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

Memorandum to Clients

February, 2002 — *News and Analysis of Recent Events in the Field of Communications* — No. 02-02

Cable/Broadcast Cross-Ownership Rules Voided, National Television Ownership Limit Threatened By Court Decision

By: Harry F. Cole

In a decision likely to have strong repercussions at all levels, the U.S. Court of Appeals for the District of Columbia Circuit handed the FCC a double whammy in February, ordering the Commission (1) to throw out its cable/broadcast cross-ownership rule and (2) to reconsider whether there is any reason to retain existing national ownership limits on television stations. The decision, titled *Fox Television Stations, Inv. v. FCC* (No. 00-1222), will almost certainly lead to further consolidation of mass media interests across the country.

The National Television Ownership Limit

Historically, the number of full-service TV stations which any one person or entity can control has been severely limited. For decades the maximum number of TV stations you could own was three, then seven. In 1984, the Commission increased the number to 12, but with the understanding that, by 1990, that cap would be repealed and the sky would be the limit thereafter. However, Congress stepped in at that point and blocked the repeal. The FCC then adopted a dual standard – you could own stations which in the aggregate reached no more than 25% of the national television audience or up to 12 stations total regardless of their audience reach. That standard remained in place from 1984 until 1996, when Congress directed the Commission to ditch the 12-station limit and raise to 35% the cap on audience reach. That is where the limit has stood since.

> *"The cable/broadcast cross-ownership rule is history, and while the 35% audience-reach cap is still in place, its future is certainly clouded after the Court's decision."*

The Cable/Broadcast Cross-Ownership Rule

The Commission has for decades prohibited common ownership of a cable television system and a television broadcast station in the same market. The FCC has also prohibited ownership of a cable system by a television network. However, that latter prohibition was repealed in 1992. At that time, the Commission determined that there was no longer any valid justification for retaining the cable/broadcast cross-ownership rule, but since that rule had been mandated by Congress in 1984, in 1992 the Commission did not believe that it had the authority to throw the rule out; instead, the Commission recommended that Congress repeal its earlier instructions. Congress did just that in 1996, but in so doing Congress did ***not*** insist that the Commission repeal the cable/broadcast cross-ownership rules.

The Biennial Review Requirement

In 1996, Congress also enacted a provision requiring the FCC to review all of its ownership rules on a biennial basis and repeal or modify them unless the Commission finds that they "remain necessary in the public interest". The cable/broadcast cross-ownership rule and the cap on television ownership were among the rules reviewed by the Commission in 1998. After that review, the Commission declined to repeal either of the two, a decision which led to the recent ruling.

The Court's Decision

The Court concluded that the FCC had not adequately explained why the national television ownership cap was neces-

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The Scoop Inside

Yo ho, yo ho, a pirate's life for me . . .

Court Declares Rule Disqualifying Former Pirates From LPFM Ownership To Be Unconstitutional

Arghhh, Mateys, Judges Keelhaul "Once-A-Pirate-Always-A-Pirate" Rule

The once-a-pirate-always-a-pirate approach to low power radio licensing walked the gangplank this month when a federal court found the prohibition against licensing former unlicensed microbroadcasters unconstitutional.

As you may recall, the Radio Broadcasting Preservation Act enacted by Congress in 2000 permanently barred anyone who ever "engaged in any manner in the unlicensed operation of any broadcast station from obtaining a low-power FM radio license." The Commission had originally indicated that it would consider, in assessing an LPFM applicant's character qualifications, whether or not the applicant had ever operated a "pirate" (*i.e.*, unlicensed) radio station. Congress, however, apparently thought that such a case-by-case approach was not enough, so it ordered to Commission to treat any history of pirate broadcasting as absolutely disqualifying.

In its decision in *Ruggiero v. FCC*, the United States Court of Appeals for the District of Columbia Circuit found that absolute bar to be an unjustified "draconian sanction for broadcast piracy" that violates the speech and equal protection clauses of the First and Fifth Amendments, respectively. The Court found the character qualifications provision so poorly aimed at achieving Congress's alleged goal of maximizing future compliance with broadcast laws and regulations that it raised a suspicion that perhaps Congress's true objective was not to increase regulatory compliance, but to penalize the microbroadcasters' message — especially since many pirates violated licensing requirements because they questioned the constitutionality of the now-defunct microbroadcasting ban and viewed their piracy as nothing more than civil disobedience.

The Court said that it could not sanction an automatic and permanent restriction on an unlicensed broadcaster's future lawful speech with no explanation from the FCC as to why a pirate broadcaster's misdeeds warrant a penalty so much more severe than past misconduct of other applicants. The provision bans low-power license applications only from broadcasters who have operated without a license, leaving the Commission free to evaluate applications from anyone else under its preexisting, more permissive character qualifications policy. As a result, civil wrongdoers, felons (including murderers), and even regulatory violators other than pirates can apply for LPFM licenses.

The Court tossed the matter back to the FCC for another try at a "carefully aimed" licensing restriction under the Commission's general character qualifications policy.

LPFM had been touted as an affordable way for small organizations to bring their messages to airwaves dominated by a few major players. All LPFM applicants must be local noncommercial educational entities; many are churches or schools. According to the FCC's database, 3,381 LPFM applications have been accepted for filing. However, the *Ruggiero* decision brings LPFM application processing to a screeching halt. For those whose applications remain pending, the remand of the rule to the FCC likely means major-league delay. For full service station licensees, the court's decision provides a hiatus from concerns that a plethora of low-power stations could cause chaos in the radio spectrum.

None of this means that the court endorses pirates' tactics. In fact, the same court issued an opinion on the same day as *Ruggiero* rejecting a First Amendment challenge of the Commission's former ban on microbroadcast stations that resulted in

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"Flagged" Applications May Be On The Move At Last

By: Ann Bavender

If you have an assignment or transfer application which has been "flagged" by the Commission and, as a result, seemingly stuck forever on the backburner of some Commission office, take heart: the possibility of movement has returned.

For the last several years the Commission has engaged in the somewhat controversial practice of "flagging" certain assignment or transfer applications when the FCC's staff determines that the change in ownership proposed in the application might have undesirable effects on market competition. A major problem with the "flagging" process has been the fact that the Commission has not developed and articulated any consistent means to determine whether any particular applicant might get flagged. More importantly, the Commission hasn't developed any processes for resolving such concerns and moving the subject applications along toward a grant. The result has been that "flagged" applications have tended to be put off to the side, left to gather dust and put down roots for months and years without agency action.

Last November, the FCC established a schedule for staff processing of pending "flagged" applications. The new schedule called for the staff to forward to the full Commission no later than February 6, 2002, a draft decision for each application which, as of November 8, 2001, had been pending for over a year. Now that this initial processing deadline has passed, the staff has been freed to focus on the next batch of applications. For "flagged" applications which, as of November 8, 2001, had been pending for over six months, the staff must forward draft decisions to the full Commission by May 8, 2002. Subsequently, the staff must forward draft decisions on all "flagged" applications within six months of their being filed.

Of course, these deadlines for draft decisions merely force the staff to start the processing process. It's up to the full FCC to approve the draft decisions and grant the applications. No timetable has been set for full Commission review of the draft orders. But at least it appears that "flagged" applications are being looked at and, to some degree, moved through the process – which is more than could have been said six months ago.

If you would like to obtain additional information regarding the competition issues which can delay the processing of assignment and transfer applications, please contact the FHH attorney with whom you normally work or the author at (703) 812-0438 or bavender@fhhlaw.com.

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an $11,000 fine against pirate broadcaster Jerry Szoka. In that case, *Grid Radio v. FCC*, the pirate could have petitioned for a rulemaking or requested a waiver of the micrbroadcasting ban but did not.

The Commission also issued a decision the same day as *Ruggiero* and *Grid* in which it upheld the FCC staff's denial of a request for special temporary authorization ("STA") to operate an unlicensed FM broadcast station and returned as unacceptable for filing an application for a FM noncommercial educational construction permit. In the case of *Leslie D. Brewer*, the STA request was denied because it failed to show that a prerequisite exceptional situation existed or that the public interest would be served. The construction permit application was rejected because the channel in the application is not allotted to the desired community, which was the same community in which the applicant had operated a pirate station between 1996 and 2000.

The lessons which can be gleaned from this flurry of LPFM-related activity are several. First, folks who have previously operated pirate radio stations cannot be absolutely barred from obtaining LPFM authorizations solely because of their past piracy. Second, notwithstanding that move toward leniency, pirate operations – *i.e.*, broadcasting unauthorized by the FCC – are ***still*** illegal and will ***still*** get you in trouble. Third, the FCC is still not ready to authorize low power FM service through some STA mechanism. And fourth, the long-pending advent of waves and waves of new LPFM stations is likely to remain pending for a while longer as the Commission sifts through the Court's decisions and attempts to react to them.

If you would like more information on these recent LPFM decisions, please contact the FHH attorney with whom you normally work.

Focus on FCC Fines

By: R.J. Quianzon

FCC PREPARES TO REVOKE FM LICENSES

In a recently released Order, the FCC announced that it is seeking to revoke four FM broadcast licenses and several associated translator licenses held by a broadcaster who refused to obey FCC orders. The broadcaster had been operating translator stations as fill-in transmitters for its main FM stations, even though they apparently weren't really "fill-in" translators and the Commission's rules prohibited the licensee from operating them otherwise. Since 1995 the Commission had been aware of this, er, problem, and had taken very clear and unequivocal steps to bring the licensee into compliance. In particular, the Commission refused to grant renewals for the translators in question unless the licensee sold them to an unrelated entity in order to bring their operation into compliance. The licensee did file for approval of an assignment, and that approval was granted – but the licensee never got around to selling the stations. The Commission then declared that, since the renewals had been conditioned on sale of the stations, and since the sale hadn't occurred, the licenses had not been renewed and should be deemed to have expired. In other words, the licensee had no authority to continue to operate the translators.

Still, the broadcaster continued to use the translators. Bear in mind, the licensee's rule violations had been brought to the Commission's attention no later than 1995, and yet in 2002, seven (count 'em, seven) years later, the situation had not changed. So now the FCC has fined the broadcaster $140,000 for illegally continuing operations of the translators. And to show that it really, really means business this time, the FCC has also designated the licensee's other full-service and (apparently legitimate) translator licenses for a revocation hearing.

This situation provides a number of lessons. First and most obvious, the FCC's prohibition against full power FM operators controlling FM translators that extend beyond their protected contour is still in effect and subject to enforcement. Under Section 74.1232(d) of the rules, licensees of full power FM stations are *not* permitted to operate translators which carry the same signal as their full power station outside of the protected contour of the full power station. In addition, FCC rules prohibit numerous other parties, such as family members, employees and business associates from operating translators that extend the signal of a full power station owned by a family member, associate, etc. All clients should be familiar with this rule and should take careful steps to assure compliance with it.

The second lesson, which may not be so obvious, is that the FCC's enforcement processes can and often do move very, very slowly. Here, what appears to be an open-and-shut violation of the rules has been known to the Commission for some seven years, and yet the violation continues to this day. It will be interesting to see how, and when, this long-running struggle between regulator and regulatee finally gets resolved.

CROSSED LINES EQUAL FCC FINES

As a general rule, most broadcasters operate under the assumption that callers to the studio realize their call may be broadcast. However, that assumption may not always be valid, and a mistake can result

in a fine as in the recent case of an FM station. A caller to the studio believed that she was calling the father of an acquaintance. The on-air personality thought that the incoming call was a prank call and played along, pretending to be the father of the acquaintance. The conversation was taped and rebroadcast – and, lo and behold, the caller found out and complained to the FCC.

In response, the licensee claimed that its announcer told the caller twice that she had reached a radio station, but it's not clear exactly how or when in the conversation the announcer made that disclosure.

The FCC fined the station $4,000 for violating Section 73.1206, which prohibits the recording and broadcast of telephone conversations without the caller's consent. The licensee argued that this situation fell within the exception, explicitly included in the rule, which permits such taping and broadcast when the caller may be presumed to have consented. According to the rule, such consent may be presumed when the caller originates the call and "it is obvious that [the call] is in connection with a program in which the station customarily broadcasts telephone conversations." Since the caller had in fact initiated the call, and since the program was a talk show which apparently did put call-ins on the air, the licensee's argument looked pretty good.

But the Commission determined that, notwithstanding those considerations, the announcer should have recognized that the caller didn't realize that the conversation might be broadcast. The moral here is that, even when a caller initiates a call to the station, station personnel cannot necessarily presume that the caller has consented to taping and rebroadcast of the call. Rather, station staff must apparently be sensitive to indications that the caller may not in fact be aware that the possibility exists that the call is being taped and might be

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Commission Contemplates Accommodating Non-Coms in Commercial Context

By: Harry F. Cole

Still struggling to fix a major hole punched in its broadcast auction processes by a U.S. Court of Appeals decision last summer, the Commission has issued a Second Further Notice of Proposed Rulemaking ("Second NPRM") seeking comment on how to deal with noncommercial applicants seeking "non-reserved", or commercial, broadcast channels. However, the range of options which the FCC suggests are under consideration reflects the difficulty of the Commission's situation.

In 1997, when Congress first gave the FCC the green light to dole out broadcast authorizations by means of an auction process, Congress was very clear that non-commercial applicants should not be required to pay for any authorization. While no doubt well-intended, that provision proved difficult, if not impossible, to implement in light of the fact that, while commercial applicants cannot apply for "reserved" (or "non-commercial") channels, non-commercial applicants ***are*** permitted to apply for "non-reserved" "commercial" channels.

The practical problem arose in each case – and there were already many such cases pending when Congress gave the go-ahead on auctions – where the field of competitors for a given commercial channel included both commercial ***and*** non-commercial applicants.

In 2000 the Commission tried to solve this conundrum the easy way, by declaring that non-commercial applicants could compete for "commercial" "non-reserved" channels by bidding and paying for them, just like everybody else. Needless to say, that approach did not go down smoothly with the non-commercial universe, which promptly appealed.

Last summer the court agreed with the appellants. As we discussed in these pages last October, the court held that Congress was very clear that NCE applicants should not be required to pay anything, so the FCC could not try to force them to pay.

In the Second NPRM, the Commission asks for comment on three options for cutting through this knot. According to the FCC, it could:

- hold NCE entities ineligible for non-reserved channels; or
- permit NCE entities opportunities to acquire licenses for non-reserved channels when no commercial entities apply for them; or
- provide NCE entities opportunities to reserve additional FM and TV channels.

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broadcast. And where such indications are present, consent to rebroadcast cannot be presumed.

FCC INDECENCY STILL UNPREDICTABLE

Last month's edition of this column contained an extensive discussion of the FCC's indecency standard and its arbitrary application. As if to underscore our observations, the FCC has fined an FM station for some morning show discussions but not others. Specifically, a Northwest station got spanked to the tune of a $14,000 fine for indecent broadcasts. But the decision leaves the area of indecency just as gray and unpredictable as before.

The FCC received a complaint about three consecutive morning radio broadcasts. The FCC decided that the first and third days' broadcasts were offensive, but the second day's broadcast was not. The broadcasts at issue included discussions of sexual fantasies and masturbation as well as extended conversation about whether males could lift or pull certain objects with their genitalia. The FCC determined that the discussions of sexual fantasies and masturbation were not offensive. In contrast, the FCC decided that the discussion as to whether the male anatomy could move objects (such as TV's) ***was*** objectionable and fined the station $14,000. The indecency standard continues to surprise.

What is particularly aggravating about this decision is that, while the Commission's decision included extensive transcripts from the programs which ***were*** deemed to be "indecent", it provided virtually no detailed description, much less any transcript, of the material which the Commission concluded was ***not*** "indecent". As a result, we are again left in the dark about where the line between decent and indecent might be found.

OTHER ACTIONS

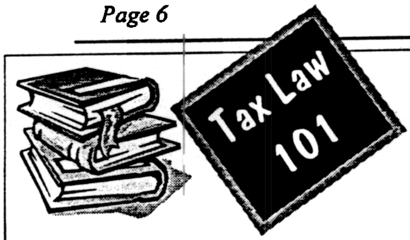
In other, more mundane, cases, the Commission:

$ nicked a Texas FM licensee $3,000 for failure to register the station's tower;

$ whacked a Boston-area FM licensee for $21,500 for a laundry list of technical violations (*i.e.*, failure to have operational EAS equipment, failure to establish a toll-free number in the community of license, failure to establish monitoring procedures to assure compliance with operating power limits, failure to maintain a station log, failure to maintain a public file); and

$ banged a tower owner for $20,000 for "failure to exhibit the required medium intensity obstruction lighting".

If you have any questions about any of these decisions or the FCC rules underlying them, please contact the FHH attorney with whom you normally work, or R. J. Quianzon at 703-812-0424 or quianzon@fhhlaw.com.



ESTATE PLANNING IN THE NEW MILLENNIUM: UNCERTAINTIES ABOUND UNDER THE 2001 TAX ACT

By: Donald B. Reynolds, Jr.

As was well-documented last year by the business press, President Bush signed into law, on June 7, 2001, the Economic Growth and Tax Relief Reconciliation Act of 2001 (the "2001 Act"), which adopted a series of fundamental changes in the estate and gift tax system. Although some media accounts touted the 2001 Act as "repealing" the estate tax, those accounts were misleading, given that the repeal of the estate tax is effective for a one-year period beginning on January 1, 2010 and is then subject to a "sunset" provision on December 31, 2010. As a result of the sunset provision, the estate tax, as it existed in 2001, is currently scheduled to become law again on January 1, 2011.

The uncertainty over the ultimate status of the estate tax has created obvious difficulties for estate planners. In addition to the basic problems created by the one-year repeal of the tax, many estate planners anticipated that the reforms included in the 2001 Act would themselves be revisited by the President and the Congress during the decade leading up to January 1, 2010-- the effective date of the estate tax repeal. In fact, on February 4, 2002, less than a year after the enactment of the 2001 Act, President Bush submitted a budget to Congress for fiscal year 2003 which includes a proposal to repeal the "sunset" provision in the 2001 Act and make the repeal of the estate tax permanent.

Given the large deficits that are built-in to the FY 2003 budget as a result of the new spending initiatives proposed by the President for defense and other programs, it appears that the proposal to make the repeal of the estate tax permanent will not receive serious attention this year, and it seems likely that the rules enacted in the 2001 Act will remain in place for at least another year. Thus, tax advisors will have to continue to cope with significant uncertainties in planning for their clients who seek to pass their wealth to future generations. Some of the most important provisions of the 2001 Act are summarized below.

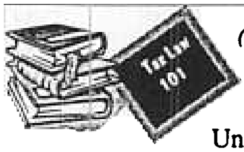
> *"Taxpayers with accumulated wealth would be well-advised to consult with a tax advisor and evaluate the effect, on their estate plans, of the changes enacted in the 2001 Act."*

Estate and Gift Taxes

The 2001 Act repeals the estate tax for decedents dying after 2009, but the Act does ***not*** repeal the gift tax. In addition to eliminating the estate tax, the 2001 Act gradually reduces the highest marginal estate and gift tax rate from 55% to 45% and, following the repeal of the estate tax in 2010, the gift tax rate will drop to 35%. In retaining the gift tax, Congress acted, in [redacted]

Under prior law, the applicable credit amount (sometimes called the "unified credit") for estate and gift tax purposes was scheduled to increase gradually until the cumulative transfers that could be sheltered from estate and gift taxation using the credit reached $1,000,000 in 2006. The Act replaces that credit with an "exemption amount" for estate and gift tax purposes. The exemption amount is $1,000,000 for both estate and gift tax purposes in 2002. As shown in the table below, different exemption amounts are provided for the estate tax and gift tax for later years:

	Cumulative Transfers Sheltered under Prior Law	Gift Tax Exemption under the Act	Estate Tax Exemption under the Act
	$ 675,000	N/A	N/A
2002-03	$ 700,000	$1,000,000	$1,000,000
	$ 850,000	$1,000,000	$1,500,000
	$ 950,000	$1,000,000	$1,500,000
	$1,000,000	$1,000,000	$2,000,000
	$1,000,000	$1,000,000	$3,500,000
	$1,000,000	$1,000,000	N/A due to repeal



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Carryover Basis Rules for Income Tax Purposes

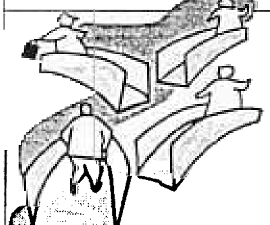
Under established estate and gift tax principles, a taxpayer's basis in property received by a gift made during the donor's lifetime is equal to the lesser of the fair market value of the property on the date of the gift, or its basis in the hands of the donor, *i.e.*, in general, the property takes a "carryover" basis. In contrast, under the historical estate tax system, property received by bequest or inheritance from a decedent is generally "stepped-up" to its fair market value. This step-up in basis at death eliminates the recognition of income on the sale of the property by the beneficiary to the extent of any gain attributable to the period prior to the decedent's death.

Upon full repeal of the estate tax in 2010 (and continuing until "sunset" in 2011), the current system will be replaced with a carryover basis system in which assets retain the basis inherited from the decedent. A decedent's estate will, however, be allowed to increase the basis of assets passing from the decedent in the aggregate amount of $1,300,000, plus the amount, if any, of the decedent's built-in losses and unused loss carryovers. The decedent's executor may allocate the $1,300,000 among assets owned by the decedent at death. An additional $3,000,000 exemption may be allocated to qualified marital deduction property inherited from a spouse, either outright or in a qualified trust, which brings the total step-up amount available to a surviving spouse to $4,300,000. In view of these changes, it will be imperative for taxpayers to keep accurate records of the income tax basis of their assets.

The introduction of a carryover basis regime also demonstrates that the repeal of the estate tax can result in additional burdens for certain taxpayers. For example, consider the simple case in which a decedent dies owning a single, appreciated asset that is worth $1,000,000 and has a basis of $100,000. Under the current rules providing for a step-up in basis, the taxpayer's estate pays no estate tax (because the $1,000,000 value of the asset falls within the exemption amount) and, upon receiving the asset from the estate, the heirs' may sell the asset for its $1,000,000 value without incurring any income tax liability because the basis in the asset will increase to $1,000,000 under the basis step-up rule. In contrast, under the carryover basis regime that accompanies the repeal of the estate tax, the heirs will realize a taxable gain of $900,000, if they sell the asset after receiving it from the estate.

A carryover basis rule has particularly serious potential consequences for assets that are depreciated or amortized during a taxpayer's lifetime. An FCC broadcast license is an example of such an asset and, under current law, is generally subject to amortization over a 15-year period. Although the taxpayer enjoys the benefit of the amortization deductions during his lifetime (since the deductions presumably shelter income from taxation), the deductions also reduce the basis of the asset and, under a carryover basis rule, increase the amount of taxable gain that the heirs will realize upon selling the asset after the taxpayer's death.

As noted above, the estate tax repeal and the imposition of a carryover basis rule will not become effective until 2010 and then, under current law, are scheduled to sunset a year later. When the potential for additional legislative changes over the next few years is added to the mix, the difficulties that taxpayers now face in creating an optimal estate plan become readily apparent. Nonetheless, tax- [illegible]



FHH - On the Go, On the Job

Frank Jazzo and ***Ali Shapiro*** will be attending the Satellite 2002 Conference at the Washington Convention Center on March 6-8, 2002.

Frank Jazzo, along with ***Bobby Baker***, Head of the FCC's Office of Political Programming, will lead a "Crash Course on Political Advertising" at the Louisiana Association of Broadcasters' Annual Convention at the Hotel Bentley in Alexandria, Louisiana, on Saturday, March 23, 2002, from 9:00 a.m. - 12 Noon.

Congratulations to ***Mitch Lazarus***, who led the legal team that obtained recent FCC approval of Ultra Wide Band (UWB) service. This new technology, which operates at very low frequencies on a rapid pulse basis, has applications for communications, construction/designing and public safety uses.

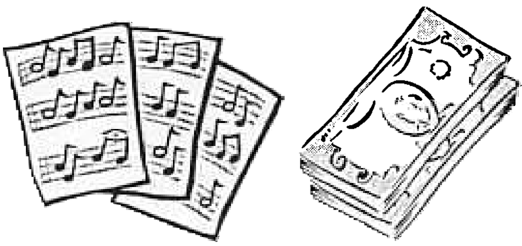
Back to the Future???

Payola Enforcement May Be On the Come-back Trail

Congressional Committee Chair Urges Investigation

By: Howard M. Weiss

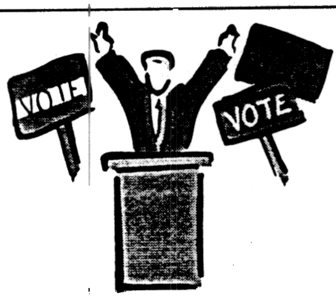
According to a letter from Congressmen John Conyers (D. Michigan) to the Chairman of the House Judiciary Committee, Congress should investigate allegations of payola from record companies to "radio conglomerates". Conyers charges that stations are trying to circumvent the law through gifts, travel and other pay-offs. And he says the problem is worse due to recent radio consolidations. The Congressman wants a hearing.



The notion of "payola" conjures up images of Alan Freed and the early days of rock 'n' roll, some fifty years ago. But the fact is that the payola laws enacted then are still on the books, alive and kicking – and that means that they can be enforced. Certainly Representative Conyers is pushing for such enforcement.

This may be yet another false alarm, part of a long history of such cries for action that have gone nowhere in the recent past. Nevertheless, it would still be a good idea for you and your managers to refresh your understanding of Sections 317 and 508 of the Communications Act and the FCC's rules implementing them. Programming managers and staff should be given a memorandum detailing the do's and don'ts of music selection, gifts, outside employment and relationships with record promoters. They should also be required to execute affidavits on at least an annual basis that create a paper trail that demonstrates that you have exercised due diligence as a licensee. Keep in mind that violations of the payola law are federal criminal violations, carrying with them penalties like fines and even incarceration.

We can assist you in this important task. We have available a model memo, as well as copies of FCC orders and notices on the subject and a model payola affidavit which may be tailored to your operation. If you need help, contact the FHH attorney with whom you normally work or Howard Weiss at (703) 812-0414 or weiss@fhhlaw.com.



Political Broadcasting – How Reasonable is Reasonable?

By: Liliana E. Ward

Spring – when a broadcaster's fancy turns to thoughts of . . . political advertising??? Yes, like it or not, the political primary season is fast approaching. As candidates prepare for the whirlwind election season, so must stations prepare for the influx of requests from political campaigns for broadcast time. The FCC's political broadcasting rules govern a wide range of interactions between the station and candidates. They include a number of specific guidelines for the treatment of political spots, particularly with respect to rates and scheduling. Violations of the rules can carry fines up of to $25,000 for each violation.

One of the central tenets of the political broadcasting rules is the obligation of ***commercial*** broadcasters to provide federal candidates "reasonable access" to their facilities. Reasonable access must be provided ***at least*** during the 45 days preceding a primary and the 60 days preceding a general or special election, including spot and program time and during prime time. Whether access must be afforded before a convention or non-primary caucus will be determined by the Commission on a case-by-case basis. Generally, however, the FCC is likely to hold that a federal candidate is the best judge as to when the candidate should start his or her campaign and the candidate's first request for time must be honored if it is not, on its face, unreasonable.

To satisfy the reasonable access requirement, broadcast stations must consider access requests on "an individualized basis." In other words, a broadcaster cannot simply decide to set aside a block of time between 2:00 and 4:00 pm, daily, for political candidates and program around it. Instead, the broadcaster must consider and accommodate, as much as reasonably possible, a candidate's stated purpose in seeking air time and make available various lengths, classes and periods of time.

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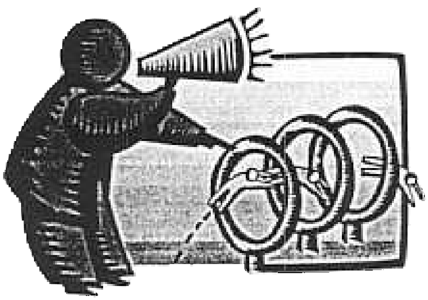
That steady drum beat, getting louder . . .

Look Out—Renewals Are Closer Than You Think!

By: Anne Goodwin Crump

All good things must end sometime, and that includes license terms. While the license renewal cycle may seem to be a long ways away, it is actually just around the corner. The next license renewal cycle will begin ***April 1, 2003***, with preparations for license renewals for the District of Columbia, Maryland, Virginia, and West Virginia. (The deadline for filing DC/MD/VA/WV renewal applications is actually June 1, but the pre-filing preparations, including the broadcast of pre-filing announcements, cranks up two months before.) The television license renewal process will begin a year later.

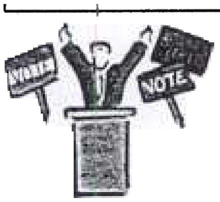


Since the beginning of the cycle is just over a year away, ***now*** is the time to begin making preparations for the renewal process. While the Commission has deregulated and streamlined license renewals significantly over past years, these changes focus more attention on the regulations which are left. Further, while the yes/no questions about matters such as the public file appear quite simple, care must be taken that the answers given are correct.

Accordingly, at this time, we recommend that station managers check their stations' local public inspection files to make sure that they are complete and up-to-date. Stations should ensure that basic documents such as licenses and information as to signal contours and main studio location are in the public file, as well as other required documents. All stations should be particularly aware of requirements relating to political broadcasting, and television stations should pay especially close attention to requirements with regard to children's programming.

Another, related matter is quarterly issues/programs lists which each radio and television station must prepare and place in the public inspection file. Those reports should list at least five issues of importance in their communities and provide a description of the programs aired by the station which have provided significant treatment of those issues. The information in the report should include, at a minimum, the title, time, date and duration of each issue-responsive program, together with a brief description of that program.

If you would like any assistance with these matters, please contact either the FHH attorney with whom you normally work or Anne Goodwin Crump at 703-812-0400 or crump@fhhlaw.com. The firm also has available, for a small fee, a Record Keeping Checklist for both radio and television stations.



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A broadcaster may not use a denial of reasonable access as a means to censor or otherwise exercise control over the content of political material.

In determining how much access is "reasonable", the broadcaster may give weight to such factors as the amount of time previously sold to the candidate, the disruptive impact on regular programming, and the likelihood of requests for time by rival candidates. Candidates are not entitled to a particular placement of their political announcements in a station's broadcast schedule. A broadcaster can refuse to sell spot time within news programming to candidates, but a station may ***not*** impose a flat ban on the sale of any particular non-news time period. To justify a denial of access, a broadcaster must be able to demonstrate a realistic danger of substantial program disruption, perhaps caused by insufficient notice to permit schedule adjustments or an excessive number of equal opportunity requests.

It is important to note that, since the last major election cycle, Congress has relieved non-commercial educational broadcast stations of the obligation to provide "reasonable access". While NCE stations were subject to that requirement, legislation enacted in December, 2000 removed that burden from them.

Once a station has opened its doors, and schedule, to political advertisers, other rules and policies come into play, including, among others, the "lowest unit rate" rule and the obligation to maintain a complete and current file in the station's local public inspection file relating to requests for political time. We will address such other aspects of the political rules in future issues of the Memorandum to Clients.

If you have any questions concerning compliance with the political broadcasting rules, or would like to purchase a copy of our political broadcasting primer, please contact the FHH attorney with whom you normally work or contact Liliana E. Ward at (703) 812-0432 or ward@fhhlaw.com.

$500,000,000 in projected leasing fees

Budget Proposed By White House Hints At Spectrum Fee For Analog TV Licensees Who Remain On Channels 52-69 After 2006

By: R. J. Quianzon

Bargaining has begun anew in Washington. The President's release of the fiscal year 2003 budget has kicked-off the annual calculator-poking, crystal ball-gazing ritual in which the FCC and other interested observers try to divine what impact the proposed budget might have on them. And if you're a television licensee currently operating, analog, on Channel 52-69, the future impact could be substantial.

The President's budget proposes $278 million to fund the FCC in fiscal 2003, a 14% increase over last year. Anticipated revenues from regulatory fees are projected to increase to $250,000,000, a 10% increase from 2002.

However, perhaps the most interesting element of this year's budget is the dollar figure which the government anticipates receiving from leasing certain portions of the airwaves.

By now we are familiar with the notion of spectrum auctions, and the sizable dollars which such auctions are able to generate for the federal government through the ***sale*** of spectrum. But the proposed budget provides for $500,000,000 in spectrum ***leasing*** fees (as opposed to spectrum auction proceeds) projected to be collected starting in 2007. Although the details of this proposed spectrum fee or "user fee" are still vague, it appears that a primary source of those leasing fees would be television broadcasters transmitting analog signals on Channels 52-69 in 2007 and thereafter.

In other words, it looks like the President may be planning to have the FCC charge rent for analog TV operations on Channels 52-69 starting in 2007.

There is no real mystery about why the government might want to become a rent-charging landlord. For years the government has assumed, rightly or wrongly, that it would be able to auction off the Channel 52-69 once the conversion to DTV and the resulting clearing out of that portion of the current TV band were completed. The projected completion date for that process is 2006. Meanwhile, the auction of spectrum, including television channels 52 - 69, is predicted to raise more than $25 billion for taxpayers during the next five years. So the ready availability of that spectrum for auction, and the government's ability to assure delivery of clear spectrum to the buyer, are matters of no small importance to the budgetary process.

Thus, the government's ability to effectively auction off the 52-69 spectrum hinges to a great degree on its ability to clear that spectrum of its current users. Much as the sale of a house may be complicated, and less profitable, if somebody else is already living in it and not planning to move, so too the sale of the 52-69 spectrum is likely to be far more problematic, and less profitable, if it is still occupied by analog TV broadcasters when the new buyers want to move in. And what better way to encourage the current tenants to get a move on than by upping what it will cost them to stay put? Hence, apparently, the plan to start collecting rent – with anticipated aggregate collections of some $500,000,000 – from hold-over analog broadcasters on Channels 52-69 starting in 2007.

Readers are cautioned that the terms of any spectrum licensing fee are not at all clear. Further, the budget is merely a proposal and almost certainly will be significantly amended before passage by the Congress and signature of the President. The final budget will likely be considerably different from the President's proposal. In other words, we have a long way to go, and the end result may not resemble in any way the current proposal. But to the extent that the President's proposal may afford some insight into the government's long-range plans, potentially affected parties may wish to take note.

Questions regarding the budgeting process, federal receipts from auctions and proposed spectrum leasing fees may be directed to the FHH attorney with whom you normally work or R. J. Quianzon at (703) 812-0424 or quianzon@fhhlaw.

This just in!!!

New Royalty Rates for Internet Transmissions Announced

Hot off the presses. The Copyright Office has issued the following grid of royalty rates for statutory licenses covering internet transmissions. This was released at press time. A more detailed analysis of these rates and what they mean for broadcasters will appear in next month's Memo to Clients. In the meantime, if you have questions, contact the FHH attorney with whom you normally work, or Alison J. Shapiro at (703) 812-0478 or shapiro@fhhlaw.com.

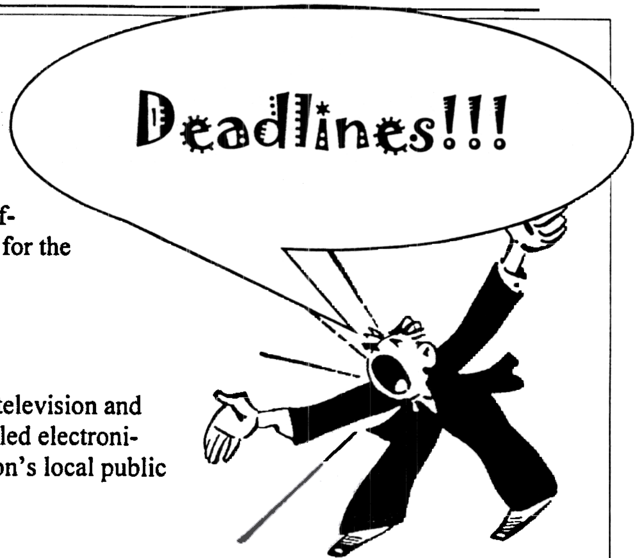
Type of Service	Performance Fee (per performance)	Ephemeral License Fee
Webcaster		
(a) Simultaneous internet retransmissions of over-the-air AM or FM radio broadcasts	0.07¢	9% of Performance Fees Due
(b) All other internet transmissions	0.14¢	9% of Performance Fees Due
Commercial Broadcaster		
(a) Simultaneous internet retransmissions of over-the-air AM or FM radio broadcasts	0.07¢	9% of Performance Fees Due
(b) All other internet transmissions	0.14¢	9% of Performance Fees Due
Non-CPB, Non-Commercial Broadcaster		
(a) Simultaneous internet retransmissions of over-the-air AM or FM broadcasts	0.02¢	9% of Performance Fees Due
(b) Other internet transmissions, including up to two side channels of programming consistent with the public broadcasting mission of the station	0.05¢	9% of Performance Fees Due
Business Establishment Service		
For digital broadcast transmissions of sound recordings pursuant to 17 U.S.C. §114(d)(1)(C)(iv)	Statutorily exempt	10% of Gross Proceeds
Minimum Fee		
$500 per year for each license		

(Continued from page 5)

As a practical matter, none of these alternatives is likely to be palatable to everyone. The first suggestion will go down especially hard for NCE entities, who may feel that they are being excluded from a large portion of the broadcast spectrum to which they have historically always enjoyed access. The third suggestion (*i.e.*, setting aside more channels exclusively for non-commercial operation) will go down especially hard for commercial broadcasters, who may not like the idea of losing spectrum to the NCE folks. And probably nobody is going to like the second suggestion, since commercial interests will probably be reluctant to cede any of their spectrum, while NCE interests will probably view as undesirable any spectrum which might be made available.

While the Commission is obviously trying to come up with some workable solution, it is not at all clear that there is any such solution. Perhaps this problem can be resolved only with the help of Congress, which could provide guidance about how it expects the FCC to implement the 1997 Act.

In any event, the Commission has invited comments on the three proposals listed above, as well as any other ideas anybody might have to address the court's concerns. As of this writing the deadline for comments and reply comments has not yet been announced. If you would like to submit comments or reply comments, please contact the FHH attorney with whom you normally work or Harry F. Cole at 703-812-0483 or cole@fhhlaw.com.



February 17-March 1, 2002

DTV Extensions of Time - Any commercial television station requiring an extension of time beyond May 1, 2002, for completion of construction of its DTV facilities must file an extension request on FCC Form 337, which will detail the station's good faith efforts to meet the deadline and the reasons why it will be impossible for the deadline to be met.

April 10, 2002

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

April 15, 2002

EEO Comments -The comment deadline in the rule making proceeding concerning possible revisions to the Commission's equal employment opportunity rules has been extended to April 15. The deadline for reply comments has been extended to May 15.

May 1, 2002

DTV Construction - Commercial television licensees are required to have constructed their DTV facilities by May 1, 2002, unless they have obtained an extension of the construction deadline prior to that date. As indicated above, applications for extensions are due by March 1, 2002.

(Continued from page 1) sary in the public interest. The Commission had claimed that the rule needed to be retained to preserve competition and diversity. But the Court concluded that that claim was not supported by any evidence. And while the Commission had indicated that it preferred to take a "wait-and-see" approach to national ownership caps, and particularly to assess the effect of the relaxation of local television ownership caps on competition and diversity, the Court held that the Commission had in fact "adduced not a single valid reason to believe [the national ownership cap] is necessary in the public interest, either to safeguard competition or to enhance diversity."

The Court also noted that the Commission never bothered to explain why the conclusion that it had reached in 1984 – *i.e.*, that the national ownership cap could be repealed in its entirety – could or should be ignored now. The Commission merely tried to argue that its 1984 ruling was "irrelevant" once Congress rejected that ruling in 1984. The Court wasn't buying that, however, pointing out that the reasoning of the FCC's 1984 decision stood "unrebutted".

As to the cable/broadcast cross-ownership rule, the Court similarly held that the FCC had failed to support its conclusion that competition and diversity would suffer without the rule.

At the bottom line, the Court treated the two rules differently. As to the cable/ broadcast cross-ownership rule, the Court ordered the Commission to "vacate", or repeal, the rule right away. As to the national television ownership cap, however, the Court simply ordered the Commission to review the record again and issue a further decision concerning the continued vitality of the cap. In the meantime, the 35% audience-reach cap remains in place.

So to recap, the cable/broadcast cross-ownership rule is history, and while the 35% audience-reach cap is still in place, its future is certainly clouded after the Court's decision. But bear in mind that the Commission may seek review of the Court's decision by the Supreme Court, which could keep the final resolution of these questions in limbo for months if not longer. And the Commission still gets a crack during its remand consideration of the national ownership cap to try to justify it (although, given the pummeling the Court gave the Commission's reasoning in this go-around, it would not be surprising if the Commission were simply to run up the white flag and repeal the cap).

If you have any questions about this decision or its possible effect on your interests, please call the FHH attorney with whom you normally work or Harry F. Cole at 703-812-0483 or cole@fhhlaw.com.