversely affected by the signal loss.)

A number of full-power television stations did not make the transition due to financial, technical, or international coordination issues. Several TV owners are in bankruptcy proceedings and were entitled to extensions of the construction deadline. Others encountered equipment glitches when they flipped the switch. Any station which, for whatever reason, is still broadcasting analog signals must continue to make the DTV Consumer notifications and must inform the public of the areas that are not receiving the station's DTV signal.

The Commission will now turn its attention to finalizing plans for the transition of LPTV and Class A television stations to digital service, and issues resulting from that transition, along with lifting the remaining freeze on rulemaking proceedings to change the community of license of television stations. In the meantime, we will keep you informed of any new developments resulting from the DTV Transition.

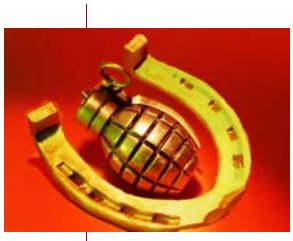
(Continued from page 4)

ence, you might want to think about creating one, if only for the purpose of then preserving your desired username for future exclusive use (after all, it's free, and did we mention that one in five people who used the Internet in December, 2008, visited Facebook?). However, since every user can only have one username, you should, as they say, "choose wisely".

And what happens if someone has already taken your trademark as a username and you want it back? Well, Facebook claimed to have a system in place through which anyone with a registered trademark could preserve that right by submitting evidence of its rights in the form of the United States Patent and Trademark Office registration number. But that appears to have closed upon the opening of the username creation process on June 13 (again – not the greatest outreach on Facebook's part).

There is still a relatively simple automated IP Infringement Form that can be used to report infringements on intellectual property. It appears that filing this form is akin to filing a "Notice and Takedown Request" under the DMCA (another topic we've covered on Commlawblog) and will result in Facebook providing the allegedly infringing party the opportunity to respond.

Of course, we're always ready and able to assist you in combatting the scourge of cybersquatting. The only thing that rankles us more than Facebook cybersquatting is Twitter. Not cybersquatting on Twitter, mind you. All of Twitter. But that's a story for another article . . . .



Horseshoes, hand grenades, but not broadcast construction

Audio Division Deletes Nine Stations for Failure to Construct as Authorized

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A scathing 23-page Memorandum Opinion and Order emphatically demonstrates that the FCC takes very seriously certifications included in applications. If we needed a reminder, the decision proves again that lying in any application can result in the loss of the station authorization in question *and* a referral of the matter to a U.S. attorney for potential prosecution *and* a separate FCC hearing to determine whether you're basically qualified to be a licensee of *any* station. Strong medicine indeed.

But most importantly, the decision conclusively establishes that, if you don't build the facilities specified in the CP the FCC gives you, you risk losing whatever facilities you did build, along with the underlying CP.

Following a lengthy investigation, the Audio Division concluded that two NCE licensees – Great Lakes Community Broadcasting, Inc. and Great Lakes Broadcast Academy, Inc. (we'll refer to them collectively as "Great Lakes") – under the control of one James J. McCluskey had lied to the Commission. In at least nine license applications – five for full-power NCE stations and four for translators – Great Lakes had certified, falsely, that CP-specified facilities had been constructed when they hadn't.

Various complaints and petitions from broadcasters (including some I authored for WYCE, Wyoming, Michigan) brought some of Great Lakes's shenanigans to the Commission's attention. With that start, the FCC pursued Great Lakes through a combination of Enforcement Bureau on-site inspections, an Audio Division letter of inquiry and (as described in a related article on page 7) even some cyber-sleuthing. In instance after instance the Division found that Great Lakes's claims that it had constructed the facilities specified in CPs issued to it just weren't true. In one case, no facilities had been constructed at all, notwithstanding a certification in the license application to the contrary. In other cases, facilities of some sort apparently had been built, but they were at the wrong site, the wrong height and/or the wrong power.

The Division ruled it was not good enough for Great Lakes to just throw something up in the general vicinity of the CP sites. (The horseshoes/hand grenades axiom is fully applicable here.) CPs for four full-power stations and two translators were automatically forfeited because the facilities authorized had not been constructed before the CPs expired. Great Lakes did escape cancellation of one CP because grant of the license application had already become final, but that escape may be temporary: the Audio Division concluded the facilities specified in the CP and license application were never constructed, so that station will be the subject of a forthcoming hearing designation order. That hearing designation order will also examine the character qualification of the Great Lakes entities, McCluskey and Great Lakes's engineering consultant David C. Shaberg to hold other FCC authorizations.

It's not good enough to just throw up facilities roughly similar to those specified in the CP. The horseshoes/hand grenades axiom is fully applicable here.

Great Lakes's varied and sometimes contradictory proffered reasons for its false certifications had, in my admittedly biased view, the persuasive power of a sixth-grader's excuses for not doing his home work.

For example, Great Lakes argued that the facilities it constructed complied with its authorizations because they did not exceed the antenna heights and power levels set in the CPs and therefore would not cause interference to other stations. Without breaking a sweat, the Audio Division swatted that down: except in very specific instances covered in the FCC's rules, the Division observed, "we do not allow permittees to self-approve modifications to their construction permits." The Audio Division continued that parties like Great Lakes cause "substantial harm when they hoard spectrum by holding authorizations for full-service FM stations but operate minimal facilities" that might not have been approved had they actually been presented to the FCC.

Great Lakes also claimed that problems getting accurate readings from its GPS unit led to construction of facilities at considerable distance from the FCC-authorized sites. In that regard Great Lakes seems to have been oddly unperturbed when it kept getting different readings, as if it were to be expected that a particular site really ought to have at least a couple of different sets of geographical coordinates. In any case, the Division was unconvinced.

The vigor with which the Audio Division is going after Great Lakes may be a harbinger of a "get tough" policy with respect to spectrum warehousing and false construction certifications. If you've found yourself

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A peek in the back-end of CDBS

Caution, E-Filers: The FCC Knows Who You Are!

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Before you even think about trying to pull the wool over the Commission's eyes by hiding behind the anonymity that CDBS's electronic filing system might seem to provide, think again. The Commission knows all and sees all – well, it certainly can find out a lot, if not all – and any thought of Internet anonymity is largely illusory. Some folks in Michigan recently found that out the hard way.

CDBS, of course, has dramatically changed the dynamic of routine filing with the Commission. Back in the day, when paper ruled, each application (or routine regulatory report, like an Ownership Report) had to bear an original signature. That provided some assurance that the filing had actually been reviewed and approved by the signatory. But with CDBS, the notion of presenting actual signatures to the Commission went out the window. And that, in turn, gave rise to the possibility of less than honest manipulation of the system. After all, if you are able to access CDBS (which merely requires knowing the relevant CDBS account number and FCC Registration Number (FRN) and the passwords associated with each), you can type anybody's name into the signature block and no one would be the wiser, right?

While the applicant's response seemed to tell one story, the FCC's CDBS logs seemed to tell a very different story.

Not really.

In a recent decision (described in the article on page 6 of this issue of the *Memo to Clients*), the Audio Division pulled the curtain back, at least a tad, on the information available to the FCC from the back-end of CDBS.

The case involved a couple of entities (we'll refer to them collectively as "Great Lakes") which had acquired CPs and licenses for a bunch of NCE FM full-power stations and translators in Michigan. Complaints and petitions had raised questions about whether Great Lakes had been honest in many of its applications. In one instance, for example, Great Lakes had filed a license application claiming that the station in question had been constructed and was up and running – even though an Enforcement Bureau inspection of the site three days after the application was filed turned up no station at all.

The license application in question had not been "signed" by a Great Lakes officer; rather, it had been "signed" by Great Lakes's engineering consultant. That opened the door for the Division to write to Great Lakes advising it of that particular deficiency. (While the FCC's decision does not say so, it sure looks like, in so notifying Great Lakes, the Commission was setting a trap by giving Great Lakes yet another opportunity to mess up.) Sure enough, a week later an amendment to the license application was filed, this time bearing an appropriate name in the "signature" block. The Commission then sprung the trap, notifying Great Lakes of the results of the Enforcement Bureau's inspection and asking for an explanation for why Great Lakes claimed, in its application and amendment, that the station was up and running when it, er, wasn't.

Not surprisingly, Great Lakes had an explanation. The original license application had been placed in the CDBS queue "to have the information readily available for our internal review", or maybe "as an internal reminder that this was a priority". In any event, it had been filed by mistake. Who knew? It could happen to anybody! And when the deficiency letter rolled in, well, the Great Lakes principal merely supplied his "signature" without realizing the application which he was amending should not have been filed in the first place.

This is where things get interesting. After receiving that response, the FCC staff – apparently acting on its own initiative – checked its CDBS logs. It determined that the license application had been started on a particular date at a particular time (down to the minute) from a particular Internet address (*i.e.*, a 12-digit IP address). The Commission then found that that IP address was registered to a company listing a particular street address. (The decision doesn't say how the staff found that out, but it's not that hard with, *e.g.*, a simple WHOIS search.) The staff ***then*** found that that street address was the same as the address listed in the driver's license *and* voter registration of Great Lakes's consulting engineer. (Again, the decision sheds no light on exactly how the staff found this out . . . but we can guess.)

Next, the staff reviewed the CDBS logs relative to the amendment in which the corrected "signature" was submitted. While Great Lakes's response certainly seemed to indicate that the Great Lakes principal had prepared and filed that amendment by himself, the logs seemed to tell a different story. That amendment was started, completed and filed all within a six-minute period from the IP address associated with Great Lakes's consulting engineer.

The FCC decision indicates that Great Lakes will soon be placed in a hearing to delve into this instance and a series of others, all of which strongly suggest misrepresentation or lack of candor. It's always possible that some innocent explanation really does exist here, but it's hard to imagine what that explanation might be. We shall see.

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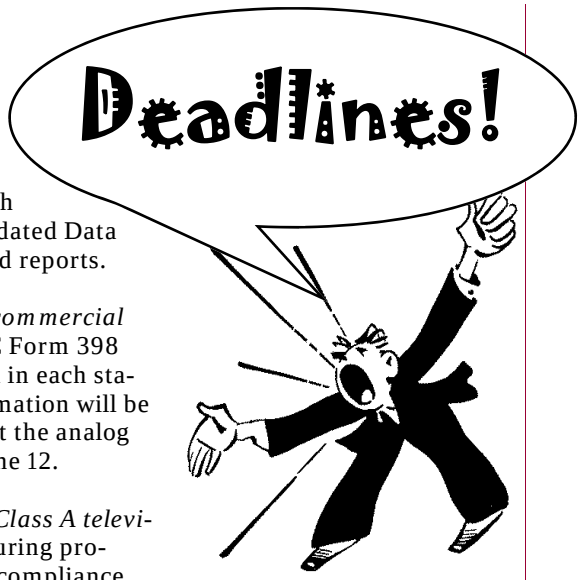
July 10, 2009



DTV Consumer Education Quarterly Activity Reports - All *television* stations that did not transition to DTV-only operation by March 31 must file a report on revised FCC Form 388 and list all station activity to educate consumers about the DTV transition. The period to be included is April 1 through June 12, 2009, for stations completing transition by June 12. As with previous reports, the second quarter report will be filed through the Consolidated Data Base System (CDBS), the general electronic filing system for applications and reports.

Children's Television Programming Reports - Analog and Digital - For all *commercial television* and *Class A television* stations, the second quarter 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. Once again – and for the last time – information will be required for both the analog and DTV operations. Please note, however, that the analog programming will not have aired for the entire quarter, but only through June 12.

Commercial Compliance Certifications - For all *commercial television* and *Class A television* stations, a certification of compliance with the limits on commercials during programming for children ages 12 and under, or other evidence to substantiate compliance with those limits, must be placed in the public inspection file.

Website Compliance Information - Television station licensees must place and retain in their public inspection files records sufficient to substantiate a certification of compliance with the restrictions on display of website addresses during programming directed to children ages 12 and under.

Issues/Programs Lists - For all *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.

July 13, 2009

Rural Radio/Allotment and Assignment Procedures - Comments are due in the Commission's rulemaking proceeding regarding proposed revision of the AM and FM allotment and assignment priorities to ensure that more AM applications go to auction and to deter FM stations from moving to more urban areas, as well as to provide special opportunities for tribes and attempt to expand rural service.

August 1, 2009

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more 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.

EEO Mid-Term Reports - All *television* station employment units *with five (5) or more full-time employees* and located in **Illinois** and **Wisconsin** must file EEO Mid-Term Reports electronically on FCC Form 397. All *radio* station employment units *with eleven (11) or more full-time employees* and located in **California** must file EEO Mid-Term Reports electronically on FCC Form 397. For both radio and TV stations, this report includes a certification as whether any EEO complaints have been filed and copies of the two most recent EEO Public File Reports for the employment unit.

Television Ownership Reports - All *noncommercial television* stations located in **Illinois** and **Wisconsin** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically. *The filing requirement for commercial stations has been suspended, as all commercial stations are subject to the new November 1, 2009, universal filing deadline.*

Radio Ownership Reports - All *noncommercial radio* stations located in **California**, **North Carolina**, and **South Carolina** must file a biennial Ownership Report (FCC Form 323-E). All reports filed must be filed electronically on FCC Form 323-E. *The filing requirement for commercial stations has been suspended, as all commercial stations are subject to the new November 1, 2009, universal filing deadline.*

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a commercial VHF station, while Delaware would remain a bridesmaid in the commercial VHF station allotment process.

PMCM and Fletcher Heald realized that Section 331(a) could be used as a vehicle to fill the upcoming vacancy in the New Jersey allotment scheme, and at the same time bring a commercial VHF station to Delaware for the first time. So PMCM went out and bought the Ely (population 4,040) and Jackson (population 9,038) stations. As soon as the DTV transition was complete, PMCM notified the FCC that it was agreeable to moving its two stations to serve Middletown Township and Wilmington, respectively, and would the FCC please issue it revised licenses right away as required by Section 331? (We have posted copies of PMCM's notifications on the FHH website at www.fhhlaw.com.) The move would provide new local TV service to Middletown Township and Monmouth County, which have over 600,000 inhabitants but no local TV stations, not to mention Wilmington, which has another 72,000 people and only one local commercial (UHF) TV station.

The proposed moves don't mean that Ely and Jackson will necessarily lose their allotments. Operation of KVNV and KJWY in Middletown Township and Wilmington will not technically foreclose continued use of Channels 3 and 2, respectively, in Ely and Jackson. That means that the Commission should be able easily to re-allocate those channels back to those communities; it could also grant interim operating authority to some deserving entity – perhaps the kind of "eligible entity" that the Commission has been seeking to promote through its diversification initiatives – pending selection of a final licensee. PMCM has indicated that it will be happy to cooperate in a hand-off to its successor(s) in Ely and Jackson. In addition, PMCM has offered to continue to provide low power TV service to Ely from a translator/LPTV station it is acquiring in that market.

The FCC has yet to react to PMCM's proposal, but if the FCC goes by the book, Delaware will for the first time have its very own full power commercial VHF station, and New Jersey will have its full power commercial VHF restored.

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blocked by an operation akin to Great Lakes, that should be good news – the *Federales* may be on the way to help you out. But on the other hand, if you hold a CP for unbuilt facilities, you are well advised to "get 'er done" within the time provided. If you don't get finished in time, you are equally well advised to fess up and suffer the consequences. While it may not might nice to try to fool Mother Nature, it's downright dangerous to try to fool the FCC.

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For the rest of us, though, it bears noting that the Commission ***does*** have considerable ability to ferret out information, both from its own internal records and from the same Internet resources we all have. And this case demonstrates that the Audio Division, at least, is not shy about digging for facts when investigation seems warranted. It is always a good policy to be completely honest with the Commission; it's also unwisely short-sighted to think that you might be able to get away with anything less.

FHH - On the Job, On the Go

On June 25-27, **Howard Weiss** attended the 72nd annual summer convention of the Virginia Association of Broadcasters in Virginia Beach.

On July 24, **Frank Jazzo** (along with NAB exec Dennis Wharton) will conduct the "Legal, Legislative and FCC Issues" session at the annual convention of the Arkansas Broadcasters Association in Little Rock.

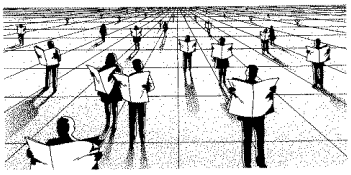
Scott Johnson has been awarded the Dean's Medal by the University of Alabama College of Communications and Information Sciences for sustaining friendship, unsurpassed loyalty and commitment to the College's mission. **Scott**'s "counsel and steadfast support in [the College's] continuing efforts to develop the best possible broadcasting facilities" were specifically cited in the award. He is only the eighth person to receive the Medal.

Media Darling of the Month? We've got your *Media Darling of the Month* . . . right here. First we have **Joe Di Scipio**, who was quoted in Comm Daily about pending proposals to clarify rules governing the travelers information service. But with all due respect to **Joe**, we have to give it up for **Kevin Goldberg**, who did a 15-minute interview for the Score, a Chicago sports radio station, on copyright issues. Why are we liking **Kevin** here? Because he used that opportunity to sing the praises of www.CommLawBlog.com to listeners in the Windy City. Any friend of the FHH blog is a friend of the *Memo to Clients* — and Kevin, you're not only our friend, you're our *Media Darling of the Month.*

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

Updates on the News

And then there were five . . . – After six short-handed months, it looks like we will soon have a full five-member Commission on board. The formal nominations (in late June) of Mignon L. Clyburn and Meredith Attwell Baker would fill the last two vacancies on the Commission, bringing it up to capacity for the first time since former Commissioner Tate departed in January, following closely out the door by former Chairman Martin. The 8th Floor Shuffle has been particularly complicated by the fact that Commissioner Adelstein was nominated to move over to the Department of Agriculture's Rural Utility Services months ago, and has been hanging around presumably because, if the Commission were to drop below three active members, it would cease to function. But that worst-case scenario has now been averted with the Senate confirmation of Chairman Julius Genachowski (*see* story below) and Commissioner McDowell, who has re-upped for another hitch. Since Commissioner (and former Acting Chairman) Copps is still mid-term, we now have a "permanent" three-member Commission – Commissioner Adelstein was heading out the door just as soon as Chairman Genachowski was going in – with nominees for the other two seats well on their way through the nomination process. (No word yet on the schedule for their confirmation hearings, but ideally, we hope to have profiles of all five Commission members in our next issue.



Meet the new boss . . . – Julius Genachowski was sworn in as Chairman of the FCC on June 29. Hitting the ground running, he promptly announced his staff, consisting of nine individuals boasting stellar résumés, including several with extensive Commission experience. Genachowski himself is no stranger to the Commission, having served as a senior advisor to Chairman Reed Hundt in the 1990s. Joining him in his new gig will be three veteran Commission officials (Mary Beth Richards, Ruth Milkman and Bruce Gottlieb) along with an array of talent from the private sector and elsewhere in the government. While broadcast experience is not a hallmark of the new regime, at least one Special Assistant previously served as an executive at CBS (although his work there involved "new media initiatives" and the "network's growing mobile business"). Sherese Smith, Genachowski's Legal Advisor with particular responsibility for media and enforcement issues, was most recently Vice President and General Counsel for Washington Post Digital. She has extensive background in the area of intellectual property.

Breaking news – AM's on FM translators approved – As we go to press, the FCC has just released its long-awaited Report and Order authorizing AM stations to rebroadcast their signals on FM translators. We will provide more in-depth coverage of this item in next month's *Memo to Clients*, and on our blog at www.commlawblog.com. An initial skim of the decision indicates that it specifically approves origination of programming on FM translators by Class D AM licensees during times when their AMs aren't operating. While we hail the opening of this long-overdue opportunity for AMers, we can't help but observe that this new twist adds yet one more type of radio station vying for spectrum.

Did she at least pay the right application fee? – In early June, one Angela Lee filed an application for modification of the license of Station WAEO(FM). The application was dismissed the next day with a terse – but remarkable – public notice reading as follows:

> License to modify was dismissed 6/2/2009 via public notice only (no letter sent). The only station construction permit expired 5/25/1987 and this applicant was not the permittee. No application to assign the long-expired permit was ever filed. No authority to operate the station has ever been issued to Angela Lee. No authority to change community of license to Detroit, MI.

As best we can figure, an initial construction permit had been issued for WAEO(FM) in 1985, specifying La Grange, Indiana, as its community of license. It appears that that station was never built and the permit thus expired in 1987. It also appears that Ms. Lee figured that all she had to do was ask the FCC to move the station – which she presumably thought was still alive and kicking – to Detroit, and it would be so moved. Too bad that (a) the station had died 20 years ago, (b) she didn't own it anyway, and (c) a move from La Grange to Detroit probably would have raised some 307(b) problems in any event. Oh well, no harm in asking.

If we can't have pepperoni rolls, we probably don't need beer – The Commission has added to the lexicon of things you can't say on the radio, if you're a noncommercial broadcaster and you're referring to people or companies who have provided you with underwriting support. We last alerted our readers to the issue of prohibited "advertisements" in a post on www.commlawblog.com in March. Readers may recall that one of the terms declared *verboten* by the Commission then was "world famous pepperoni rolls". This time around, the target is nothing less than (cue ominous music) . . . "cold refreshing beer". According to the Bureau, the expression "cold refreshing beer" "promote[s] that product through use of qualitative terms".

FM ALLOTMENTS ADOPTED – 4/22/09-6/19/09

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
TX	Mount Enterprise	76 miles SW of Shreveport, LA	279A	08-226	Accommodation Substitution
TX	Buffalo	104 miles SE of Abilene, TX	299A	07-279	TBA

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.

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The procedural and jurisdictional questions that this order presents are intriguing, but for our purposes, it suffices to observe that the Commission (or at least the Enforcement Bureau) obviously frowns upon felonious conduct as well as the failure to report felonious conduct when disclosure is sought by the Commission. Licensees should do their best to keep their noses clean, and if they do run into any trouble, they should also be sure to be up front about it with the Commission.

FCC increases fines for profitable broadcasters – If you're a "highly profitable" company, heads up – if you get cross-wise with the Commission's enforcement machine, the FCC may be inclined to whack you harder than less successful folks. Recently, the Enforcement Bureau went after a Fox station in New Jersey which had renewed all of its broadcast and auxiliary licenses but had forgotten about one single license — it forgot to renew a satellite earth station license (the satellite dish sitting in most station parking lots or on their rooftops).

Upon finding that its satellite license had lapsed, Fox filed for a replacement license and asked for special authority to operate while the replacement license was being issued. The Bureau granted the new license, but still chose (as it often does) to exact a financial penalty from the licensee. Although the fine for the expired license would ordinarily have amounted to $8,000, the Bureau doubled the fine to $16,000 because the fine was being paid by Fox and the Bureau determined that Fox was a "highly profitable" company and should therefore pay more. The rationale: the Commission wants to be sure that the fine is "a deterrent, and not simply a cost of doing business". (Since, according to the Bureau, Fox's revenues for the second quarter of 2008 alone reached $18 million, it's a bit of a stretch to think that an extra eight grand will have much deterrent effect, but what do we know?) So "highly profitable" companies, take note: violations may cost more for you than they might for your less successful competitors.

Group files a complaint and gets fined $9,000 – A hobby club in Texas was fed up with all of the interference that it was receiving on its radios from a nearby airport. The club contacted their attorney, who duly penned a complaint to the FCC about the airport operations. The complaint provided detailed information about the club, the frequencies which it used and a description of the interference.

The FCC dutifully looked into the complaint to determine who was causing the interference. Although the club had identified their operations and frequencies, they had forgotten to check one thing before reporting the issue to the FCC: the club's radio license had expired five years earlier. The FCC looked no further because the real cause of the problem – the club – unknowingly had turned itself into the FCC.

Not only had the club identified the frequencies that were creating the problems, it had provided a written statement to the FCC that it had been operating illegally. The FCC was able to issue a $9,000 fine to the club without even leaving the comfort of its office.

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