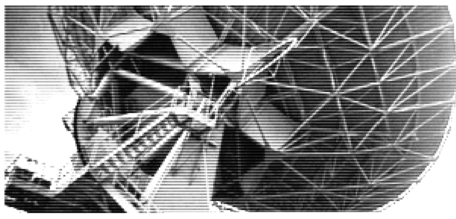

FLETCHER, HEALD & HILDRETH
Communications Law & Regulation

MEMORANDUM TO CLIENTS

News and Analysis of Recent Events in the Field of Communications

Quest for spectrum

FCC Ratchets Up Spectrum Re-Purposing

Quick turn-around inquiries suggest predetermined results

By Davina Sashkin
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If the FCC's not-so-secret intentions come to fruition, we may well look back on December, 2009, as the beginning of the end of over-the-air broadcast television. Some might argue that regular old free-over-the-air broadcast TV has been on its way out for some time – although all that anguished governmental hand-wringing over the lack of DTV converter coupons less than a year ago, and the dramatic harm that that lack was expected to cause, certainly suggested that the Feds attached substantial importance to broadcast TV. What a difference a year makes! Now the FCC seems itching to sound the broadcast death knell.

The strong suspicion is that the end goal has already been determined before the means or the rationale have been established.

In back-to-back public notices released in early December, the Commission asked for (a) "specific data on the use of spectrum currently licensed to broadcast television stations" and (b) ideas on how to encourage more video over the Internet. Why the FCC didn't simply ask "how can we migrate TV to broadband so we can give the TV spectrum to wireless?" is beyond us. After all, one of the notices referenced the November letter from the heads of CTIA – The Wireless Association and the Consumer Electronics Association urging that the Commission go on the hunt for more spectrum for wireless – with the explicit suggestion that that hunt start with TV spectrum. (So it seems that that suggestion has gotten legs at the Commission in less than a month. Most broadcasters would fall over if their pleas for Commission action were heeded with such alacrity, but we digress…)

It is generally recognized that FCC solicitations for public comment are often skewed to elicit precisely the information necessary to support the intended outcome, and to minimize the opportunities for contrarians. In the Spectrum Notice of Inquiry (*NOI*), the Commission takes that to a whole new level.

For example, it asks "What would be the impact to the U.S. economy if insufficient additional spectrum were made available for wireless broadband deployment, in terms of investments, jobs, consumer welfare, innovation, and other indicators of global leadership?" Contrast that with the follow-up question: "What would be the impact to the U.S. economy and public welfare if the coverage of free over-the-air broadcast television was diminished to accommodate a repacking of stations to recover spectrum?" Translation: Is fiddling with broadcast to recover spectrum for the poor wireless companies really so bad when the fate of U.S. leadership *in the world* is at stake?

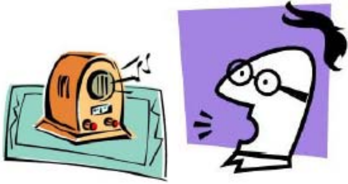
The Spectrum *NOI* shows even more of the FCC's cards when it posits that the majority of broadcast television is actually delivered to consumers via cable and satellite, not over the air. The obvious conclusion to be drawn is, gee, can't we get by with some channel sharing? It takes the Commission three single-spaced pages of broadband-friendly questions before the Commission remembers that

(Continued on page 7)

December, 2009 **No. 09-12**

Inside this issue . . .

Licensee Exorcises Enforcement Hold Based on Phantom Broadcast 2
Focus on FCC Fines 3
Commission Suspends Biennial Commercial Broadcast Ownership Report Indefinitely 4
Hawaii Share Services Agreement Under Scrutiny 6
Anne Goodwin Crump Named Member, Vince Curtis Retires 7
Nationwide LPTV/TV Translator Filing Opportunity Postponed 8
Get Out Your Crayons and Glue Stick: It's Design-a-Database Time 9
Quick Updates On The News 9
Deadlines 10



Ghost in the machine?

Licensee Exorcises Enforcement Hold Based on Phantom Broadcast

By Kevin M. Goldberg
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When the FCC (prodded by complaints) raises questions about the content of your programming, it helps to have a solid handle on what you're broadcasting. And at times it also comes in handy if you've been listening to your station so that you can know what you're not broadcasting, even if it sounds like you are, or vice versa. Confused? That's what happened recently to a New Jersey licensee.

Equity Communications, L.P. is the licensee of WAYV(FM) in Atlantic City, New Jersey. It filed an application to renew WAYV's license in January, 2006. But as they sailed through 2009 with 2010 fast approaching, WAYV's license still hadn't been renewed (of course, the Communications Act and the Commission's rules allow the station to continue operation as long as they have a timely renewal application pending).

Why was the renewal being held up? After asking around at the Commission, the licensee got the word: the staff had placed a hold on the renewal application because the station was the subject of one or more complaints alleging that it had broadcast indecent material at times when children were likely to be in the audience. Digging a little deeper, the licensee learned that the complaints were filed in response to two broadcasts of "The Hal Turner Show", one in October, 2006 and the other in December, 2006 (of course these were after the expiration of the prior license period, but could still be considered against the renewal application).

There's just one catch: ***Neither WAYV nor any other station licensed to Equity broadcasts anything called "The Hal Turner Show". Au contraire***, according to WAYV, at the times of the alleged indecent broadcasts its programming was controlled by an automatic music selection system that pre-screened content. The likelihood that something akin to the Hal Turner Show might have made its way onto WAYV was nil.

Hal Turner, by the way, is a controversial figure who espouses a number of, um, extreme views. To get some idea of his history, Google his name. One example: according to Wikipedia, Mr. Turner may have been the source of a report, widely circulated on the Internet earlier this year and denied by the State Department, that the U.S. has given China eminent domain rights to U.S. property as collateral for debts owed to China. Suffice it to say that the notion that a Hal Turner radio show might attract indecency complaints is not at all far-fetched.

But Equity was 100% confident that the notion that WAYV broadcast Mr. Turner was totally far-fetched.

So, to quote Mike LaFonaine (Fred Willard's character in "A Mighty Wind"): "Wha' happened?" That's where Equity's listening to its own station came in handy. It appears Mr. Turner, or maybe one of his fans, might have been engaged in a little bit of pirate radio on WAYV's 95.1 MHz frequency in northern New Jersey, a fact brought to light by Equity's own President, Gary Fisher.

According to an affidavit from Mr. Fisher, while driving through northern New Jersey from Atlantic City to New York City in November, 2007, he tuned into his station's 95.1 MHz frequency. We'll let him tell his own story from there:

> At a point approximately 60 miles north of the Station's protected service contour, my radio revealed a signal other than that transmitted by the Station, carrying a program called "The Hal Turner Show." I listened to this program continuously for some time, including through the top of the hour, but never heard any station identification. As such, it appears likely that the signal carrying

(Continued on page 8)

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Focus on FCC Fines

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Sponsorship in the news, again – Five years after the Armstrong Williams sponsorship flap hit the headlines, the FCC is still handing out fines. The latest fine is a $32,000 hit to a Bethlehem, PA, TV station for receiving payments for airing five episodes of the Williams show ten times each (at $100 a pop to the station). The fine is for violation of the sponsorship identification rules – a more elegant way of saying "payola" – and amounts to considerably more than the amount that the station originally received. It is worth nothing that there is *no prohibition against receiving payment for airing any particular programming,* including the Armstrong Williams show; BUT if payment is received, the Communications Act and the Commission's rules require that the fact of such payment be properly disclosed in on-air "sponsorship identification" announcements.

The Armstrong Williams matter was the hot topic for discussion as 2005 began. Mr. Williams was a talk-show host of his own syndicated program. It seems that Mr. Williams received money from U.S. Department of Education to promote the Bush Administration's No Child Left Behind Act ("NCLB"). Not surprisingly, Mr. Williams's on-air treatment of NCLB was favorable. The major PR flapdoodle initially arose when the government's payments to Williams surfaced – since a bunch of folks didn't cotton to the idea that the government should be paying friendly media figures (like Williams) to secretly propagandize on behalf of the administration's pet projects. Criticism was also directed to the fact that Williams did not disclose to his audience that he was getting paid to promote the topic. However, because Mr. Williams is not an FCC licensee – he only provided programming to broadcasters – there was little that the FCC could do other than issue him a sternly-worded letter.

But to get his word out to the masses, Mr. Williams did have to use broadcast channels, which afforded the FCC targets which it could in fact reach: *i.e.*, the broadcasters who aired his programming. As part of an investigation into the broadcasts and the payments to Mr. Williams, the FCC inquired about payments that broadcasters received. It turned out that the Bethlehem, PA, TV station's contract with Mr. Williams specified a $100 per broadcast payment to the station for each broadcast. The station advised the FCC that this was a nominal amount and that the station likely did not advise its viewers that it had been paid.

That was all the FCC needed. The licensee's admission that the station had received payments for broadcasting the program but had failed to disclose those payments gave the Commission an open-and-shut sponsorship identification case. The timing was inopportune for the licensee, since the FCC has in recent years been on something of a rampage about sponsorship ID violations, looking into embedded advertising, video news releases (VNRs) and the like. Because of that, the Commission was ready to roll when *L'Affaire Williams* broke across the headlines.

(For any reader who may not be *au courant* with the sponsorship ID rules, they provide that, when a station transmits any matter – music, talk-shows, endorsements – in exchange for money or other consideration, the station must let its viewers or listeners know. Specifically, the station is required to identify that the matter is sponsored, in whole or in part, and identify who paid for the sponsorship.)

The station defended itself by claiming that a $100 payment to a television station is a nominal amount. The FCC didn't accept that excuse and held fast to its rule that *any* payment or consideration received by a station required a sponsorship disclosure. The FCC identified five programs, each broadcast ten times, in return for each of which the station received $100 without identifying the sponsorship. The FCC initially proposed a forfeiture of $40,000.

The station raised several other defenses including inability to pay the fine and good faith efforts by the station to prevent payola. The FCC didn't think much of those defenses, either. But the station also asked the FCC to cut it a break since it was a first time offender. The FCC looked through its records and found that the licensee had kept its nose clear FCC-wise, so it cut 20% off the station's fine. The grand total of the fine was $32,000.

Licensees should always be certain to identify sponsors of any programming, music or other matters being broadcast. Everyone at a station should be reminded that sponsorship can arise from even the most minimal exchange of money or consideration. Again, the law does not prohibit taking money (or other consideration) in return for programming; but when such consideration does change hands, the law requires stations to make that known to their audience.

Underwriting? Yes! Advertising? No! – A rural Arizona non-profit, LPFM station signed off on a consent decree requiring it to shell out $700 a month to the government for the next ten months and file compliance reports with the government for the next three years. The FCC had initiated an investigation back in 2007 into the possibility that the station was airing advertisements. (LPFM licensees are, of course, noncommercial by nature. As a result, while they may broadcast underwriting acknowledgements, they may *not* broadcast advertisements.)

(Continued on page 10)

Form 323 update

Commission Suspends Biennial Commercial Broadcast Ownership Report Indefinitely

Back to the drawing board as court challenge is filed and apparent technical design flaws surface

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Let's see . . . where were we? Last month's *Memo to Clients* left the Form 323 brouhaha in cliff-hanger mode. We at Fletcher Heald had filed both a stay motion and a petition for reconsideration, the revised commercial broadcast Ownership Report form (Form 323) had still not been formally unveiled by the Commission, the deadline for filing had slipped from November 1 to December 15 and then to January 11, and rumors of problems with the operability of the revised form were circulating.

In December, things continued to get interesting.

Two days before Christmas, and all was neither calm nor bright for Form 323 at the FCC. On December 23 the agency's troubled efforts to launch its revised Form 323 – the Ownership Report for commercial broadcasters – got more troubled on a couple of fronts. In the morning, Fletcher Heald, together with ten state broadcaster associations, asked the U.S. Court of Appeals for the D.C. Circuit to stay the implementation of the form pending Court review of the new burdens that form imposes.

> *The FCC has never explained its reluctance to let us all kick the tires on the new form before having to drive it off the lot.*

A couple of hours later, the Media Bureau issued an order postponing indefinitely the deadline for filing biennial (but *not* other, non-biennial) Ownership Reports on the new form in order to fix mechanical problems that have cropped up with the form. While the two events were not directly related to one another, they both shone a glaring and none too favorable light on the FCC's six-month (and counting) campaign to impose, without notice or comment, new and intrusive reporting obligations on commercial broadcasters.

We have already chronicled the history of, and major league flaws underlying, that campaign in considerable detail. Need a refresher? Go to our blog (www.commlawblog.com), search for "Form 323", and start reading.

On December 8, the FCC finally took the wraps off its revised form – that would be six months after first announcing in the Federal Register that the new form had been designed. (The FCC has never explained its reluctance to let us all kick the tires on the new form before having to drive it off the lot.) In so doing, the Commission did not acknowledge FHH's motion for stay or petition for reconsideration, and instead appeared to be adopting a "damn the torpedoes" approach. With the January 11 deadline closing in fast, FHH headed to court, along with the broadcaster associations from Alabama, Alaska, Arkansas, Kentucky, Louisiana, Mississippi, New Mexico, Puerto Rico, South Carolina and Tennessee.

Normally you go to the Court of Appeals only after the agency has taken some action which the Court can then review. But in certain extraordinary circumstances, the Court is authorized to step in even absent agency action, to make sure that the Commission is doing what it's required by Congress to do. The revised Form 323 requires the submission of social security number (SSN)-based FRNs for every individual having an attributable interest/ position in connection with any commercial broadcast licensee. As we see it, the FCC's efforts to steamroll that requirement into place have fallen demonstrably short of Congressionally-imposed criteria, even though affected broadcasters have no conventional way to secure judicial review before they are required to comply – a situation perfectly suited for the "extraordinary writ" process.

So away we went to Court, asking it to stay the implementation of the new form. Since, when we filed the petition, the deadline was still January 11, we asked the Court to treat this as an "emergency" situation, the goal being a ruling by January 4, *i.e.*, a week ahead of the January 11 deadline.

Meanwhile, back at the FCC, representatives from a number of law firms had met with Bureau staffers on Friday, December 18, to demonstrate to the staff that the new Form 323 was, as a purely practical matter, a nightmare. The group served up multiple horror stories of cumbersome on-line processes, system time-outs and losses of "saved" data, all of which contributed to massive amounts of time spent completing the form. (How massive? The group told of cases, involving "moderately complex" ownership structures, where the completion of a single form took 500 to 800 hours. 800 hours? Wrap your mind around that. That's the equivalent of 20 40-hour weeks – about five months – all dedicated 100% to the completion of a single form. Where's the Paperwork Re-

(Continued on page 5)

(Continued from page 4)
duction Act when you really need it?)

Following the meeting, the group – ably led by Wiley Rein's Kathleen Kirby, who deserves big props for leading the charge – followed up with a letter requesting an extension of the January 11 deadline as well as various mechanical modifications to the form to alleviate the problems that have been encountered. The letter focused exclusively on the mechanics of the form; it made no reference to the more fundamental legal questions that FHH had raised and the FCC had declined to address.

The Bureau, apparently convinced that their form does have glitches and hiccups, agreed in the Order released on the afternoon of December 23 to suspend the January 11 deadline for biennial Ownership Reports. The suspension is indefinite, and is intended to allow the staff to "investigate what changes can be made" to get the form to work more efficiently without compromising the "completeness, quality, usefulness and aggregability of the data." The Order provides that, once the dents have been knocked out of the revised form, the FCC will announce a new deadline which will be at least 90 days from the date the New(er) and (More) Improved form is made available.

Once the dents have been knocked out of the revised form, the FCC will announce a new deadline which will give broadcasters at least 90 days to upload and file their reports.

Note, though, that the form, flawed as it is, is ***still*** required to be completed and filed in ***non***-biennial reporting circumstances. Those include consummation reports relative to assignments or transfers of control. But if the form as it currently stands is problematic, why use it at all? That's just one more question the Commission has declined to answer.

Also, note that, when the biennial form is eventually filed, it will (according to the Bureau's Order) still have to reflect ownership as of November 1, 2009. That means that, if the new form were to become available on, say, February 1 (that's just an optimistic guess on our part), reports would be due 90 days later, ***i.e.***, by (let's see, 30 days hath September . . .) May 3, the first business day in May. That's six months after November 1. While many licensees may not have changed during that time, it's reasonable to assume that a significant number ***will*** have changed – meaning that those changed licensees will be reporting outdated information likely relating to entities or individuals with which the reporting licensees have no connection at all. That is not a recipe for complete and accurate data collection.

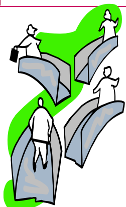
Be that as it may, the deadline for filing biennial reports on the revised Form 323 has now been suspended indefinitely.

But hold on – what does that suspension do to the Petition filed with the Court? Well you might ask. With the January 11 deadline gone, the immediate threat to all commercial broadcasters was obviously removed. But the deadline suspension does nothing to cure the underlying unlawfulness of the new SSN-based FRN reporting requirement. And notwithstanding the suspension, ***non***-biennial Ownership Reports must still be filed on the new form, with the unlawful SSN-based FRN requirement. And the FCC continues to show no inclination to address, much less resolve, the issues which FHH has raised about that unlawfulness.

In other words, the suspension does absolutely nothing to correct what we believe to be the more fundamental flaws in the new form. (Not surprisingly, in its Order the Bureau claimed that FHH's motion for stay, filed with the Commission in November, was rendered moot by the Order. We disagree with that example of bureaucratic wishful thinking.)

Obviously, the Bureau's Order was a late-breaking development that the Court should know about, so within a couple of hours of the release of the Bureau's suspension Order, we were back in Court, supplementing our Petition. In our Supplement we advised the Court of the Bureau's Order and acknowledged that, because of the deadline suspension, there is no longer any need for "emergency" relief, ***i.e.***, a ruling by January 4. BUT we emphasized that the form is still seriously flawed, that non-biennial filers are currently being harmed by those flaws despite the suspension, and that those flaws are still not susceptible to judicial review through conventional means. In other words, while we withdrew the request for "emergency" relief, we emphasized that prompt extraordinary intervention by the Court is still called for here. Accordingly, we renewed our request that the Court consider our Petition.

With the arrival of the final Christmas/New Year's holiday week, things quieted down briefly on the Form 323 front. But we should not expect that to last long. Stay tuned.



FHH - On the Job, On the Go

On March 1, **Jim Riley** will be a presenter on a panel at the National Religious Broadcasters' annual convention in Nashville (which will run from February 28 - March 2). **Jim**'s panel is titled "Today's FCC Through the Looking Glass: What You Really Need to Know."

Trouble in paradise?

Hawaii Shared Services Arrangement Under Scrutiny

A harbinger of things to come back on the mainland?

By Steve Lovelady
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Controversy continues to simmer over a recent combination of operations at three television stations in Hawaii. A couple of months ago we reported on a public interest group's challenge to the Shared Services Agreement (SSA) signed by two companies holding FCC licenses for a total of three Honolulu-market television stations. The purpose of the SSA was to combine most of the day-to-day workings of the three stations into one operation. The most publicly visible result of this combination was the effective elimination of one station's local news staff and broadcast of a single newscast (branded "Hawaii News Now") on all three stations. This drew the ire of a citizen's media watchdog group in Hawaii, which enlisted Georgetown University Law School's Institute of Public Representation to file a complaint at the FCC about the arrangement.

Since the SSA did not involve any actual change in control of any of the licensees (at least according to SSA participants), no prior FCC approval was necessary. That, however, didn't stop the objectors from asking the FCC to put the kibosh on the deal. While the FCC declined to do so (by, *e.g.*, taking some form of "emergency" action), it did the next best thing: the FCC staff agreed to look into the deal.

First step: The staff asked the station licensees to provide copies of the various agreements between them. The licensees responded by filing redacted copies of the documents, which prompted the staff to take the . . .

Second step: The FCC insisted on *un*redacted versions of the documents in order to allow an analysis of the true relationships between the parties. Recognizing that the licensees might view some of the information in the documents as confidential and propriety, the staff thoughtfully reminded them that the FCC does have formal procedures for requesting confidential treatment – and the licensees should feel free to follow those procedures if they wanted such treatment. In addition, the FCC staff asked pointed questions about the transaction and why the parties were not in violation of the FCC's multiple ownership rules.

So while the SSA arrangement has already been implemented, the deal is clearly not yet out of the woods, as the FCC staff is actively looking into this matter.

While the SSA arrangement has already been implemented, the deal is clearly not yet out of the woods.

While you might think that an isolated deal way the heck out in the middle of the Pacific might not have much impact on mainland regulatory concerns, you would be wrong. The little lesion that is the Honolulu SSA deal shows signs of potentially metastasizing into a much more serious ailment for the TV industry as a whole.

The Honolulu deal – and particularly the combination-of-TV-newsrooms component – has become a rallying point for critics of broadcast media consolidation. Senators Kerry (D-MA) and Grassley (R-IA) sent a jointly-signed letter to FCC Chairman Genachowski expressing their concern about media consolidation, specifically mentioning the Honolulu news broadcast combination as an example of the problem.

And Commissioner Copps has publicly expressed (a) his displeasure that the "tsunami of consolidation" is not over yet and (b) his hope that the upcoming FCC quadrennial review of its media ownership rules will be an "important tool for getting a handle on big media run awry". The American Cable Association (a trade organization representing more than 900 small and medium-sized independent cable companies) has jumped on the bandwagon by calling on the FCC to investigate Local Marketing Agreements (which are very similar to SSAs) that give television stations more leverage in local markets to negotiate high retransmission consent fees, among other perceived evils.

In other words, the Honolulu SSA may be drawing the focus of governmental attention onto informal deals (LMA's, SSA's, etc.) that have generally flown beneath the radar in recent years.

Meanwhile, back in Hawaii, the locals are still plugging away in the hopes of unscrambling the SSA egg. Laid-off (or would that be lei'ed-off?) news anchorpersons staged a "funeral for a newsroom" that attracted local coverage. And the objecting citizen's group that first shone a spotlight on the Honolulu deal hosted a public forum called "Save Local Television, Stop Big Media" attended by the head of the Georgetown Law group leading the charge at the FCC. The stations' newsroom consolidation was listed in one Honolulu newspaper's roundup of important local stories in 2009.

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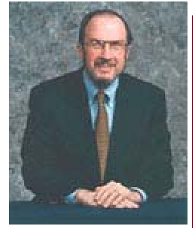
Anne Goodwin Crump Named Member, Vince Curtis Retires



FHH is pleased to announce that Anne Goodwin Crump has become a member of the firm. Anne is a *magna cum laude* graduate of Davidson College (where she was a member of Phi Beta Kappa, thank you very much). She received her law degree from the University of Virginia School of Law. Anne has been a member of the FHH family for more than 20 years, specializing in a wide range of broadcast-related areas.

And as we welcome Anne into the ranks of membership, we would be remiss if we failed to acknowledge the retirement of Vince Curtis, who officially leaves the FHH fold as of December 31. Vince spent more than 40 years at Fletcher Heald, serving as one of the firm's co-managing members over the last decade or so. He specialized in broadcast matters. In addition to serving the firm's clients ably throughout his career, he was also a valuable resource internally, providing his colleagues with historical perspective, guidance and encouragement, all with a constant and welcome sense of humor and enthusiasm. With profound respect, gratitude and affection, we bid farewell to Vince. Godspeed.

(Continued from page 1)

there might be some public interest concerns at stake. Accordingly, it perfunctorily asks what impact the assisted suicide of broadcast TV might have on such things as "public awareness of emergency information, local news, political discourse, and education?" Minor details, really. (Well, not really minor if you go back and look through the Commission's elaborate panegyrics about Localism in the, er, Localism Proceeding. But, as Chad and Jeremy so eloquently put it, that was yesterday, and (maybe) yesterday's gone.)

While the FCC pays lip service in the NOI to the notion that market-based (*i.e.*, monetary) incentives could be utilized to entice broadcasters to "reallocate" spectrum to wireless providers, the next day it invited comments on how to incentivize video manufacturers to help the commission speed things along. The Video Device Innovation inquiry rhapsodizes about the popularity of Internet video and wonders aloud how the FCC might best twist the arms of broadcasters by promoting greater migration from broadcast TV to IP-delivered TV. In fairness, the Commission seeks comments on how to best shape future device development and deployment to promote the use of a single, portable screen for *all* personal video and Internet usage. This convergence has long been touted as just around the corner – the FCC seems to be tired of waiting for the Walk sign.

Lest our cynicism suggest otherwise, we note that neither inquiry is, in and of itself, without merit. It is true that the 1996 Communications Act instructed the Commission to assess alternative uses for broadcast spectrum after the DTV transition, and there are certainly opportunities for increased spectrum efficiencies and alternative uses. Our concern lies more in the method of the FCC's madness: as usual, the strong suspicion is that the end goal has already been determined before the means or the rationale have been established. And that in turn leads to the suspicion that the invitations for comment are simply window-dressing, empty exercises designed to create the false impression that the public may actually have the ability to influence the outcome, when that outcome has already been pre-determined.

Why are we cynical here? One example: the Commission afforded a whopping three weeks for the preparation and submission of comments in response to the Spectrum *NOI*. That *NOI* raised vast questions of overwhelming importance, and requested extensive data which would have to be compiled, organized, analyzed and presented. And yet, would-be commenters were given *less* time to do that than the Commission routinely provides for comments on simple FM channel drop-in proposals. Are we the only ones who see a problem here?

While we do not doubt the importance of broadband deployment to all Americans, the FCC, as guardian of the public interest, convenience and necessity in *all* areas of communications, has a duty to consider the historic economic and social role of broadcast TV before the broadband horse gets too far out of the barn. Whether the Commission acknowledges and accepts that duty remains to be seen.

(Continued from page 6)

For practical purposes all this activity seems unlikely to result in a restoration of separate local news operations at the three stations in question. After all, the FCC's rules do not require a television station to have a local news broadcast at all. The attention sparked by this transaction, however, could have larger implications in future rulemaking that may restrict broadcast consolidations and agreements like SSAs that, in the eyes of some, achieve the same results as actual consolidation.

Nationwide LPTV/TV Translator Filing Opportunity Postponed

If you've been counting the days until the January 25, 2010 opportunity to file for new digital-only LPTV/TV translator stations (and major mods for existing analog and digital LPTV/translator stations) in non-rural areas, it's time to re-set the calendar. In December the FCC announced that that January 25 date is slipping by six months. Mark your calendars: ***the new date is July 26, 2010***.

We reported in last July's *Memo to Clients* when the Commission, in a flush of optimism, flung open its doors to LPTV/translator applications in "rural" areas as of August 25 – with the promise that applications for *all* areas could be filed as of January 25. Apparently, that initial "rural" window brought in enough applications to keep the processing staff busy: according to the FCC, the postponement of the nationwide window "is necessary to complete the processing" of rural applications filed since August.

Perhaps more ominously, the FCC advises that the postponement will also "permit Commission staff to dedicate additional time and resources for consideration of the Broadband Plan." As concern mounts that the Commission may be determined to "re-purpose" broadcast television spectrum for broadband use (*see* the related story on page 1), the postponement of the nation-wide LPTV/translator should send more than a *frisson* down broadcasters' spines. While the FCC's stated purpose – to free up staff – may be completely accurate, it's hard to avoid the suspicion that an underlying purpose could be that the FCC does not want to get broadcasters' hopes up relative to the availability of TV spectrum if that spectrum is going to be "re-purposed" out from under them even before their applications are processed. The FCC's thinking might be that it's better to keep potential applicants on the outside looking in for the time being, rather than to accept applications that could somehow gum up the works if the Commission eventually decides to yank TV spectrum away from broadcasters for the Greater Good of broadband.

The public notice makes no mention of the pending proposal to have Channels 5 and 6 re-purposed for radio use.

Interestingly, the public notice makes no mention of the pending proposal by a number of public interest groups hoping to have Channels 5 and 6 re-purposed for radio use. (We wrote about that proposal in the August, 2009 *Memo to Clients.)*

For the time being, "rural" applications and others permitted under the rules will continue to be accepted. But all you non-rural applicants will have to sit on the sidelines until mid-summer, if not longer.

(Continued from page 2)

"The Hal Turner Show" was an unlicensed "pirate" signal not authorized under the FCC's rules.

So it looks like we're dealing with a simple matter of misidentification, coupled with some apparent piracy. WAYV is the only licensed full power FM radio station operating on 95.1 MHz in New Jersey. Some reports (where would we be without Wikipedia?) indicate that Mr. Turner lives in an area of New Jersey no more than six miles from the spot where Mr. Fisher heard "The Hal Turner Show", a location which is outside of WAYV's protected service contour – WAY outside, if Mr. Fisher's affidavit is to be believed. (Note that the affidavit indicates that he was listening to the station some 60 miles outside the protected contour.)

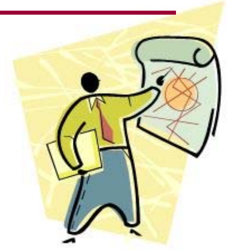
Equity's conclusion: "[A] complainant could have identified the Station as a possible culprit through a search of the FCC's Consolidated Data Base System ('CDBS'), without hearing any station identification during the program material in question."

Equity submitted Mr. Fisher's affidavit – along with a similar statement from the station's Program Director describing the programming the station *does* air – to the FCC, urging it to lift the hold on the station's renewal application. And that appears to have done the trick, because within a matter of weeks the hold was lifted and the station's renewal application had been granted.

Equity was fortunate in a number of respects. It was, of course, a stroke of good luck that its executive happened to have personally experienced the phenomenon which apparently triggered the complaints. That is, while seemingly listening to WAYV, he heard the very programming apparently mentioned in the complaints. And it was good luck – actually, it was not luck, but good solid broadcast practice – that the station's PD was able to describe the station's programming system. It's often difficult, if not impossible to prove a negative. How, after all, can you conclusively demonstrate that your station did *not* broadcast any particular show? Having a well-established system and a station official personally familiar with that system is a good way to

(Continued on page 9)

White space update!



Get Out Your Crayons and Glue Stick: It's Design-a-Database Time

By Christine E. Goepp
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Regular readers know that the FCC adopted rules to allow new, unlicensed, wireless devices to operate in unused channels of the broadcast television spectrum just over a year ago. This was an exciting development for wireless broadband access and content providers, but incumbent users (such as television broadcasters and wireless microphone operators) worried about interference. Therefore, the FCC required that white space devices – which it calls "TV band devices" – must prevent interference by having both spectrum-sensing capability and also geo-location capability with access to a database of licensed users. The idea is that a TV band device will: (a) access a database; (b) let the database know where the device happens to be located; and (c) receive a list of available frequencies for that location. As an additional safeguard, TV band devices will also detect other users and drop off their frequencies. A separate and more stringent procedure will authorize "sensing only" devices that lack geo-location.

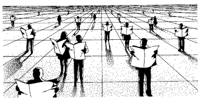
Obviously, establishing a database is a crucial step in the process of designing and testing these new devices because they must be able to interface with it. Accordingly, on November 25, 2009, the FCC's Office of Engineering and Technology issued a Public Notice "inviting proposals from entities seeking to be designated TV band database managers."

This is in part a creative design competition: the FCC specifies only that each design must include "basic functional architecture . . . a data repository, a data registration process, and a query process." Beyond that, prospective database managers are limited only by the scope of their imaginations and the number of pipe cleaners they can grab off the craft table.

Each applicant must provide:

- A demonstration of sufficient technical expertise;
- A demonstration of a viable business plan;
- The scope of the database functions it plans to perform;
- If the plan involves multiple databases, a description of how data will be synchronized;
- If the plan involves multiple entities, information on other involved entities and their business relationship with the applicant; and
- A description of the methods (*e.g.*, interfaces, protocols) to be used by devices to communicate with the database, including any security measures.

Proposals are due by January 4, 2010. They will presumably be made available for review by the public soon thereafter, because the Commission has also invited comments (due February 3, 2010) and replies (due February 18, 2010) on the proposals. Sharpen those crayons, because we expect that neatness will count.



Quick Updates On The News!

In the wake of the 9/11 attacks and the anthrax scare eight years ago, the FCC stopped accepting hand-delivered packages at its headquarters. Instead, all submissions were to be delivered to an off-site location for additional screening before they would be allowed to penetrate the perimeter of the Portals. But now, in a sign of apparently relaxed concerns about such things, the Commission has shut down (effective December 28) its off-site filing office, and is requiring that all hand-delivered paper filings be trucked directly to the Secretary's Office at FCC HQ (445 12th Street, S.W., Room TW-A325, Washington, D.C. 20554). If you're mailing your filings in via USPS (First Class/Express/Priority), you should use that address as well. Other overnight deliveries (*e.g.*, FedEx, UPS, etc.) must be addressed to 9300 East Hampton Drive, Capitol Heights, Maryland 20743.

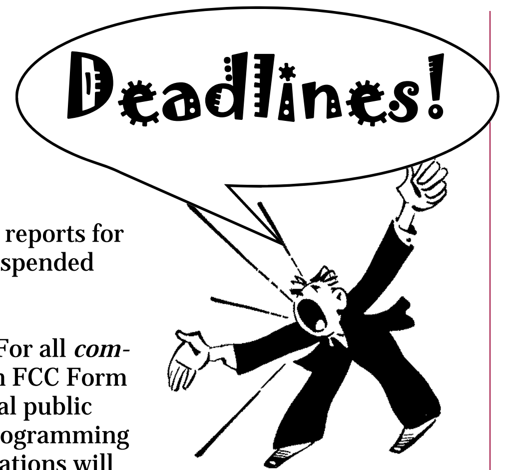
Originals and copies must be held together with rubber bands or other fasteners. The Commission emphasizes that ALL FILINGS MUST BE SUBMITTED WITHOUT ENVELOPES. And if your filing is supposed to go to a particular staff member, be sure to make that clear on the first page of the filing (or with a cover sheet).

(Continued from page 8)

start.

But it may have been even luckier that Equity was able to obtain information about the complaints from the Commission's staff. While there are ways to wrest such information from the staff, there tends to be some reluctance on the part of the Commission to give up the information easily. So Equity was extremely fortunate to be able to learn that the complaints involved alleged broadcasts of the Hal Turner Show.

Of course, the WAYV situation was likely an exception. Many renewal applications are currently pending subject to "enforcement holds" because of complaints that have rolled in the door, many alleging some form of indecency. How many of those involve demonstrably inaccurate claims (as was the case in WAYV)? We have no way of knowing – but then, neither does the FCC.



January 1, 2010

Closed Captioning Deadline - As of January 1, 2010, all new, nonexempt Spanish language programming must be provided with captions.

January 11, 2010

Biennial Ownership Reports – The requirement to file biennial ownership reports for *all commercial AM, FM, TV, LPTV,* and *Class A Television* stations has been suspended indefinitely. *See* article on page 4.

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, and a copy must be placed in each station's local public inspection file. Please note, however, that for television stations, only digital programming will be included, as all analog programming ended last quarter. Only Class A stations will need to use the analog programming section of the form.

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.

February 1, 2010

EEO Public File Reports - All *radio* and *television* stations with *five (5) or more full-time employees* located in **Arkansas**, **Kansas**, **Louisiana**, **Mississippi**, **Nebraska**, **New Jersey**, **New York**, and **Oklahoma** 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 **Kansas**, **Nebraska**, and **Oklahoma** 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 **New York** or **New Jersey** 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.

Noncommercial Television Ownership Reports - All *noncommercial television* stations located in **Kansas**, **Nebraska**, and **Oklahoma** must file a biennial Ownership Report. All reports must be filed electronically on FCC Form 323-E.

Noncommercial Radio Ownership Reports - All *noncommercial radio* stations located in **Arkansas**, **Louisiana**, **Mississippi**, **New Jersey**, and **New York** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

(Continued from page 3)

The FCC concedes that it can sometimes be difficult to distinguish between (a) language that is acceptable as an underwriter acknowledgement and (b) language that is unacceptable as an advertisement. Although the FCC's latest "voluntary agreement" from a station is short on specifics, it serves as a reminder that the government will target whomever it chooses, including a local non-profit council for the arts. In conjunction with the earlier case involving proper sponsorship identification, it should be a paramount task for every station to ensure that sponsorship identification procedures are properly followed and, for those stations that operate noncommercially, that underwriting announcements do not run afoul of FCC underwriting restrictions.