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

Memorandum to Clients

June, 2002 — *News and Analysis of Recent Events in the Field of Communications* — No. 02-06

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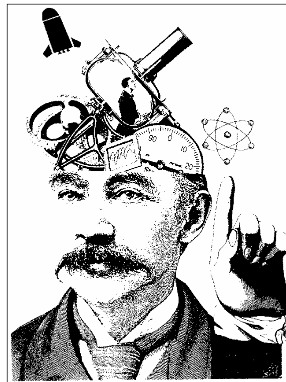
Spectrum Policy Task Force Solicits Suggestions In Wide-Ranging Review Of Spectrum Use and Allocation

By: Lee G. Petro

The Commission's Spectrum Policy Task Force is seeking comments on a wide range of topics relating to the Commission's current spectrum policies. The Spectrum Policy Task Force, created by the Commission in February 2002 to coordinate a thorough review of the Commission's policies relating to spectrum use and allocation matters, has been busy for the past four months identifying areas of inquiry. It has raised questions that can be divided into five main subjects.



Market-oriented Allocation and Assignment Policies

The Task Force is focused on adopting market-oriented allocation and assignment policies, and is seeking comment on how best to design and implement such policies. Such efforts have thus far focused on two potential techniques: (1) permitting flexible uses by the incumbent licensees of the spectrum; and (2) auctioning "overlay" licenses and white space spectrum, i.e., geographic licensing of MDS licenses. The Task Force is interested in comments on the relative strengths and weaknesses of each of these approaches.

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In addition, the Task Force is requesting comments on whether there are alternative methods for allocating spectrum. For instance, the Commission might choose to convert current "site-based" licenses, i.e., broadcast and private land mobile, to geographic licenses, with the flexibility to provide alternate services. The Task Force also is interested in identifying whether there is any currently under-used spectrum that could be auctioned.

Moreover, the Task Force is seeking comment on whether there should be different spectral policies for those radio services in the more congested band, in comparison to the less congested band. Alternatively, should the Commission afford greater protection to those radio services operating in urban areas, regardless of the radio service, in relation to those services provided in rural areas.

Finally, the Task Force is also seeking suggestions to facilitate experimentation and innovation, along with the proper treatment of unlicensed devices. In both cases, the Task Force seeks comment as to the proper incentives to promote new services that will be put to its highest valued use.

Interference Protection

The Task Force has also focused a substantial portion of its inquiry on the area of interference protection. Noting that the spectral band is becoming more congested, the Task Force is seeking comment on the proper level of protection from interference which should be required among the various radio systems.

Of primary interest for the Task Force is the appropriate level of interference that should be afforded in the spectral band. Currently, the Commission distinguishes "interference" from "harmful interference" by accepting a certain level of the former, and limiting the latter. The Task Force is seeking com-

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Auction Action Axed . . . For now

Auction of Channels 52-56 Stayed At Last Minute, Postponed By Congress Until At Least August

By: R.. J. Quianzon

In a flurry of activity hours before the beginning of Auction 44, Congress and the FCC staved off the auction of Channels 52-59. Earlier in the month Channels 60-69 were given a similar reprieve. Auction of Channels 54, 55 and 59 has now been put off until at least August; auction of the remaining channels has been postponed at least several months longer.

In 1997, as part of the transition to digital television, Congress required the FCC to auction off Channels 52-69. As part of that requirement, Congress established deadlines by which the auctions must occur and - - funds had to be deposited into the U.S. Treasury. The auction for all of these channels was scheduled to begin on June 19, 2002. Three and a half weeks before the intended date of auction, the FCC postponed the auction of Channels 62-69 for seven months. However, the FCC indicated it was going to continue its auction of Channels 52-59.

The latter announcement ruffled feathers on Capitol Hill. The House of Representatives had already passed legislation which ordered the FCC to stop the auction. However, the Senate had not enacted similar legislation. The FCC continued on with its plans for auction.

The auction of Channels 52-59 was scheduled to occur on Wednesday, June 19, 2002, at 9:00 a.m. However, on June 18 the Senate and House passed legislation stopping the auction of all Channels but 54, 55 and 59. The President signed the Bill into law the next morning.

Currently, Channels 54, 55 and 59 are slated to go to auction this August. Congress has delegated to the FCC the authority to decide when further auctions should occur. In the interest of providing rural mobile phone companies with additional spectrum, Congress thought to ensure that Channels 54, 55 and 59 be auctioned as soon as possible.

The last-minute jockeying occurred because many potentially-affected entities believed that it was premature to commence the final disposition of Channels 52-69 just now. Existing broadcasters on those channels, of course, are not in a hurry to give their channels up, and a number of potential bidders for the channels felt that more time was necessary to enable the Commission to clarify various aspects of the auction, including whether or not the available spectrum is available to noncommercial broadcasting applicants and, if so, how those applicants can be integrated into the process without having to participate in an auction.

It is anticipated that further developments and complications are likely before Channels 52-69 are finally disposed of. If you have any questions about this proceeding, contact the FHH attorney with whom you normally work or R.J. Quianzon at 703-812-0424 or quianzon@fhhlaw.com.

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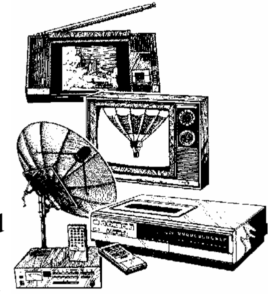
Supremes Reject Satellite Attack on "Carry One, Carry All" Local Must Carry Rule

By Vincent J. Curtis, Jr.



The Supreme Court has refused to hear an appeal brought by the Satellite Broadcasting and Communications Association concerning the "carry one, carry all" must carry rule involving local television stations. The Association had asked the Supreme Court to review an earlier decision of the Fourth U.S. Circuit of the Court of Appeals in Richmond in which that court upheld the rule as a reasonable, content-neutral restriction on satellite carriers' speech.

Under the Commission's rule, satellite carriers are required to carry all local stations in a market if they decide to carry any. The purpose of the rule is to protect small, independent broadcasters from being dropped by satellite carriers in favor of new channels. The satellite carriers argued that they had a free speech right to broadcast what they wanted. Because the carriers can choose not to retransmit ***any*** local stations, the Court of Appeals observed that the satellite carriers remain free to transmit programming of their choice -- accordingly, the Court of Appeals held that the fact that the right to transmit some local stations carries with it a requirement to carry them all is ***not*** a constitutional violation. The Supreme Court denied the Association's petition for review, and let stand the lower Court's decision.

(Continued from page 1)

ment on whether this current structure is successful, and whether any changes are warranted.

Moreover, the Task Force raises the possibility of establishing receiver standards or guidelines that would only protect those receivers that met these new standards, but would otherwise permit a greater level of interference received on older receivers.

Finally, the Task Force is also interested in comments addressing the possibility that licensees be accorded the opportunity to negotiate interference rights among themselves, or making available arbitration or mediation as a means to resolve interference disputes.

Efficiency of Spectrum Use

The Task Force is also interested in determining how to make more efficient use of the spectrum. It is soliciting suggestions for new rules or policies which might encourage spectral efficiency, and it is also seeking comment on whether any rules presently in effect are inhibiting the efficient use of spectrum.

In addition, the Task Force is seeking to measure the relative efficiencies among the various radio services, and is attempting to identify an appropriate benchmark for such a comparison. The Task Force is also interested in developing methods to provide incentives to promote spectral efficiency, including fees or receiver standards that would require more efficient systems.

Public Safety Communications

The Task Force is seeking comment on spectrum issues relating to public safety communications. While the Task Force notes that there is a substantial need for reliable, cost-effective communications among local, state and federal agencies, it also acknowledges that the overall level of traffic is quite low in relation to commercial communications. Accordingly, the Task Force is looking for comments on whether there are any spectrum sharing techniques that can be implemented without reducing the high level of reliability currently in existence.

International Issues

Finally, with respect to international issues, the Task Force is seeking comment on international spectrum agreements, such as the International Telecommunications Union allocation process, and coordination issues with Mexico and Canada. In particular, the Task Force is interested in examining the effect of the international agreements on domestic allocation and allotment policy, especially with respect to satellite and international communication services, and what steps can be taken to improve these activities.

Despite the extraordinarily wide scope of the subject matter of its inquiry, the Task Force established the initial comment deadline for July 8, 2002, with reply comments due on July 23, 2002. At publication, the Commission denied a request for an extension of time to file Comments. Conceivably, other parties could also file an extension to file comments. In the meantime, if you have questions about the Task Force's work, or if you would like our assistance in preparing comments for submission to the Task Force, you should contact the FHH attorney with whom you normally work or Lee G. Petro at 703-812-0453 or petro@fhhlaw.com.

COMMISSION FORCES REFORMATION OF TIME BROKERAGE AGREEMENT IN SALE CONTEXT

By: Anne Goodwin Crump

Perhaps not surprisingly, in May the Commission approved the transfer of control of 16 TV stations, four radio stations, and 27 associated translator and LPTV stations from one group owner to another. The approval was granted despite the fact that the proposed transfer would result in violations of the radio/television crossownership rule in five markets, and the buyer was granted a 12-month temporary waiver in order to divest stations to come in compliance with the rule.

The most interesting part of the decision, however, related to one relatively small market in California. There, although the new television/radio combination appeared to comply with the numerical limits of the Commission's rule, the existence of a time brokerage agreement ("TBA") between the seller and another television station in the market called into question compliance with the local television multiple ownership rule. That TBA was to be assigned to the buyer.

Licensees operating under a TBA, JSA or the like should review their agreements and how those agreements are in fact being implemented in order to assure that they comply with the FCC's expectations.

The seller had previously owned the Fox affiliate in the market and had a TBA with the CBS affiliate in the same market. The seller later purchased the CBS affiliate which, because of the size of the market, forced it to sell the Fox affiliate. It then entered into a new TBA with the Fox affiliate pursuant to which it would supply all of the non-network programming.

Once the Commission's rules changed to make TBA's attributable interests, however, the TBA was revised so that the seller would supply no more than 15% of the Fox affiliate's programming. That programming is scheduled to air between 5:00 and 8:00 p.m. and between 10:00 and 11:00 p.m., Sunday through Saturday. Pursuant to the Commission's rules, this change (*i.e.* reducing to no more than 15% the amount of programming to be provided under the TBA) normally would have made the TBA non-attributable. But at the same time the seller and the Fox affiliate licensee entered into a joint sales agreement, pursuant to which the seller would receive all of the revenue not only from the programming supplied under the TBA, but also from all other, non-network programming.

This combination of circumstances raised a red flag with the Commission's staff, which looked into the matter further. Lo and behold, the staff discovered that, while the Fox affiliate licensee theoretically had the ultimate authority over the programming which aired in the remaining 85 percent of the time, it had not actually exercised that authority. Syndicated programming acquired since the time of the change in ownership of the Fox affiliate had all been purchased at the suggestion and with the assistance of the seller. Further, while the "general manager" of the Fox affiliate stated that the broadcast of the programming is subject to his approval, he spends only 7 to 10 hours per ***month*** at the station (nice work, if you can get it). Further, the parties could point to no instance in which the Fox affiliate licensee had rejected any of the programming suggestions made by the seller, and that licensee had no affirmative obligation to seek out any programming. The FCC further noted that the Fox affiliate licensee had no economic incentive to reject programming suggestions or seek out other programming, since it would not retain any revenues from non-network programming.

Taking all of these factors into consideration, the Commission determined that the TBA must be treated as an attributable interest. The seller therefore was found to be in violation of the local television multiple ownership rule, and the Commission held that it could approve the transfer only on the condition that the joint sales agreement and any other relevant contract be revised so that the time broker would be entitled only to revenues resulting solely from the 15 percent of programming provided under the TBA. The Commission directed that the amended agreement be submitted to the Commission for review within 30 days.

The Commission noted that this was a case of first impression and did not penalize the seller for its rule violations. The case proves that the Commission is clearly willing to look beyond the labels which parties may place on agreements and, instead, examine the actual functioning of those agreements. Even if a set of agreements would facially appear to comply with the Commission's multiple ownership rules, the Commission has demonstrated that, under the right set of circumstances, it will delve deeper and may find agreements to be attributable.

While the parties in this particular case avoided any penalty because the situation was, in the Commission's view, brand new, it will be hard for other licensees to make the same claim: the FCC has now made clear that it will look at substance rather than form in the manner in which TBA's and the like are implemented. With that in mind, licensees presently operating under a TBA, JSA or the like should review their agreements and the manner in which those agreements are in fact being implemented in order to assure that they comply with the Commission's expectations.

Should you have any questions about this decision or about the structuring of transactions generally, please contact the FHH attorney with whom you normally work or Anne Goodwin Crump at 703-812-0400 or crump@fhhlaw.com.

Focus on FCC Fines

By: R.J. Quianzon

UCC v. Moneychangers: Round Two to the Moneychangers — In early 2001, as Enron Corporation was experiencing the worst of its problems with the Securities and Exchange Commission and the public, a small issue with the FCC came to light. In its flurry of company acquisitions throughout the 1990s, Enron had acquired several companies which operated walkie-talkie radios and other wireless communications systems. However, Enron failed to advise the FCC that a transfer of control had occurred with the communications devices. In similar instances, the FCC has fined companies more than $100,000 for failing to follow FCC rules when transferring such licenses.

Based upon financial representations which Enron made to the FCC and the apparent inability to pay fines, the FCC entered into an agreement with Enron in which Enron walked away with a $7,500 fine. Righteously indignant, the United Church of Christ, Inc. asked the FCC to reconsider the Enron deal and the paltry fine. Relying upon previous FCC cases, the Church of Christ argued that the FCC should impose a more significant fine. Washing its hands of the matter, the FCC has denied the Church of Christ pleas.

The FCC's leniency with Enron is not a typical example of the FCC's enforcement authority. The FCC in the past has issued tens of thousands of dollars in fines for failure to obey rules regarding microwave and land mobile licenses such as those used by Enron. Clients are reminded that, in addition to the licenses for broadcast facilities, auxiliary licenses such as remote pick-ups, studio-transmitter links and weather radar should be maintained according to FCC rules. As noted as the front story of last month's publication, the FCC is currently purging its systems of invalid licenses of this type and licensees should take great care to ensure that they are properly operating auxiliary stations.

Station fined for broadcasting call from its own phone — As this column repeatedly advises, licensees must advise a person that a telephone call will be recorded or broadcast prior to doing so. In an interesting development, the FCC fined a station for broadcasting a telephone call which was made using the station's equipment. The latest development involves station-to-station competition. An on-air personality went to the offices of its competitor radio station, providing on-air reportage of the journey with his cellphone during the trip. Upon arriving at the competitor's station, the personality simply handed over his cellphone to an announcer for the other station. The announcer began talking into the cellphone, thus putting himself on the air of his competition's station. The FCC rules that the conversation over the cellphone, without a broadcast disclosure, is prohibited by its rules and has fined the station $3,200. All clients are advised that participants in ***any*** phone call (including cellphone calls) must be properly notified, and must consent, before the call may be broadcast or recorded.

Radio Pirates Fined — The FCC is continuing its latest initiative to stop radio piracy. As noted in recent issues of this column, G-men have confiscated equipment from and arrested several radio pirates recently. Most recently, Michigan and New York men have been fined $10,000 each for illegally broadcasting on 88.1 MHz without a license. Should the men continue with their radio piracy, they face the same consequences met by those before them - - removal of equipment and incarceration. If you are aware of radio pirates interfering with your station, contact our offices or the local field office of the FCC

No word yet on tail phantoms . . .

Transition Period for New Head Phantoms Announced

If you're into Specific Absorption Rates ("SAR's") -- and you know who you are -- you will doubtless be thrilled to know that we are now in the middle of a transition period requiring the termination of the use of any head phantoms other than the head phantom specified in Edition 01-01 of Supplement C to OET Bulletin 65. Seriously.

Just a year ago, the Commission announced the release of Edition 01-01 in which it gave everybody a heads up that it would soon be imposing a three-to-six month transition period after which the new standard head phantom (you know, the one recommended by IEEE Standards Coordinating Committee 34) would become mandatory. Of course, that new standard head phantom has been commercially available for six months or more (we see them everywhere nowadays . . . we think). And, if you've been using your beach time to catch up on your recreational reading, you know that CTIA's Revision 1.1 of its "Method of Measurement for Radiated RF Power and Receiver Performance" for the CTIA Certification Program made use of the new standard head mandatory after May 31, 2002.

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New Copyright Royalty Rates Set For Audio Streaming

By: Alison J. Shapiro

On June 20, 2002, the Librarian of Congress rejected in part the rates and terms recommended by the Copyright Arbitration Royalty Panel ("CARP") for the statutory license for eligible non-subscription services to perform sound recordings publicly by means of digital audio transmissions (*i.e.*, "Webcasting") and to make "ephemeral" recordings of sound recordings. We reported on the CARP's recommendations in our March, 2002 Memorandum to Clients.

Most significantly, the Librarian has abandoned the CARP's two-tiered rate structure of 0.14 cents per performance for "Internet-only" transmissions and 0.07 cents for each retransmission of a performance in an AM/FM radio broadcast, and has decided that the rate of 0.07 cents will apply to both types of transmissions. The Librarian also reduced the ephemeral recording fee from 9% to 8.8% of the performance fees. (The ephemeral fee covers the copying which occurs when the computer makes digital versions of the songs as they are streamed.) The minimum fee for all services who stream over the Internet, however, remains unchanged and is set at $500.00 for each calendar year, or part thereof, in which it streams.

The rates announced by the Librarian of Congress go into effect on September 1, 2002. Full payment of royalties for all pre-September 1, 2002 streaming must be made by **October 20, 2002.** Since not all broadcasters and Webcasters have kept detailed records of the performances they have streamed up until now, these services can estimate the number of performances at 15 songs per hour. These estimates will be acceptable even up to 30 days after the effective date of the rates and terms. Payment for streaming for the month of September is due on or before **November 14, 2002**, and payments for subsequent months will be due the 45th day after the end of each month for which royalties are owed (*e.g.*, payment for the month of October will be due on or before December 16).

Payments must be sent to:

SoundExchange™
1330 Connecticut Avenue NW
Suite 300
Washington, D.C. 20036
Attention: Mr. Sean Glover

There are also numerous record keeping requirements that broadcasters and Webcasters must comply with. Since, the record keeping requirements have not finally established, look for a summary of these in a future issue.

If you have questions or concerns regarding the new royalty rates for streaming, you should contact the attorney with whom you normally work or Alison J. Shapiro at 703-812-0478 or shapiro@fhhlaw.com.

July 1, 2002

Broadcast Auxiliary Record Update Deadline - All licensees must check the Commission's ULS system to make sure that the records for their broadcast auxiliary stations (such as Studio-Transmitter Links and Remote Pick-ups) have the correct Facility Identification Number for the parent stations associated with them. If not, the Commission will allow the licenses to expire and will remove the authorizations from its records.

July 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.

Issues/Programs Lists - For all commercial and noncommercial radio, television, and Class A television stations, a listing of each station's most significant treatment of community issues must be placed in the station's local public inspection file. The list should include a brief narrative describing the issues covered and the programs which provided the coverage, with information concerning the time, date, duration, and title of each program.

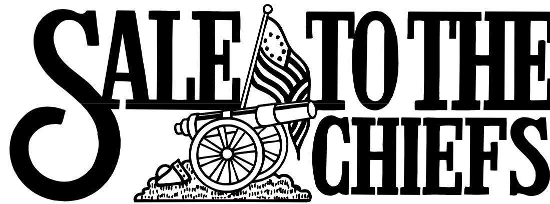
"Free" air time — much like free lunches?

Free Air Time Probably Won't Come Cheap

By: Jennifer Wagner

The cost of "free" air time would be billed to broadcast licensees under a proposal unveiled by a group of congressmen this month.

The Free Air Time proposal is a key element of a campaign finance reform bill that is supposed to reduce the cost and increase the flow of campaign communication on television and radio stations, according to sponsors Senator John McCain (R-Ariz.), Senator Russell Feingold (D-Wisc.), Senator Robert Torricelli (D-N.J.), and Representative Martin Meehan (D-Mass). "Free", in this context, apparently does not mean free for everybody, as the proposal contemplates that broadcast licensees would be billed a "spectrum user fee" in order to achieve its stated goals.



Although Congressional staff is still hammering out the who, what, when, why and how much of this bill, it is expected to include the following provisions:

- $ Television and radio broadcast license holders would be required to devote at least two hours a week in the period just prior to elections to candidate-centered and issue-centered programming, such as debates, interviews, and town hall meetings. At least half of that programming would have to air in or near prime time. None could air between midnight and 6 a.m.

- $ A voucher system would be used to enable qualifying candidates and political parties to place a reasonable number of ads on the television or radio stations of their choices. Federal candidates would qualify for vouchers by raising a threshold level of small dollar donations. Qualifying national parties will receive block grants of vouchers in each two-year cycle, which they could use on behalf of local, state or federal general election candidates.

- $ The voucher system would be funded by an annual spectrum usage fee on all broadcast license holders, amounting to not more than one percent of the gross annual revenues.

Ambiguous terms abound, such as "reasonable number of ads," "qualifying candidates," and - the most frightening of all – "annual spectrum usage fee." Despite the overall lack of clarity in the legislation's current embodiment, one thing seems certain: "free air time" is not so free for broadcasters. On a positive note, similar legislation introduced as the Torricelli Amendment to this year's Campaign Finance Reform law was shut down by broadcaster lobbying efforts earlier this year, as was a House campaign reform bill provision sponsored by Meehan and Rep. Chris Shays (R-Conn.). There is thus at least some reason to believe that the prospects for this latest proposal may be limited. On another positive note, House Telecom Subcommittee Chairman Fred Upton (R-Mich) has already announced that he would oppose any congressional effort to mandate free TV time for candidates for federal office. Such a plan is unworkable, according to Upton.

Regardless of those potentially hopeful signs, however, the fact remains that a number of members of Congress are intent upon effectuating campaign reform, and have apparently identified the broadcast industry as a primary source which might be looked to to pick up the tab for such reform -- so that the reforms could be touted as "free". The trouble is that free air time is much like free lunches -- there's really no such thing.

We here at Fletcher, Heald & Hildreth will be tracking this legislation. If you have any questions about its current incarnation, please contact the FHH attorney with whom you normally work or Jennifer Dine Wagner at 703-812-0511 or wagner@fhhlaw.com.

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So the Commission has determined that a three-month transition period should do the trick. As of ***September 15, 2002***, ***all*** SAR testing in any FCC certification application ***must*** use the new standard IEEE SCC 34 head phantom.

And further news for all you SAR folks -- Subcommittee 2 of the IEEE's Standards Coordinating Committee 34 has, since the release of Supplement C 01-01, revised its draft standard (P-1528) on SAR measurement procedures. These new procedures will also be mandatory beginning on September 15, although the Commission encourages one and all to start using immediately.

FM ALLOTMENT PROPOSALS 5/27/02-6/24/02

STATE	COMMUNITY	CHANNEL	DOCKET NO.	DEADLINES FOR COMMENTS	TYPE OF PROPOSAL (I.E., DROP-IN, SECTION 1.420, COUNTERPROPOSAL)
IN	Speedway	265A	02-143	Cmts - 8/5/02, Rep - 8/20/02	1.420 (relocate channel from Lebanon, IN)

Consistent with our past practice, Fletcher, Heald & Hildreth PLC provides this advisory on a periodic basis to alert clients both to FM channels for which applications may eventually be filed, and also to changes (both proposed and adopted) in the FM Table of Allotments which might present opportunities for further changes in other communities. Not included in this advisory are those windows, proposed allotments and proposed channel substitutions in which one of this firm's clients has expressed an interest, or for which the firm is otherwise unavailable for representation. If you are interested in applying for a channel, or if you wish us to keep track of applications filed for allocations in your area, please notify the FHH attorney with whom you normally work.

FM ALLOTMENTS ADOPTED 5/27/02-6/24/02

STATE	COMMUNITY	CHANNEL	DOCKET NO.	AVAILABILITY FOR FILING
CA	Westwood	259A	02-42	None (change of community)
CA	Sunnyvale	285A	01-322	None (change of community)

"TBA" means "to be announced". Newly-allotted channels are not likely to become available for filing until after the Commission has resolved certain difficulties with its broadcast auction processes. The Commission has provided no indication of when those difficulties may be resolved.

FM ALLOTMENT CHANGES IMPLEMENTED THROUGH APPLICATIONS

In June, the Commission revised the FM Table of Allotments to reflect the following changes which had been made through the application process:

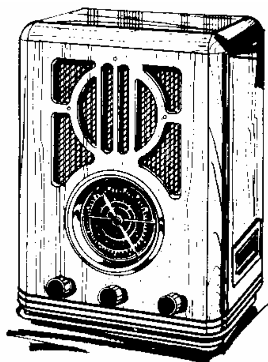
STATE	COMMUNITY	CHANNEL DELETED	CHANNEL ADDED
AL	Tuscumbia	262C	262C1
IA	Pella	277C1	277C0
MO	Vandalia	282A	282C3
SC	Pawley's Island	253A	253C3
TX	Dalhart	240A	241C3
TX	Seadrift	286A	286C2
WA	Walla Walla	256C2	256C1
WY	Diamondville	287C2	287C1

Congress Looking Hard At Allegations Of Payola, 21st Century-Style

By: Ann Bavender

Changes in the broadcast industry have suddenly made "payola" a hot issue on Capitol Hill. For decades "payola" was a sleeper issue, vaguely reminiscent of Alan Freed and the early days of rock 'n' roll in the 1950s. Now Congress is getting numerous requests to take a closer look.

"Payola" is the acceptance of (or agreement to accept) money, services or anything of value in return for broadcasting music or other programming ***without*** disclosing the acceptance on the air to the broadcast public at the time of broadcast. The Communications Act and FCC regulations have prohibited "payola" for decades. Initially, "payola" came in the form of outright payments or gifts by record companies to radio station programming directors or DJ's in exchange for the playing of certain music on the air. Often these payments were made without the knowledge of station management.



The current concern about "payola" involves very different types of arrangements which don't fall within the traditional notion of that term. Consolidation in the radio industry has given large radio group owners the leverage to force record companies to pay radio stations before the stations will play the music of the record companies' artists. But since direct (but undisclosed) payments would clearly be subject to the prohibition against payola, it is alleged by some that the group owners and record companies may be using alternative, less direct methods to achieve the same end. For example, one large radio group, Clear Channel Communications, has drawn the wrath of record companies since Clear Channel also holds a dominant position in the music concert business. Record companies claim Clear Channel pressures them to use Clear Channel's concert services for the record companies' artists in order to get their artists' music played on Clear Channel stations. As another example, some allege that record companies may be relying on middlemen to make improper payments to the stations for, *e.g.*, advance copies of the stations' music playlists. The Commission's staff has stated informally, however, that such payments are legal so long as there is no *quid pro quo* for airplay.

Whether any of these practices are in fact occurring at all -- much less whether such practices, if they are occurring, are violations of the "payola" rules as they have been enforced over the years -- has not yet been established. Nevertheless, various Congressmen are leading efforts to stop these practices. At presstime Senator Russell Feingold of Wisconsin introduced legislation addressing "payola." The legislation would also reform radio industry practices that have led to higher concert ticket prices and homogenized radio programming featuring only artists with financial clout. Representative Howard Berman of California has called for a reversal of radio ownership consolidation that has concentrated power in a handful of conglomerates, particularly Clear Channel. Representative Berman and others are also concerned about numerous allegations that Clear Channel is "parking" or "warehousing" broadcast stations by using third parties or shell corporations to hold stations which it cannot own under the FCC's multiple ownership rules.

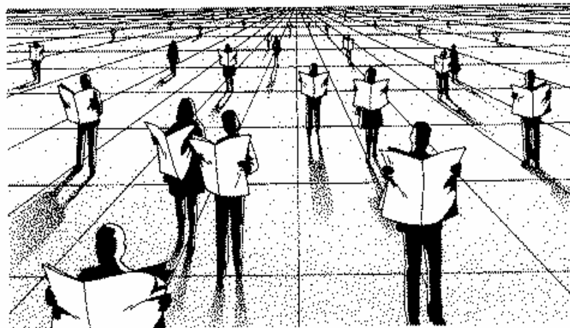
Various industry groups are calling for Congressional and government intervention. A large coalition of musicians, artists, union groups, retailers and labels, including the Recording Industry Association of America (RIAA), American Federation of Musicians, American Federation of Television and Radio Artists, National Academy of Recording Arts and Sciences, and the Future of Music Coalition recently issued a statement calling for Congress and the FCC to make sweeping changes in the broadcast industry. Specifically, they asked Congress to prohibit all payments to stations designed to influence radio playlists, regardless of how such payments are made. They also asked Congress to examine how consolidation in broadcast stations, concert promotion, and entertainment venues has decreased fair market competition for artists, nightclubs, and concert promotion companies. Another coalition of civil rights and consumer groups also recently called on the FCC to investigate the anticompetitive effects of broadcast industry consolidation.

As this issue heats up, if you have questions or concerns about "payola" -- real or alleged -- and how it affects your station, please contact the FHH attorney with whom you normally work or Ann Bavender at 703-812-0438 or bavender@fhhlaw.com.

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

Updates on the News

The Freeze is on -- On June 18, the Commission announced an immediate freeze on "maximization" applications for all TV stations - digital and analog - on Channels 52-59. The goal is to facilitate Auction No. 44, in which the Commission expects to make the spectrum used by Channels 52-59 available to interested bidders. The freeze applies to any application which would result in an increase in the analog or DTV service area of a 52-59 station as defined either in the DTV Table of Allotments, in outstanding licenses or CP's, or in applications on file prior to June 18. Applications were on file by June 18 may be subject to amendment, if the applicant can demonstrate that amendment would be in the public interest. The FCC has suggested that amendments which resolve interference with other stations or which remove mutual exclusivity may meet that standard.



Waivers of the freeze may be available for applications which would permit the co-location of transmitter sites in situations where the Commission is encouraging such co-location (*e.g.*, to reduce construction costs for DTV stations, or to achieve greater efficiency of spectrum use). Waivers may also be available if you can show that waiver is necessary to maintain quality of service to the public. This latter category would include situations where zoning restrictions preclude construction at a particular site, or where unforeseen events (*e.g.*, the September 11 attacks) require relocation to a new tower.

FCC maintains hard line on DTV extensions -- The Commission is sticking to the hard line which it announced (and which we reported on in these pages) last month relative to DTV CP extension requests. In keeping with its new policy which requires a showing that the applicant/permittee has taken all reasonable steps to resolve any impediments to construction, the Commission has, since the announcement of that policy, denied dozens of DTV extension applications.

New Mandatory Electronic Filing -- Effective July 1, 2002, Ownership Report (FCC Forms 323 and 323E) forms for both commercial and noncommercial stations ***MUST*** be filed electronically. Paper versions will not be accepted after June 28 unless accompanied by an appropriate waiver request.