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Memorandum to Clients

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The Swami and the Blogmeister take a field trip

FCC v. Fox: The Swami Tells It Like It Was, and Like It Will Be

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[*Editor's note*: Last year the Supreme Court agreed to consider the constitutionality of the FCC's broadcast indecency policies in the context of two cases, one involving comments made during awards shows aired by Fox Television, the other involving an episode of *NYPD Blue* on ABC. Check our posts on www.CommLawBlog.com for more background – search for keyword "indecency". The argument before the Supremes was held on January 10. Kevin "the Swami" Goldberg and Blogmeister Harry Cole attended.]

Blogmeister: I think we can agree that, from the perspective of a broadcaster, the argument was disappointing. After the Second Circuit's sweeping endorsements of First Amendment rights for broadcasters in *Fox* and *ABC*, it was a let-down to hear the far more cautious tone of the Supreme Court Justices.

Swami: Disappointing – maybe. I also thought "demoralizing" at first – but on further reflection, I don't think this is a lost cause by any means.

Blogmeister: Interesting. But before we ask you to gaze into your crystal ball and come up with a prediction of the vote, how about your thoughts on the overall arguments? For instance, what happened to the FCC's interest in protecting children's innocent ears from the evils of vulgar words? The Court's landmark 1978 *Pacifica* decision – the case that initially established that the FCC might constitutionally regulate "indecent" broadcasts to some degree – was based in large measure on precisely that interest, but there was virtually no discussion of that at all during the argument. Instead, the government harped repeatedly on the notion that broadcasters have been given the use of their spectrum *for free* by the government, and they have derived "billions and billions of dollars" from that spectrum.

Swami: The government was claiming that, in return for the supposedly free spectrum, broadcasters should be happy to cough up some of their constitutional rights. I have a real hard time with that notion, particularly because even the *Pacifica* court didn't seem to go down that road. But maybe the government is looking to move away from the "protect the kids" justification in light of the Supremes' *Brown* decision last term. (In that case, the Court threw out a California statute restricting the sale of violent video games to minors. The Court held that the state hadn't demonstrated that such games cause harm to minors. Justice Scalia, writing for the majority, observed that "disgust is not a valid basis for restricting expression".)

Blogmeister: Another thing. How about the *Fox* lawyer's willingness to throw the radio industry under the bus? Noting that *Pacifica* involved a *radio* broadcast, Justice Alito asked whether there is a basis to distinguish between radio and TV for purposes of indecency regulation. Counsel for Fox seemed happy to say that radio is different and, thus, on its own to argue that the FCC's indecency policies can't be applied to radio.

Swami: That was pretty striking. But for my money, the highlight of the argument came when ABC's counsel pointed out to the Justices that the Supreme's courtroom itself features images of bare breasts and buttocks. As counsel proceeded with his argument, he apparently noticed that Scalia was looking around the court to see if he could see those images. Counsel happily pointed them out to the Justice, noting that counsel hadn't focused on them before. "Me neither", responded Scalia. [As a service to our readers, we've included one of those images (depicting Philosophy, from the north wall frieze) on Page 8.]

Blogmeister: OK, enough of the color commentary. Let's get right down to the real nitty-gritty. How do you figure the Court's going to come out here? Are you sticking with your prediction from last June? (Check out the Swami's piece in the June, 2011 *Memo to Clients*, where he predicted that the

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Déjà vu all over again

FCC STILL Applies Over-the-Air Contest Rules to On-Line Contests

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Almost three years ago we reported on a decision by the Enforcement Bureau indicating that on-line contests conducted by broadcast licensees are subject to the ***broadcast*** contest rule if the contest is promoted on the air. The station that got whacked back then was KOST.

Fast-forward three years. The folks in the Enforcement Bureau have issued another fine for pretty much the same misconduct. And check it out – one of the wrong-doing stations is none other than KOST! C'mon, guys – really?

This time around, the station (along with several other commonly-owned stations) ran an on-line contest calling for contestants to make video commercials (for Chevys) and submit them on-line. A panel of "impartial judges" would then review the entries and pick up to 20 finalists that would be posted on the participating stations' websites for listeners to vote on. No aspect of the contest involved on-air activity (*e.g.*, "listen-to-win", "be the tenth caller", etc.), ***BUT*** the contest ***was*** promoted on the air.

And that was enough to trigger the broadcast contest rule (Section 73.1216), which requires (among other things) full on-air disclosure of all material elements of the contest. The licensee conceded that it didn't broadcast the rules. The rules *were* available on the station's website – but the Commission requires that the rules be *broadcast*, so the fact that they were available on-line (or elsewhere) doesn't mean diddly. That's Violation Number One.

Upon further review of the contest rules that were posted on the website, the Commission noted an interesting fact. Entries were permitted up to the "close of the Contest Period". The "Contest Period" was defined as February 11-March 21. So far, so good.

But the rules further provided that that impartial panel of judges would be selecting the finalists "on or about March 10"; the finalists would then be posted on the stations' website so listeners could check them out and vote on their faves. Listener voting was set to occur from March 12-March 21.

Hold on, there, Skippy – let's think about that for a minute. If finalists were picked prior to March 12, what would happen to entries submitted between March 13-March 21?

As the Bureau noted in its finest bureaucratese, these rules "conflict[ ] temporally". (It should not come as much surprise that KOST's 2009 violation involved a similar "temporal conflict".) That's Violation Number Two.

Bottom line? $22,000. That's a considerable upward adjustment from the standard $4,000 fine for contest violations. But the Bureau figured that there were six separate stations involved, and the licensee has a track record of contest violations (including at least two or three others besides the 2009 problem). So $22 G's sounded about right to the Bureau – and it warned the licensee it could expect even higher fines "if such misconduct persists".

The take-home lessons here are pretty simple.

First, if you mention a contest on the air, you'll have to comply with Section 73.1216. That's the way it was three years ago, and that's the way it still is. You should read that section and be prepared to jump through the hoops it imposes. Even if the contest is supposedly limited to your website, it's still subject to the broadcast rules if you promote it on the air.

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Entercom has a better idea

Time for a Change in the FCC's Contest Rule?

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The promotions department at KOST (and at least some other Clear Channel stations) should be sending "thank you" notes to the folks at Entercom Communications Corp. As reported on the opposite page, KOST was recently spanked to the tune of $22K for violating the FCC's contest rule (Section 73.1216) in part by failing to broadcast all the material terms of a contest it was running on its website. (The fact that KOST was a recidivist violator of the contest rule didn't help it much.)

But now Entercom (which owns more than 100 radio stations) has filed its own petition for rulemaking asking the Commission to bring the contest disclosure requirement into sync with "how the majority of Americans access and consume information in the 21st century." That would be the World Wide Web, of course.

According to Entercom, "Americans expect to instantly access information at their fingertips by merely logging on to a website". That being the case, if the FCC wants to be sure that potential contest participants are advised of the contest's rules, it should be enough that those rules be available on-line. Any required over-the-air disclosures can thus be limited to announcements that full contest rules are available on station websites. (Any web-averse Luddites out there can be taken care of on request by e-mail or fax.)

According to Entercom, "Americans expect to instantly access information at their fingertips by merely logging on to a website".

As Entercom observes, the current broadcast requirement is hit-and-miss: not all contest rules are broadcast all the time, so it's not clear that any would-be contestant is ever going to hear *all* (or even any) contest rules on the air. And even if a would-be contestant does hear some rules, there's no guarantee that that individual will fully comprehend the rules because (as Entercom delicately frames the issue) "the listening environment for radio varies widely among listeners." Of course, the contest rule applies equally to radio *and* television licensees, but Entercom sees radio as particularly hard-hit by the rule in its current form.

Entercom also points out that the Commission's insistence on over-the-air announcement of contest rules (as opposed to website posting) appears inconsistent with the Commission's own increasing reliance on electronic filing.

The FCC hasn't invited public comment on the petition yet, a step that would ordinarily occur before the Commission would formally propose adoption of the suggestion. At this point, we have no idea whether the Commission would be inclined to embrace Entercom's proposal – particularly because the existing contest rule has, through the forfeiture process, provided a nice revenue stream into the Commission's coffers. (In fairness to the Commission, we don't really know for sure that such crass pecuniary considerations would inevitably come into play here.) We also suspect that some smaller radio stations won't like the idea of having to e-mail or fax rules on request. But rattling off a bunch of rules on the air is plainly tedious for broadcaster and listener alike. And why should anyone suffer that tedium when that exercise does not achieve the supposed goal of the exercise – *i.e.*, publicizing the contest rules – because the FCC has never said exactly when, and how often, contest rules are required to be aired?

Check back with our blog for updates – if the FCC invites comments on the Entercom petition, we'll let you know.

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Second, when you design a contest, it's always a good idea to carefully read through the rules and procedures you cook up ***before*** you finalize things. Oh, and keep a calendar handy while you're doing the read-through. That may help avoid those pesky temporal conflicts. Such precautions are simply to take – some might even say that they're nothing more than common sense steps that should factor into the planning of ***any*** station promotion. However you may choose to look at it, the fact is that failing to think things through thoroughly beforehand gives rise to a potential fine of at least $4,000, and possibly more – not to mention the hassle and expense of responding to an FCC letter of inquiry.

Rural Radio: Tribal Applicants Finally Moving to the Head of Some (but not all) Lines

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For nearly three years the Commission has been working to develop mechanisms to promote new radio stations serving Native Americans. The process has been gradual, to say the least. Starting in 2009 with a proposal to create a Section 307(b) priority for Native Americans, the Commission has taken a series of steps looking to facilitate the entry of "Tribes" (a collective term used by the FCC to refer to federally-recognized Native American Tribes and Alaska Native Villages) into the ranks of broadcast owners.

In the closing days of 2011 the Commission took one more step in that process by creating a short-cut available to Tribes seeking new commercial FM stations primarily serving Tribal Lands. The new approach – which might also create opportunities for non-Tribal entrepreneurs willing to work with Tribal applicants in certain capacities – is designed to assure Tribal applicants the first opportunity to apply for such stations, free from competition from non-Tribal applicants. But the path blazed by the Commission imposes its own considerable set of hurdles.

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The short-cut was necessitated by the fact that the allotment process for commercial FM channels is different from the process for allotting AM or noncommercial FM channels. For AMs and noncom FMs, a party who identifies the availability of a channel can get a lock on the channel simply by filing an application for it. In the case of commercial FM channels, on the other hand, the first step in the process merely allots the channel; after that, the channel is made available to the highest bidder at an auction, regardless of whether that highest bidder is a Tribe.

And there's the problem.

If the goal is to assure that Tribes get first dibs on channels serving Tribal members, the Commission had to figure out how to keep that particular class of FM channel off the auction block long enough to give Tribes first crack. (To be clear, that "particular class" of channels includes channels allotted according to the "Tribal Priority" adopted in 2010. Fuzzy on the details of the "Tribal Priority"? Check out our article in the February, 2010 *Memo to Clients* for background.)

Here's what the Commission has come up with:

After a Tribal Allotment – *i.e.*, a channel allotted pursuant to a Tribal Priority – is made, the FCC will open a Threshold Qualifications (TQ) Window. During the TQ Window, any Tribe or Tribally-controlled entity can apply for the allotment. The applicant would have to satisfy the Tribal Priority factors underlying that particular Tribal Allotment. The relevant factors are numerous (stick with me, this gets a little complicated):

- ✔ The applicant is either a federally recognized Tribe or Tribal consortium, or an entity owned or controlled 51% or more by a Tribe or Tribes.
- ✔ At least a portion of Tribal lands within the proposed city-grade (70 dBu) contour must be those of the Tribe or Tribes holding at least 51% ownership or control of the applicant.
- ✔ At least 50% of the area within the proposed city-grade contour is Tribal Land of the applicant Tribe or, alternatively, the city-grade contour (a) covers 50% or more of the applicant's Tribal Lands, (b) serves at least 2,000 people living on Tribal Lands, and (c) the population on Tribal Lands within the proposed 60 dBu (yes, the 60 dBu) contour constitutes at least 50% of the total population covered.
- ✔ The proposed station's city-grade contour does *not* cover 50% or more of the Tribal Lands of a Tribe that is not a party to the application.
- ✔ The proposed community of license is located on Tribal Lands.
- ✔ The proposed station constitutes a first or second reception service or a first local Tribe-owned commercial station at the proposed community of license.

Careful readers will have noted that those criteria would exclude any Tribe that lacks Tribal Lands – and there are a significant number of Tribes in that position. No problem: the Commission will entertain waivers of the Tribal Lands coverage requirements if a particular geographical portion of the station's proposed coverage area is identified with a Tribe that is a party to the application.

If only one acceptable application is filed during the TQ Window, that applicant will get the station. If two or more acceptable applications are filed, the Commission will establish a period during which the applicants may negotiate a settlement or a merger. (Caution: Engineering settlements that would result in more than one application being granted won't be allowed.)

If no settlement or merger is reached, the allotment will be auctioned, but only those applicants accepted during the TQ Window and the original proponent of the Tribal Allotment will be allowed to bid. The winner will need to file a Form 301 or, in the case of the original proponent, go forward with the Form 301 it filed with its allotment proposal.

In the event no qualifying party files during the TQ Window and the Tribal Allotment proponent asks that its pending Form 301 not be immediately processed, the Tribal Allot-

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New deal sets ASCAP rates through 2016

RMLC-ASCAP Party Like It's 2009

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The Radio Music License Committee (RMLC) and the American Society of Composers, Authors and Publishers (ASCAP) have announced a deal regarding the rates and terms to be paid by radio stations for the right to perform musical works through 2016. You may recall one of our earlier discussions of this topic; if you do, you're already aware that setting these rates and terms is a rather extensive process, since ASCAP (and BMI) must have its agreements approved by a United States District Court for the Southern District of New York, a condition of a consent decree which settled a lawsuit back in the 1940s.

This particular go-round seemed pretty intense, even by RMLC-ASCAP standards. After the prior agreement expired at the end of 2009, a "bridge fee" was set as both sides began dual sets of negotiations – first working on an interim rate that would be in place until this permanent deal was reached.

We've heard rumors for a few weeks that the final deal was reached but, of course, nothing is final until the Southern District says it's final. The Southern District has spoken and we think broadcasters will like what they hear.

According to a press release issued by RMLC, the broadcast industry will pay rates closer to those paid in 2009 than what they might have expected to pay in 2012. In fact, broadcasters are getting a rebate! Part of the deal involves a $75 million credit against amounts paid in 2010 and 2011, which will be instituted in increments of $15 million per year (and is on top of $40 million in industry-wide rebates implemented when the interim rate was approved in 2010 – go back to the related article in the July, 2010 *Memo to Clients* for more information). ***So check your statements, there should be an immediate fee decrease of about 30% per station starting this month!***

Other aspects of this deal that broadcasters will find attractive:

> Those using the "blanket license"" (most stations and probably all music stations) will be especially happy to know that the calculation and reporting process will be simplified: you'll now pay a straight 1.7% of gross revenue. The icing on the cake is the ability to deduct 12% for revenue from multicasting sources and a 25% for revenue from new media.
>
> Those using the "per program" option (mainly news and talk stations) will also pay a straight percentage of gross revenue, in this case its 0.2958% with the same deductions as above.
>
> Finally, agreement will allow for greater innovation in terms of expanding into new media

Radio broadcasters should look for new license forms to be available within a month and should also hope that this will spur a similar resolution of the RMLC's negotiations with BMI. They should also thank Bill Velez and the folks over at RMLC for some great representation on their behalf.

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ment will be set for auction. But the first time that allotment is offered at auction, only applicants meeting the Tribal Priority criteria for the allotment will be allowed to bid.

If no qualifying party bids on the Tribal Allotment in that first auction, at the next auction in which that allotment is offered, any applicant – whether or not a Tribe or Tribal entity – may bid.

Any license issued for a Tribal Allotment – whether through grant of a singleton application or following an auction – will be subject to a holding period. For four years after the station goes on the air, it may not be assigned or transferred unless the party that would get the station also could have qualified for the Tribal Priority under which this particular Tribal Allotment was awarded.

Interestingly, the newly adopted process will allow non-Tribal parties to partner with qualifying Tribes to go after new FM allotments – provided that the qualifying Tribe or Tribal consortium retains 51% ownership or control of the applicant entity. It remains to be seen whether non-Tribal entrepreneurs will find such partnering opportunities attractive. And in view of the major league restrictions that characterize the entire Tribal Allotment process, it also remains to be seen whether very many of these allotments will come into being in the first place.

But one thing is clear: the Commission has committed itself to promoting broadcast ownership by, and broadcast service for, Native Americans. And more importantly, the Commission has acted – slowly, perhaps, but still aggressively – to make good on that commitment.

[While the FCC has formally adopted the new process for dealing with commercial FM Tribal Allotments, that process is not yet in effect: thanks to our old friend, the Paperwork Reduction Act, the process needs to be blessed by OMB before it can kick in. We'll let you know when that happens – check on our blog (www.CommLawBlog.com) for updates.]

ION – the prize, 2012

Commission Dismisses TV Channel-Sharing Proposal

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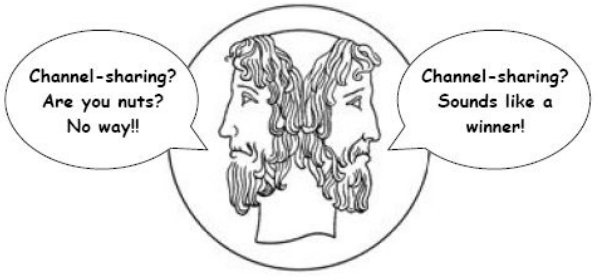
As part of its push to "repurpose" television broadcast spectrum for wireless broadband use, the FCC has, since 2010, been promoting the idea of channel sharing. The idea is that two or more TV stations would share one 6 MHz broadcast channel, each station having its own program stream. One of the primary keys to enticing broadcasters to take the bait is that each station stream would have cable and satellite must-carry rights.

Attentive *Memo to Clients* readers may have thought that that proposal rang a bell – because (as we reported back in 2008) not only had somebody come up with the idea before, but that somebody had formally proposed its own license-sharing deal with features very similar to the approach the Commission is now pushing.

In November, 2008, an assignment application (FCC Form 314) was filed proposing a "share-time" arrangement for a bunch of TV stations licensed to ION Media Networks. A new company, Urban Television, LLC, would acquire "share-time licenses" permitting it to broadcast on the ION channel. ION would continue to be the licensee of, and would continue to operate, its existing stations on the same channels. (According to the application, Urban is owned 49% by ION and 51% by BET Founder Robert L. Johnson's RLJ Companies.)



While the application was remarkably sparse on technical details – the contract between ION and RLJ was only two pages long, for crying out loud, and the summary of the transaction was only four (double-spaced, at that) – the basic idea boiled down to splitting up a single station's 6 MHz channel into multiple, separately-licensed digital streams capable of accommodating separately-owned TV stations. As proposed by Urban Networks, each stream would be designated a "television station" and so would be entitled to the same mandatory cable and satellite carriage afforded to every full power station. Urban Networks sweetened the pot by offering a slew of new opportunities for minority entrepreneurs to participate in broadcast ownership and programming.

The broad strokes of Urban's technical proposal were pretty close to the Commission's repacking concept – separate licenses within a given 6 MHz channel, and cable and satellite carriage for everyone.

The FCC invited comments, and then proceeded to ignore the proposal even while advancing its own version of channel-sharing.

But now, after a three-year wait, the Commission has summarily dismissed the Urban Networks applications.

Rather than pull the plug publicly, it did so in a letter (dated January 6, 2012), sent to the applicants but not officially released or broadly publicized. (Not to worry – we've provided a link to the FCC's letter on our blog at www.CommLawBlog.com.) According to the letter, the application involved "a division of time, not a division of spectrum". That's an interesting – but arguably meaningless – distinction, since today's digital TV signal is a commingled stream, where the separate .2 and .3 channels are created by interleaving data bits rather than partitioning a 6 MHz channel into independent smaller frequency blocks. And, the FCC continued, "channel sharing arrangements quite different from that proposed here have become the subject of an outstanding Notice of Proposed Rule Making", referring to the 2010 channel-sharing proposal. The Commission, however, declined to say exactly how its proposal is different from ION's or how any differences (whatever they were) might have affected its evaluation of the proposal.

It's neither unusual nor unreasonable for the FCC to shy away from a novel proposal if a similar idea is already under study in a formal rulemaking proceeding. But when the Commission is struggling to entice broadcasters to operate jointly on a single TV channel, what message does the Commission send when it summarily flushes a very similar proposal down the drain? Why not just fold the ultimate disposition of the ION/Urban proposal into the rulemaking? Or how about granting that proposal on a temporary, experimental basis as a kind of "test-drive" for the channel-sharing approach?

In its own huffing and puffing about spectrum repurposing, the Commission has spent considerable energy trying to allay broadcasters' suspicions that channel-sharing might put them in a deep hole. How are television licensees supposed to interpret the fact that, when given the chance (by the ION proposal) to demonstrate that channel-sharing will not put broadcasters behind the eight ball, the Commission has apparently blown the notion off without offering any explanation?

FCC pulls rug out from under successful bidder

Caveat Bidder, 2012 - Trust But Verify

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We've warned would-be FCC auction participants about the need to perform due diligence before diving into the bidding. The FCC routinely – and prominently – announces that it doesn't guarantee that any spectrum it may put up for bids is actually going to work. Accordingly, careful examination of the engineering specs you have in mind is always a good idea before you commit to plunking down a chunk of change on a channel.

But now we have yet another reason to sound the Caveat Bidder alarm again. It turns out that, even if the FCC tells you that you're qualified for bidding credits, you should remember the cautionary admonition: trust but verify. A bidder found out the hard way what happens when you believe what the FCC tells you.

The situation arose seven years ago, in FM Auction 37.

A couple of brothers formed a partnership to bid on some channels. They owned attributable interests in only two stations, so they qualified for a 25% discount as new entrants to broadcasting. In their short-form Form 175 auction application they specified the four FM channels they planned to bid on; they also laid claim to the 25% discount, identified their two stations, and fully disclosed their interests in them. So far, so good.

If the FCC tells you what the rules mean, how often does it make sense to try to argue the point?

The FCC's staff then wrote them a letter, pointing out that their stations happened to be in the same area as one – but only one – of the channels they planned to bid on. The FCC advised the brothers that they would ***not*** be eligible for any bidding credit with respect to that one channel. Not to worry, though, because the FCC affirmatively advised that the brothers ***could*** claim the 25% credit for the other three channels they planned to bid on.

So bid they did – successfully, in fact.

They were the high bidders on one of the three channels for which they were to get a credit. But when the time came to pay up, imagine their disappointment when the FCC told them that they would have to pay the full, undiscounted amount of their winning bid – an extra $63K and change over what they had expected to pay. According to the Commission, the 70 dBu contour of one of the brothers' existing stations would overlap the equivalent contour of the station they planned to build on their new channel. That overlap rendered them ineligible for the credit. That'll be $63,250 more than we told you it was going to cost, please. Thanks for your business and come back real soon.

The brothers protested that they had been expressly advised by the Commission that they could claim the bidding credit for the channel in question. Yeah, responded the FCC, about that advice – our staff messed up. Sorry about that. But forget what we told you, because you should have known that your existing station was in the "same area" as the channel you were bidding on. So you also should have known that you weren't eligible for the credit for that channel. After all, the Commission lectured, auction participants are expected to know the rules.

But isn't the FCC's own staff also expected to know the rules? When the staff provides a seemingly official interpretation of those rules, you wouldn't normally question that interpretation. After all, who knows the rules better – you or the FCC? And if the FCC tells you what the rules mean, how often does it make sense to try to argue the point, even if you're pretty sure that they're wrong?

But that's apparently what the Commission thinks the brothers should have done.

And if that doesn't surprise you, how about this? The brothers objected that the FCC was making them pay more than the channel is worth, since the brothers calculated the value of the channel based on the credit that the FCC had told them they were entitled to. In response, the Commission accused the brothers of "buyer's remorse".

"Buyer's remorse"? The Commission itself had told the brothers that they would be entitled to a discounted price (thanks to the bidding credit). The brothers presumably wouldn't be remorseful if they had to pay just that discounted price. Their reluctance to pay the non-discounted price looks more like a reasonable reaction to a bait-and-switch tactic than "buyer's remorse". But maybe that's just us.

The brothers' plight highlights at least one aspect of the FCC's auction process. That process involves multiple self-certifications by the bidder. In order to make those self-certifications, the applicant must know the underlying rules: an applicant's ability to accurately certify, for example, that it's entitled to a bidding credit depends on the applicant's familiarity with the bidding credit rules. If the applicant turns out to be wrong, disappointment can ensue – even, apparently, if the FCC's staff made the same error and led the applicant astray on that very point.

For the record, here's our understanding of the FCC's bidding credit eligibility rules:

An applicant is entitled to a 35% credit if neither it nor any

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broadcasters would win the *Fox* case by 6-3 or 7-2.)

Swami: I still see Justices Kagan and Ginsburg voting in favor of the broadcasters. Not a big surprise – at least to me – since I had them both in this camp when I made my initial predictions last year. Both Kagan and Ginsburg expressed serious concern about the "appearance of arbitrariness about how the FCC is defining indecency in concrete situations", as Ginsburg put it. I thought it was noteworthy, too, that Justice Ginsburg – an opera buff – pointedly asked whether televising a nude scene from The Makropulos Affair (a Czech opera – who knew? – apparently misidentified in the official transcript as "Metropolis", at least according to some commentators) would run afoul of the FCC's policies.

Blogmeister: I just moved The Makropulos Affair way up in my Netflix queue.

Swami: Not to be confused with Fritz Lang's great "Metropolis", the classic 1927 sci-fi film.

But enough about movies, operas, Kagan and Ginsburg. On to the other side of the Court, where it seems equally clear that Chief Justice Roberts and Justice Scalia are two solid votes for the FCC. Both surprised me a little, since they're key switches from my predictions last summer. I figured that Scalia would set aside his morality-tinged aversion toward indecent speech in favor of his longstanding interest in protecting even controversial speech. Also (as I pointed out last year), his opinion in the *Brown* case sure suggested that he doesn't buy into the "we must protect the kids" rationale that underpinned the 1978 *Pacifica* decision. And for Roberts, I thought he would stick with the position he staked out in *Snyder v.Phelps* and *United States v. Stevens*. I probably shouldn't have trusted my gut on either one.

During the argument, both Roberts and Scalia clearly indicated that they believe that broadcasters have a higher responsibility to society, and that the government is entitled to insist on what Scalia termed a "certain modicum of decency". It looked like they were buying into the government's new contract theory – *i.e.*, since the government is supposedly giving broadcasters their lucrative spectrum for free, the government can exact something in return. Seeming to step out of his role as judge and into the role of regulator, Roberts said that "[a]ll we are asking for, what the government is asking for, is a few channels where you are not going to hear the S word, the F word. They are not going to see nudity." Shoot, simply his use of "S word" and "F word" alone shows you where he stands. Ditto for Scalia, who used similar terms to refer to "shit" and "fuck".

Blogmeister: Here's an interesting factoid: the only two times the Supreme Court has considered whether the FCC can penalize the broadcast of certain words, none of those words has been spoken during the oral arguments. That's more than two hours of people arguing about the use of a small handful of particular words, and those words never make an appearance. (Check it out: recordings of the arguments in *Pacifica* and *Fox* are available on-line. You can find links to both on our blog (www.CommLawBlog.com).) Maybe I'm missing something, but if nobody even says what the words are – and everybody instead pussy-foots around them – that suggests that the words themselves have some inherent mystique that makes them different from all other words. Different and, therefore, subject to different treatment by the government. But words are just words, collections of letters and sounds, with no force in and of themselves. So a failure even to mention what the words at issue are could be seen as a major concession that they really *are* different. Roberts's and Scalia's references to "the S word" and "the F word" reflect their apparent belief that one should not utter the words even in a dispassionate judicial forum in which those words are the very focus. That's obviously bad news.

Swami: Agreed. (And if you'll notice: I don't share the Justices' aversion to using the words themselves. Before we move on with my predictions, I should just come out and admit that, if ***I*** were on the Supreme Court, I'd vote to overturn the indecency regulations.)

So if I'm right on those four, the count's at 2-2. Since Justice Sotomayor has recused herself from the case – presumably because she was sitting on the Second Circuit when both *Fox* and *ABC* rolled through on their way to the Supremes – it will take only four votes, total, to avoid reversal of the decisions below (both of which favored the broadcasters). Where are the other justices?

As is his custom, Justice Thomas didn't open his mouth during the argument – he hasn't asked a question during the last five and a half terms – so there's nothing new there to analyze. I'm sticking with my earlier prediction: not only will he rule for the broadcasters, but he'll actually go the farthest in doing so. He may even take the position that both *Pacifica* and *Red Lion* should be abandoned by the court.

Blogmeister: For the neophytes among our readers, we should explain that "*Red Lion*" was the 1969 case in which the Supremes held that the First Amendment rights of broadcasters can be abridged by the FCC because spectrum is scarce. Tossing *Red Lion* would be a huge development in communications law. When the *Fox* case passed through the Supreme Court back in 2009, Thomas issued a separate opinion observing the "doctrinal incoherence" of *Pacifica* and *Red Lion* and expressing an openness to reconsidering both. The Swami may be onto something here.

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Swami: Right, and that might seem very good for the broadcasters. But what if Thomas can't get a majority of his colleagues to join him? He could end up just writing another separate opinion, which might not be useful in getting the indecency issue resolved once and for all. (More on that later.)

Anyway, Justice Alito seems pretty solid back the other way. In my view, of all the justices he's the least friendly toward First Amendment rights. He did little during oral argument to make me believe that he'll change that in this case. He pointed out that the number of over-the-air viewers is shrinking and asked, "why not let this die a natural death?"

Blogmeister: So whether or not there's a First Amendment violation, he'd be content to just stand aside and let nature take whatever course it might? That's some First Amendment sensitivity.

Swami: Yeah, that's why I see him as a vote for the FCC here, which (if I'm right about everybody else so far) still leaves us at 3-3. But don't forget that we've also got Justices Breyer and Kennedy to consider. Fortunately, I had both in the pro-Fox camp last summer, and the oral argument didn't fully move me off that.

The Swami says that the split among the justices will most likely be 5-3 (affirming the Second Circuit) or 4-4.

Let's start with Kennedy. He seemed skeptical about the government's claim that there may be some symbolic value in imposing different indecency standards on broadcast TV as opposed to, say, cable. He also showed the most interest in the availability of the V-Chip, which could mean that he sees that as a non-regulatory answer to any possible concerns about children's access to indecent programming. But he also expressed concern that overturning the indecency rules would inevitably open the door to the all kinds of vulgar television programming. He's a question mark here.

Blogmeister: Which makes Justice Breyer crucial.

Swami: And, unfortunately, Breyer seemed confused at times, particularly when he asked the government's lawyer to walk him through the procedural posture of the case. He also seemed surprised that the ABC bare buttocks case was there at all, as if the Court should instead have been looking only at the Fox fleeting expletives case.

To me, the key to Breyer is his apparent concern about whether the Court really has to, or should, overrule *Pacifica*. He seemed to me uncomfortable about holding Fox liable for the fleeting expletives, but possibly more willing to let the FCC penalize the nudity in NYPD Blue. Importantly, he seemed to feel that both results could be reached using the existing *Pacifica* standard.

Blogmeister: That doesn't surprise me. The Supreme Court traditionally is reluctant to overrule itself. And this may be a good example of why. *Pacifica* was decided back in 1978. It involved an extreme set of facts – the George Carlin monologue at issue involved 12 minutes of the classic "seven dirty words" repeated over and over. The Court in *Pacifica* emphasized that its decision there was limited to the facts of the case. In his crucial concurring opinion Justice Powell stressed that that narrow focus would be "conducive to the orderly development of this relatively new and difficult area of law" by the Commission and the courts.

The problem is that that "orderly development" hasn't happened.

Instead, over the intervening three-plus decades the Commission has gone back and forth, up and down, this way and that way on indecency. And, most importantly, the "standards" it has invoked over the years have ***not*** been reviewed by the courts. (That's the result of a number of factors, including the Communications Act's odd provisions concerning judicial review of forfeiture decisions.)

It's as if, 34 years ago, the Court held that it's OK for the government to penalize folks driving at 100 miles per hour, but at the same time declined to say whether the government could penalize drivers at slower speeds – leaving that question to be decided in later cases through the "orderly development" of the law. No such later cases get to court. Then, 34 years later, the government tries to fine somebody for driving at 20 mph, and that guy challenges the fine, asking the Court (among other things) to throw out the 34-year-old decision as wrong. In such circumstances, the Court might figure that it could reverse the 20 mph conviction without having to toss out the earlier 100 mph ruling.

Breyer seemed to be thinking that, maybe, even if *Pacifica* was and remains good law, the Commission's *Fox* and *ABC* decisions can't be justified.

Swami: So maybe he'll write his own separate opinion laying that out. But if he does believe that the Second Circuit reached the correct result, even if for the wrong reasons, the bottom line would be good for broadcasters. Unless the FCC gets five votes to reverse the result below, that result would stand. So if Ginsburg, Kagan, Thomas and Breyer – and possibly Kennedy – all agree that the Second Circuit's reversal of the FCC was correct, broadcasters should prevail.

Let's go on the record: the Swami says that the split among the justices will most likely be 5-3 (affirming the Second Circuit) or 4-4. That's just a count as to which sides the justices take. Almost certainly we'll see a split court with multiple opinions and, probably, no single opinion reflecting the views of a majority of justices.

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Super Bowl® Trademarks: By the Numbers

By Kevin M. Goldberg
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Football is a game of numbers. Here are some interesting Super Bowl®-related numbers for you:

455 The number of trademark applications that have been filed listing the "National Football League" as the applicant/owner

141 The number of federally registered trademarks owned by the "National Football League"

9 The number of trademarks containing the word "Super" that are owned by the National Football League

11 The number of international classes in which these trademarks exist

Ideally you've figured out by now that this post serves as our annual reminder – for the fourth year running – that the National Football League takes its trademarks very seriously. The league uses those marks to protect its exclusive right to use the term "Super Bowl®". As the NFL® sees it, that right extends not only to the game itself, but also to a mind-numbing range of stuff from clothing to jewelry to party invitations/napkins/decorations/posters to sporting goods to a concert series to things like . . . television broadcasting services.

Close examination of available records indicates that the scope of the NFL®'s trademark protection does not appear to include parties, restaurants, bars or contests. As a result, one might legitimately wonder whether the NFL® really has the strength it claims in threatening legal action against anyone using the term "Super Bowl" in the promotion of their own events (assuming those events don't otherwise infringe the NFL®'s trademarks with respect to goods and services that it *has* protected). But there's no doubt that the league (like the owner of our local Super Bowl-averse franchise here in DC), has never been shy about threatening legal action and certainly has the money to back it up.

Better safe than sorry we say, so we'll reiterate our advice from last year:

The NFL has registered several trademarks, many of which you might feel inclined to use when you're referring to the Event-Of-Overriding-National-Importance-That-Shall-Not-Be-Named. These include: the expressions "Super Bowl®", "Super Sunday®", "National Football League®", "American Football Conference®" "National Football Conference®", "NFL®", "AFC®", "NFC®". The NFL also holds a registration on the Super Bowl logo, and all team names, uniforms and logos.

With that in mind, one should NOT use any of these terms or images in a way that falsely connotes any connection to the league, the game or the teams, especially if that occurs in conjunction with the promotion of any event, contest, or other activity not sanctioned by the league.

On the other hand, one MAY use those terms and images in a legitimate news story, factual recitation or commentary about the game, before or after it occurs. One MAY also use other, generic terms which have not been registered as trademarks including the all-time favorite alternative, *i.e.*, "The Big Game" (although several years ago the NFL® took an unsuccessful stab at registering "The Big Game"). One MAY also use the names of the cities whose teams are competing in the game (without using the team nicknames).

And, as we've said before, the same considerations apply to lots of other prominent sports- or entertainment-related trademarks, so consider all of this equally applicable to events such as the Oscars®, March Madness®, and the Olympics®. (Helpful practice tip: The IOC is another entity not shy about asserting its legal rights.)

Finally, since this post is all about the number and because I am the Swami, I'd be remiss if I didn't offer a prediction on the Big Game. (This is, of course, for entertainment purposes only):

Patriots: 34
Giants: 28

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Blogmeister: And while that's not a bad thing, it's not optimal. Multiple opinions, including separate concurrences from Thomas (going the furthest, possibly urging that *Red Lion* be overruled) and/or Breyer (staying the narrowest, probably looking to preserve *Pacifica*) would leave everybody in a very frustrating position: we would still not know precisely what programming the Commission can constitutionally prohibit as "indecent". We'd be back on the quest for "orderly development" of this "difficult area of law". We can all hope that some such "orderly development" might occur, but based on the last 34 years of that same quest, it's hard to be optimistic.

Swami: Which kinda puts us right back where we were before all this right? In a place where the broadcasters lack any real certainty as to when they'll be punished.

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of its attributable interest holders owns any attributable interests in another media of mass communications (*i.e.*, broadcast radio and TV station, cable television system, satellite direct broadcast system, and daily newspaper). An applicant is entitled to a 25% credit if (a) neither it nor any of its attributable interest owners owns any attributable interest in more than three media of mass communications ***and*** (b) none of those other commonly-owned mass media facilities serves the same area as the area of the proposed facilities. For purposes of an FM auction, "serving the same area" means overlap of any portion of the 70 dBu contours of the already-owned station and the proposed station. (The proposed station's contour is calculated using the maximum class facilities at the FM allotment's reference coordinates, not any applicant-specified preferred site coordinates.)

So, before certifying that you qualify for the 25% bidding credit in any upcoming auctions, you should make darn sure that you don't have a potential overlap problem. And even if the FCC tells you that you do qualify, take that with a grain of salt.

Preliminary reports suggest that the level of interest in the most recent FM auction (that would be Auction 93) has been somewhat low. That could be a function of the economy, or the relatively slim pickings, channel-wise, that are available for bidding. But if the Commission wants to encourage increased participation in its auctions, it might want to think twice about how it treats those, like the luckless brothers mentioned above, who do choose to participate.

FHH - On the Job, On the Go

For the second year in a row, **Fletcher Heald** ranked Number One, with a "commanding lead" over all other law firms, in terms of number of transactions. That's according to SNL Kagan, recognized as one of the preeminent sources of financial analysis in the media business. SNL Kagan reports that FHH advised in 112 deals in 2011, nearly three times the number of the second-place firm.

On January 31, **Mitchell Lazarus** addressed the IEEE Electromagnetic Society, Washington DC/Northern Virginia Chapter, on the topic of "Millimeter Wave Regulation."

If you plan to be in San Juan on February 10, be sure to look up **Frank Montero**, who will be in town presenting a political broadcasting seminar to the Puerto Rico Broadcasters.

On February 11, **Kathleen Victory** will appear on the "Negotiating the Deal" panel at the the Broadcast Leadership Training program presented by the National Association of Broadcasters.

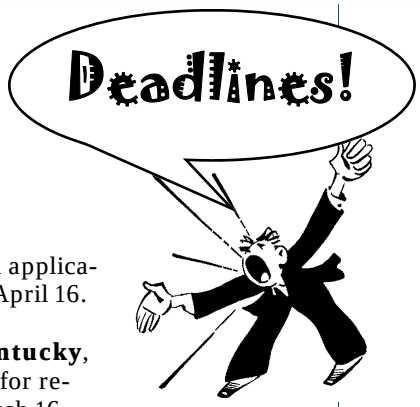
On February 20, **Harry Martin** will be appearing with the FCC's **Peter Doyle** on an FCC panel at the annual convention of the National Religious Broadcasters in Nashville.

The FHH webinar gurus presented three webinars in January. The first, emceed by **Frank Jazzo** (with **Harry Cole** adding color commentary) featured the FCC's **Bobby Baker** expounding on a wide range of political broadcasting questions. (We've included on our blog a link to both the full 90-minute recording and the slides that were shown.) The second, presented by **Harry C** to the Texas Association of Broadcasters, focused on the FCC's indecency policy. (Note to **Harry**: it may not be "professional" to refer to Charlotte Ross as a "babe", even if hers do happen to be the buttocks currently at issue before the Supreme Court.) And finally, **Dan Kirkpatrick** (with color commentators **Frank J** and **Harry C**) re-visited the license renewal process for the benefit of the Tennessee Association of Broadcasters, whose radio renewals are fast coming due.

And the webinar hits just keep on coming. **Kevin Goldberg** will be delivering a presentation on Legal Issues Affecting Social Media for the American Society of News Editors on February 9. The next week he'll present a webinar to the Media Financial Managers on Legal Issues Affecting Social Media. And then on February 28 he'll be back on journalism beat, addressing Legal Issues for Journalists for the National Press Foundation. (You can register for that last one, for free, at http://nationalpress.org/programs-and-resources/program/legal-issues-for-journalists.)

If you would like to arrange for a webinar to be presented to your organization (state broadcast association, station group, etc.), please contact **Frank J** or **Harry C**.

And finally, we would be remiss if we neglected to point out that our own **Harry C** was quoted in the *Wall Street Journal* in connection with the *WSJ*'s coverage of the indecency argument made to the Supreme Court earlier this month. Occupy Wall Street? Not really. Occupy the *Wall Street Journal*? You betcha. Yo, Harry, it doesn't matter whether you're in the 1% or the 99%, because you're the 100% *Media Darling of the Month*.



February 1, 2012

License Renewal Applications **-** *Radio* stations located in **Arkansas**, **Louisiana**, and **Mississippi** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

Post-Filing Announcements - *Radio* stations located in **Arkansas**, **Louisiana**, and **Mississippi** must begin their post-filing announcements with regard to their license renewal applications. These announcements must continue on February 16, March 1, March 16, April 1, and April 16.

License Renewal Pre-Filing Announcements - *Radio* stations located in **Indiana**, **Kentucky**, and **Tennessee** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on February 16, March 1, and March 16.

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.

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

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.

March 5, 2012

Quadrennial Review of FCC Ownership Rules - Comments are due in this proceeding, MB Docket 09-182.

April 1, 2012

License Renewal Applications **-** *Radio* stations located in **Indiana**, **Kentucky**, and **Tennessee** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

Post-Filing Announcements - *Radio* stations located in **Indiana**, **Kentucky**, and **Tennessee** must begin their post-filing announcements with regard to their license renewal applications. These announcements must continue on April 16, May 1, May 16, June 1, and June 16.

Radio License Renewal Pre-Filing Announcements - *Radio* stations located in **Michigan** and **Ohio** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on April 16, May 1, and May 16.

Television License Renewal Pre-filing Announcements - *Television* stations located in **Maryland**, the **District of Columbia**, **Virginia**, and **West Virginia** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on April 16, May 1, and May 16.

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

Noncommercial Television Ownership Reports - All *noncommercial television* stations located in **Texas** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically.

Noncommercial Radio Ownership Reports - All *noncommercial radio* stations located in **Delaware**, **Indiana**,

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Big deal?

Size Still Matters to M&A Regulators

By R. J. Quianzon
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Last year saw some successful (NBC/Comcast) and some not so successful (AT&T/T-Mobile) merger applications in the communications sector. And with hope for continued improvement in the overall economic climate springing eternal, it's possible that more large scale mergers may be in the pipeline. With that in mind, potential merger/acquisition candidates should be aware that the federal government has performed its annual ritual of announcing the thresholds it will use for automatic federal review of mergers and acquisitions.

If a transaction exceeds a certain amount, both the Department of Justice and the Federal Trade Commission must scrutinize the deal and render an opinion about any antitrust concerns raised by the deal. In addition, as AT&T is acutely aware, when a large merger involves communications assets, the FCC also has no problem sticking its nose into the deal. In fact, the FCC has its own SWAT team (formally called the Office Of General Counsel Transaction Team) to review deals. Unlike the DoJ and the FTC, the FCC's team is not automatically required to review deals of certain size; they could theoretically refrain from involving themselves in deals that pass the triggers described below.

Note, though, that the FCC's SWAT team – as well as DoJ and FTC – can choose to investigate smaller deals coming in below the triggers.

Readers considering a merger or acquisition should bear in mind that after ***February 27, 2012***, the administration automatically will be sending at least two agencies to take a closer look at transactions where either:

> the total value of the transaction exceeds $272,800,000; or
>
> the total value of the transaction exceeds $68.2 million andone party to the deal has total assets of at least $13.6 million (or, if a manufacturer, has $13.6 million in annual net sales) and the other party has net sales or total assets of at least $136.4 million

When negotiating deals, all parties would be well-advised to bear these thresholds in mind. Once those lines are crossed, the prospect of additional (and considerable) time, expense and hassle to navigate the federal review process is a virtual certainty.

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Kentucky, **Pennsylvania**, and **Tennessee** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

April 3, 2012

Quadrennial Review of FCC Ownership Rules - Reply Comments are due in this proceeding, MB Docket 09-182.

April 10, 2012

Children's Television Programming Reports - Analog and Digital - For all *commercial television* and *Class A television* stations, the first 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. Please note that the FCC now requires the use of FRN's and passwords in order to file the reports. We suggest that you have that information handy before you start the process.

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 during the past quarter 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.