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

Memorandum to Clients

May, 2003 | *News and Analysis of Recent Events in the Field of Communications* | No. 03-05

McCain/Feingold back in play . . . for the moment

New Political Broadcasting Rules in Effect

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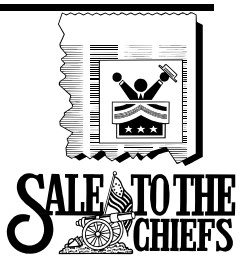

The on again - off again provisions of federal campaign finance reform laws are ***on*** again. The huge *Bipartisan Campaign Reform Act* contained something for everyone, including broadcasters. The law created significant record keeping requirements for broadcasters not only of broadcasts, but of negotiations with advertisers. On May 1, 2003, a federal court in Washington, D.C. declared most portions of the law unconstitutional. Three weeks later, the same court put its decision on hold pending further possible review of the decision by the Supreme Court. The bottom line is that broadcasters (as of mid-May, and until further notice) must comply with record keeping requirements imposed by the law.

*Broadcasters must track and report broadcasts **and** negotiations with political advertisers, and must provide considerable detail about rates, contact information, results of the negotiations, and the content of the advertisting.*

In March 2002, the *Bipartisan Campaign Reform Act* was passed by Congress and signed into law. Almost immediately, nearly a dozen people and organizations, including the National Association of Broadcasters, sued to stop the law from taking effect. More than a year after passage, a 1600-page set of opinions was issued by a special three-judge court in Washington, D.C. The judges reviewed the Campaign Act issue-by-issue. On many issues, the judges disagreed with one another; however, two of the three generally joined forces to create a majority in declaring that topic unconstitutional. The judges released a four page chart to explain who agreed with whom on which issues. Of note, all three judges agreed that the provisions for broadcasters were unconstitutional.

Since the release of the 1600-page opinions, the judges issued another opinion suspending the effectiveness of their May 1, 2003, decision. Again, they did not agree on all issues. For broadcasters, two judges voted that the record keeping rules need to be reinstated. The third judge agreed that most of their previous order should be suspended, but singled out the effect on broadcasters; the judge noted that applying the *Campaign Act*'s record keeping requirements to broadcasters was unconstitutional. Nonetheless, on a two-to-one vote, the record keeping requirements are back in place, for now.

As a reminder, broadcasters are required to track and report not only broadcasts, but also negotiations with political advertisers. Included in the information which broadcasters must compile and report are the rates charged, name and contact information of persons inquiring about political advertising (and corporate control information if the inquiry is from an organization), whether the broadcaster accepted or rejected the offer, and content information. These Federal Election Commission rules, as well as continuing FEC and FCC rules, currently apply to all broadcasters and should be followed, unless the United States Supreme Court advises otherwise.

With the Fall 2003 election season fast approaching, and the 2004 national election campaigns already ramping up, broadcasters should take care to assure that they are ready to maintain all the records which the law requires.

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FCC OK's Reliance On DTV Signal To Qualify for Analog Must-Carry

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A full power TV station has must-carry rights on cable TV systems in the same Nielsen market ("DMA") as the station, but only if the station provides the required "good quality signal" to the cable headends. If the station's over-the-air signal does not have the required strength at a particular headend, the station is not entitled to carriage on that system. However, the FCC has long allowed full power stations to use other means to deliver their signal to a cable headend, such as microwave hops, fiber, translators, or satellite, and qualify in that manner.

Broadcasters have recognized for some time that their DTV signals often cover a broader area than their analog signal, and have talked about using their DTV signal as a means of delivering their station's signal to a headend, thus qualifying for carriage on more distant cable systems. The idea is that the station's DTV signal is picked up over-the-air at the headend, then converted to analog, and transmitted on the cable system like any other analog TV signal. Until recently, however, cable TV operators have often not accepted this means of transmission. It has never been "blessed" by the FCC, and doing so would be seen as a form of "back door" must-carry for DTV, which they oppose. This is likely to change, as a result of a decision recently issued by the FCC's Media Bureau.

The Bureau's Order was a response to a must-carry complaint filed by a station which has an analog station, as well as a simulcast DTV signal on another channel. The station demanded carriage on a particular cable system, and there was no dispute that the analog over-the-air signal did not meet the FCC's minimum strength requirements at the cable headend. The broadcaster offered to use its DTV signal to reach the cable headend, which could then be converted back to analog, for carriage in analog format on the cable system. The cable operator would not agree to this, and broadcaster filed a complaint.

In the recent Order, the Bureau ruled against the cable operator. It held that the station's DTV signal ***could*** be used to transmit the station's programming to the headend, and qualify for must carry, as long as (1) the programming of the DTV signal is identical to that of the analog signal; and (2) the station paid for the costs of conversion equipment at the headend. The Bureau properly noted that this situation is no different, in effect, from a station using fiber to deliver its signal to a headend. The Bureau went on to state, however, that this does not constitute "dual carriage" because ***only*** the station's analog signal is being carried (and ***only one feed*** of the station will be carried on the cable system). The Bureau reaffirmed the current Commission policy that stations with both an analog and a DTV signal are ***not*** entitled to must carry for the DTV signal until the analog license is surrendered.

This Order may be appealed by the cable operator, and while anything could happen, the likelihood of success of such an appeal is very small. Accordingly, where necessary, TV stations should now considering using their DTV signal to qualify for analog must-carry, as long as they are willing and able to fulfill the conditions set forth in the Bureau's Order (*i.e.*, (1) the programming of the DTV signal is identical to that of the analog signal; and (2) the station pays for the costs of conversion equipment at the headend).

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Focus on FCC Fines

By: R.J. Quianzon
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Pirate Sentenced to Jail A federal court in Florida has sentenced a radio pirate to nine months in the brig followed by one year supervised release. The radio pirate had been broadcasting on an FM frequency in Orlando. During February, the same court in Florida sentenced another pirate to 18 months of house arrest. The FCC continues to capture and punish pirates throughout the nation. Two other Florida pirates were spanked with $10,000 fines during May while three of their confreres in New York were dinged for ten grand each for operating FM stations in Brooklyn and the Bronx.

"I Promise I Closed the Gate behind me" The FCC let a New York state AM operator off the hook because he promised that he regularly locked the gate around his antenna. The FCC initially proposed a $7000 fine when one of its agents noticed that the gate around an AM array was open and unlocked. The tower owner filed a statement, under penalty of perjury, stating that he regularly kept the fencing around the tower locked and that he regularly inspected it. The tower owner guessed that a tower engineer may have cut the lock to access the gate and never replaced the same. The FCC accepted the operator's statement under penalty of perjury and eliminated the fine without inquiring how, if the licensee did inspect the tower regularly, he did not happen to notice the missing lock.

Fourth Time is No Charm Most readers are familiar with the frustration which often results from bureaucratic errors at the FCC. However, one station's surrender to the frustration resulted in a $2400 fine. The station attempted to properly register its antenna in January 1999. The FCC returned the January 1999 application to correct an omission. The station resubmitted the application again in August 1999. As an encore, the FCC again returned the application, but this time gave no reason. The station gave up and did not register the tower. Two and one-half years later, an FCC agent showed up at the station and asked why the tower was not registered. The station gave the FCC agent copies of the twice-returned applications to prove that it had tried. The station then tried to register the tower a third time. The third attempt was not surprisingly rejected by the FCC and the FCC fined the station $2400 for failing to register its tower. The station tried a fourth time to register the tower, and the FCC finally accepted the fourth try. However, the fine still stands and the FCC reiterated that the successful fourth attempt did nothing to mitigate the fine for a previously unregistered tower.

More Tower Troubles A company has been fined $200,000 for constructing a monopole tower near a historic site in North Dakota. Although the company had clearance from the city council to stick the single metal rod into the ground and use it to transmit, the state historical society disagreed. After the monopole tower had been attached to the ground, the state society complained that it was detrimental to the view of an historic packing plant, cabin, and other buildings nearby. The FCC chastised the company for not checking with the state society prior to raising the tower and fined the company $200,000 (count it, TWO HUNDRED THOUSAND DOLLARS). Ouch!!! The chairman of the FCC issued a separate statement warning that the FCC will continue to take decisive action to protect environmental or preservation goals.

Other tower fines this month included:

a whopping $10,000 fine to a California AM station for failure to paint one of its four towers (the other three towers in the array were fine);

an almost whopping $8,000 to a West Virginia tower owner for operating two nights with a burned-out red light without notifying the FAA of the outage;

$3000 to an Arkansas station for failure to register the correct tower coordinates;

$3000 to the owner of a Florida tower for failing to notify the Commission of a change in ownership of the tower;

and $2000 to a Texas tower owner for failure to post its ASR number.

Ten Grand for Jumping the Gun And then there's the TV licensee who filed an application, in March, 2003, seeking to specify a new transmitter site. A couple of weeks later, the licensee filed a request for a special temporary authorization ("STA") to operate with the proposed facilities pending action on its application. But in the STA request, the licensee revealed that, in fact, it had already built the proposed facilities and had been operating from them since November, 2002, five months before it filed its application. Oops. The Commission denied the STA and then whacked the licensee for a $10,000 fine for construction and/or operation of a broadcast station without a license.

Look before you leap

Caveat Emptor: Before Buying, Don't Forget To Take A Good Close Look At The Station's Technical Plant

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When purchasing a radio or TV station, the buyer often, and understandably, focuses on the economic and business elements of the transaction. Buyers analyze cash flow and ratings. They review programming options and the depth of the advertising market. From this, an acceptable purchase price is determined. Meanwhile, the lawyers perform a due diligence on the station's FCC record, checking licenses, regulatory compliance, complaints, regulatory fees, and the like.

But one area which can easily be overlooked by the buyer is the station's technical plant: the hardware (and, in some cases, software) which will normally be essential to successful operation. After all, you wouldn't buy a used car without looking under the hood, and the same approach should apply to station acquisitions.

The Georgia Association of Broadcasters published an article last year entitled "Technical Concerns upon a Station Transfer" highlighting these same concerns. Written by Daniel Davis of D Squared Broadcasting Technologies, the article provides a useful checklist of technical items to be reviewed prior to a station acquisition.

Diligent investigation on the technical side can help avoid unpleasant post-closing surprises.

First, retain an engineer to inspect the station's operation and installation. Start with the station's technical documentation. Many of these records should be at the station; if they're not, get copies from the FCC's records in Washington. As Davis points out in his article, "Of utmost importance are FCC required documents." Those include particularly the station's main FCC license, as well as all licensed microwave facilities, such as studio-transmitter links and remote pick-up units.

Just snagging copies of these materials is not enough, however. Once you have them, you, your engineer and counsel should confirm that the licenses accurately describe the station's facilities as constructed. For example, it may be advisable to double check the geographic coordinates of the station's tower, a process which is considerably easier nowadays thanks to reasonably inexpensive GPS gear. Incorrect coordinates may have been entered in the Commission's records when the tower was first authorized, or possibly when it was registered. Such investigation can help avoid unpleasant post-closing surprises.

Along the same lines, double check to confirm that all the station's auxiliary authorizations are accurately associated with the main station authorization in the FCC's records. Those records relative to auxiliaries have been in some disarray for years. Indeed, to correct that problem last summer the FCC required all affected broadcast auxiliary licensees to make sure their licenses were correct in the FCC system. Since auxiliary licenses not associated with a broadcast call sign do not renew automatically with the parent station and may have expired, you should confirm before buying a station that all the auxiliaries you think you are buying are, in fact, still in full force and effect.

Also, are there any outstanding construction permits to modify the station? If so, check the expiration dates of the permits as well as the state of construction. If construction has been delayed, find out why. And if construction has been completed, make sure that a covering license application has been filed (and if not, find out why). You should also determine if the station is operating pursuant to any special temporary authority; if so, find out why and how long the STA will be needed. Tower lighting and registrations should also be checked.

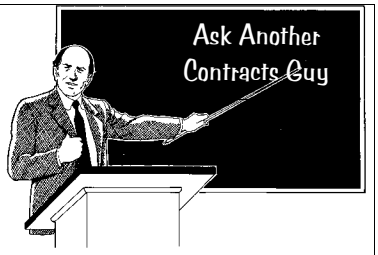
If you are buying one or more towers as part of the deal, bear in mind that when towers are sold, the new owners are required to update the tower registration to reflect the new ownership. Make sure that that has been done.

The seller may possess engineering reports which may not be available at the FCC. As Davis notes, such reports in the possession of the seller should be transferred along with the station's assets. These could include proof of performance measurement reports, copies of engineering studies, coverage maps and, for AM stations, the most recent antenna resistance measurement report. Moreover, Davis advises buyers to make certain that the original technical manuals for all the broadcast equipment, including the transmitters and consoles, are available, with factory test data for the specific transmitter for the station.

Beyond review of the station's licenses and engineering records, it is also advisable to have an engineer inspect the station's physical plant, including the studio facilities as well as the transmitter and tower facilities. Have him/her make a list of the essential equipment, check the performance of the equipment, and test the station's signal.

(Continued on page 5)

Keeping the seller on the hook



Survival Provisions in Sales Contracts

By: Howard M. Weiss
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One often overlooked, but potentially significant, provision in the sales contract is the survival provision. This can be quite simple or exceedingly complex. It addresses how long warranties and other like undertakings "survive" the closing; in other words, the survival provision establishes when the seller can breathe a sigh of relief because no one will be suing it for breached promises or indemnification for something that occurred on the seller's watch prior to closing.

A survival clause is essential for the buyer to extend liability past closing. It is of course not necessary for the seller who would prefer to have that liability end at closing. A typical simple survival clause will provide that all claims will terminate within one to three years after closing. A more complex alternative will feature different survival periods depending on the type of claim. For example, warranties regarding corporate existence, authorizations of the transaction and the existence of no inconsistent corporate documents or agreements might survive forever, as would promises regarding real estate. On the other hand, other types of defaults would survive only through the applicable statute of limitations (*e.g.*, two years for tort matters such as "slip and fall" claims). Statutes of limitation vary from state to state.

If the buyer is aware of a particular issue or type of issue regarding the station, it should consider a longer survival period as to that class of claims. Obviously, the longer the period, the easier it will be to take advantage of supporting evidence to put together a lawsuit.

In sum, a survival provision is good for the buyer to the extent it assures survival post closing. For the seller no news is good news, but as a general rule, if a survival provision is to be inserted, the shorter the survival period the better.

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Remember that radio license renewals begin this year and it will be necessary to certify in the renewal application that the facility does not have a significant environmental impact and complies with the maximum permissible RF exposure limits.

Davis also helpfully notes that many stations use telephone access remote control systems. A buyer should request copies of the program code list or completed programming worksheets for the system. After closing, user and security codes for the system should be changed to prevent former employees from accessing the system. "Without the current codes," Davis cautions, "it could become necessary to completely erase the system memory and reenter the program code, a tedious and time-consuming task."

In addition, computer software discs, recovery discs and manuals should be acquired from the seller, along with a list of all computer user names and passwords. Davis also urges buyers to request a list of the station's telephone circuits and an explanation of the purpose of each circuit. As he notes, "[i]t is possible that the station is paying for more telephone service than necessary. There could also be lines that are no longer in use, although they continue to appear on the monthly statement".

Normally, the seller will provide an inventory of all personal assets being conveyed with the station. Compare that with the list compiled by your engineer. The contract should warrant the performance of the equipment and declare that the seller has title to all property. The contract should also specifically disclose any excluded items that may belong to station personnel or which do not convey with the station. If any equipment is leased, this should be disclosed and copies of the lease agreements should be provided. Bear in mind that these lease agreements will have to be assigned over to the buyer and will likely require the consent of the leasing company. If any money is owed on the lease, they'll expect to be paid before allowing the transfer.

Lastly, review the rights to use the tower. Does the seller own or lease the tower? If it is leased, is the lease agreement assignable and under what terms? Are there other tenants on the tower that could create interference for the station? If so, what are your rights under the lease? If the tower is to be sold, check on whether the seller has been leasing space to other tenants and, if so, make sure those leases are assigned to you. And again, don't forget to update the tower registration once you own it.

Obviously, there is much to be done. But proper attention to such details should eliminate any truly unpleasant post-closing surprises.

For a copy of his article, you may contact Daniel Davis at 706-543-3313 or at dsquared@negia.net.

From spectrum traffic cops to the Green Police?

FCC Chairman Proposes Action Plan To Increase FCC Attention to Environmental/Historical Considerations in Regulatory Activities

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FCC Chairman Michael Powell is getting serious about protecting historic and environmental resources from burgeoning tower construction, and he's putting tower owners' money where his mouth is.

Powell released a statement on May 1 announcing his "action plan", the agency's first comprehensive strategic plan to improve the FCC's ability to comply with the longstanding mandates of the National Environmental Policy Act of 1969 (NEPA) and the National Historic Preservation Act of 1966 (NHPA) while simultaneously accelerating deployment of communications infrastructure, including broadcast towers.

On May 12, a mere 11 days after release of the Chairman's action plan, the FCC released a Notice of Apparent Liability for Forfeiture in the amount of $200,000 to Western Wireless Corporation and its wholly owned subsidiary, WWC Holding Co., Inc., (collectively, "Western") for operating radio transmitting equipment from an unauthorized location. Western constructed a 180-foot tower on a ridge overlooking Medora, North Dakota, near sites that were listed or eligible for listing in the National Register of Historic Places. According to the Notice of Apparent Liability, because Western's tower significantly affects these historic properties, Western was required to comply with the Commission's environmental rules and obtain authorization prior to constructing and operating from its tower. Western did not seek that prior authorization and, as a result, the FCC found that Western did not have authority to operate its tower. Its continued unauthorized operation apparently violates the Communications Act.

Western's is the first case in which the Commission has proposed a monetary forfeiture for an unlawful operation stemming from an apparent failure to comply with the Commission's environmental rules. But it is not likely to be the last, according to Chairman Powell, who has said that enforcement action will be an integral part of the communications tower-siting action plan. And while the first target of the Chairman's action plan was a wireless company, broadcasters on towers that do not comply with NEPA or NHPA should take note: they could be next.

The Chairman's Action Plan consists of the following elements:

1. Increase Agency expertise and modify rules as needed.

- Consider a Notice of Rulemaking implementing a Nationwide Programmatic Agreement for review of effects of communications facilities on historic properties.

- Consider a Notice of Proposed Rulemaking addressing rules regarding human exposure to radio frequency electromagnetic fields.

- Initiate a Notice of Inquiry to assess the impact of communications towers on migratory birds.

2. Improve transparency and communication with external parties

- Develop a Memorandum of Understanding with Tribal representatives addressing best practices for Tribal consultation between the FCC and federally-recognized Tribes on a government-to-government basis.

- Working with Tribes, develop a database that would help tower constructors more easily identify which Tribes may have an interest in a particular location under consideration as a possible tower site.

- Expand outreach to federally-recognized Tribes to ensure that the FCC respects and include tribal interests as the agency moves forward. Develop related training program for FCC personnel.

- Establish liaisons with the staff of other federal agencies that are consulted on, or may have an interest in, environmental and historical preservation review. Create points of contact within the FCC for outside parties to coordinate these activities.

- Work with U.S. Fish and Wildlife Service (FWS) to

(Continued on page 7)

In case you were wondering . . .

Renewal Form 303-S Instructions Clarified

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With the next round of renewal applications breathing down our necks, we offer the following reminders about some of the particulars of the renewal process. In preparing your renewal application, of course, you should be sure both to read the application form over carefully and to answer all questions truthfully. But in so doing, bear the following in mind:

- A separate renewal form must be filed for ***EACH*** station ***EXCEPT*** that FM translator and TV translator licenses may be included in the renewal application for the primary station with which they are associated and with which they share a common license expiration date.

- Each certification in the renewal form covers the ***ENTIRE*** license term ***EXCEPT*** that, if the station license was assigned or transferred during the license term, the renewal applicant's certification covers only the period of time during which the renewal applicant held the station's license.

- The instructions for the question dealing with violations during the preceding license term" have been clarified (in a public notice released late last month) to limit the scope of the "violations" disclosure requirement. For purposes of the license renewal form only, an applicant is required to disclose only violations of the Communications Act or FCC rules which (a) occurred during the license term and (b) have been preliminarily or finally determined by the Commission staff, or a court of competent jurisdiction. In other words, the Commission is seeking information about violations which have already been flagged by the agency or a court in some manner. That would include violations identified in Notices of Violation, Notices of Apparent Liability, Forfeiture Orders, and other similar actions. This does ***NOT*** include "violations" identified by the station itself or in conjunction with the station's participation in an alternative broadcast inspection program, nor does it include violations which were raised by petitioners or objectors but not acted on by the Commission's staff.

(Continued from page 6)

streamline, standardize, and clarify consultation process required under the Endangered Species Act.Consider development of a public agreement to guide these interactions and deliberations.

3. More efficient and effective Commission processes.

- Examine current processes for streamlining opportunities.

- Increase staff resources to address both historic preservation and environmental impact issues

- Recently created new Cultural Resource Specialist position to focus on Historic Preservation issues. Consider retention of staff biologist to address avian issues.

- Consider user-friendly improvements to Commission website to facilitate access to information.

4. Vigorous Enforcement.

- Licensing bureaus to refer appropriate cases to the Enforcement Bureau.

- Swift and effective enforcement to provide an incentive for parties to follow required processes before construction.

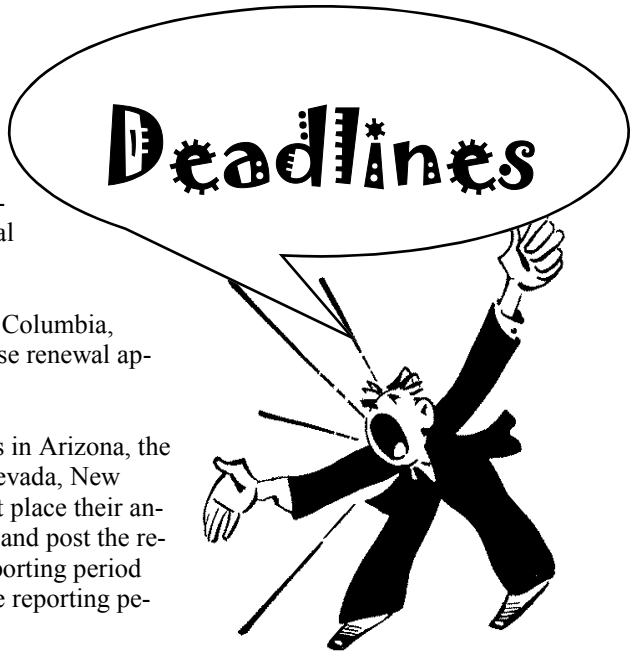
- Enforcement to complement, but not supplant, negotiation.

For years the FCC has declined any aggressive role with respect to the overall issue of the placement of towers in or near environmentally-, historically- or culturally-sensitive areas. While Congress, starting in the 1960s, has long directed the Commission (and other agencies) to consider that issue in connection with their normal activities, and while the Commission did, in response, dutifully adopt a set of environmental rules several decades ago, by and large the Commission has shown no enthusiasm for expanding its regulatory role into the environmental, historical or cultural arenas.

Chairman Powell's "action plan" may reflect a major shift away from that historical reluctance. If the full Commission follows Powell's lead, broadcasters are likely to find that the process of relocating their towers will be subject to a good deal more complication and uncertainty than has been the case in recent memory. Stay tuned for further developments.

May 28, 2003

Lower 700 MHz Re-Auction - Auction begins.



June 1, 2003

Renewal Pre-Filing Announcements - Radio stations located in North Carolina and South Carolina must begin pre-filing announcements in connection with the license renewal process.

Renewal Applications - All radio stations in the District of Columbia, Maryland, Virginia, and West Virginia must file their license renewal applications.

EEO Public File Reports - All radio and television stations in Arizona, the District of Columbia, Idaho, Maryland, Michigan, Ohio, Nevada, New Mexico, Utah, Virginia, West Virginia, and Wyoming must place their annual public file reports in their local public inspection files and post the reports on their websites. Per announced FCC policy, the reporting period may end ten days before the report is due (May 22), and the reporting period for the next year will begin as of the following day.

Ownership Reports - All commercial and noncommercial radio and television stations in the Arizona, the District of Columbia, Idaho, Maryland, Michigan, Ohio, Nevada, New Mexico, Utah, Virginia, West Virginia, and Wyoming must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All reports filed on FCC Form 323 or 323-E must be filed electronically.

July 10, 2003

Children's Television Programming Reports - For all commercial television stations 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.

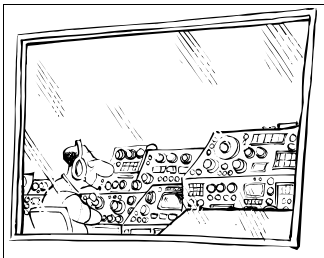
August 1, 2003

Renewal Pre-Filing Announcements - Radio stations located in Florida, Puerto Rico, and the Virgin Islands must begin pre-filing announcements in connection with the license renewal process.

Renewal Applications - All radio stations in North Carolina and South Carolina must file their license renewal applications.

EEO Public File Reports - All radio and television stations in California, Illinois, North Carolina, South Carolina, and Wisconsin must place their annual public file reports in their local public inspection files and post the reports on their websites. 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 as of the following day.

Ownership Reports - All commercial and noncommercial radio and television stations in California, Illinois, North Carolina, South Carolina, and Wisconsin must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All reports filed on FCC Form 323 or 323-E must be filed electronically.



Cost of streaming tentatively set

AM/FM BROADCASTERS CUT WEBCASTING ROYALTY DEAL

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Commercial AM/FM broadcasters have cut a deal with SoundExchange, resolving the longstanding uncertainty about music royalty rates for webcasts of AM and FM broadcasts. The terms of the new deal, which would set the fees for streaming from January 1, 2003 through December 31, 2004 (and continuing on, on an interim basis, into 2005, subject to later adjustment), had not yet been officially published as of press time. However, reports indicated that the terms governing broadcasters' royalties for streaming are nearly identical to the terms which have been proposed for Internet-only webcasters. According to those reports, the new deal gives nonsubscription streamers -- *i.e.*, the group which would most likely include broadcasters streaming their signals onto the internet -- two options: they can pay on either a "per performance" basis or an "aggregate tuning hour" basis.

Streaming broadcasters will have to make their election within 30 days after the final adoption is published in the Federal Register. The default option which will apply if they do not make an affirmative election will be the per-performance basis.

The "per performance" option would cost the streamer 0.07315 cents ($0.0007315) per performance, with the term "performance" defined as "per song per listener". So if you streamed ten songs and during each song you had ten on-line listeners, your gross royalty liability would be 10 songs x 10 listeners x 0.07315 cents, or a total of $0.07315 (*i.e.,* less than eight cents).

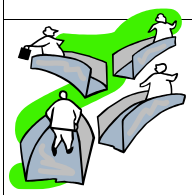
Royalties under the "aggregate tuning hour" option are calculated based on the number of on-line listeners per hour, with the term "tuning hour" being defined as one listener listening for one hour. Broadcasters electing this option for their network streams are then sub-divided into two categories: (a) stations "reasonably classified" as news, talk, sports or business programming; and (b) conventional AM and FM music programming. Royalties for the former, non-music, stations are 0.0762 cents ($0.000762) per Aggregate Tuning Hour. Royalties for conventional music stations are 0.88 cents ($0.0088) per Aggregate Tuning Hour.

Streaming broadcasters would have to make their election within 30 days after the final adoption of the rate structure is published in the Federal Register. An election would remain in effect for the entire two-year term. The default option -- *i.e.*, the option which will apply if you do not make an affirmative election -- will be the per-performance basis.

Finally, the minimum nonsubscription fee would be $500 per calendar year per station or, in the case of a licensee which owns and streams more than five separate stations, $2,500. So even if you are streaming 50 stations, if they are all under your control, your aggregate minimum fee would be capped at $2,500.

The fee structure is ***not*** yet in effect. It must first be published in the Federal Register, after which comments may be submitted. If the structure is not opposed, the new rates will take effect 45 days after the last day of the month in which the Copyright Office publishes the terms a second time. And if the structure is opposed, a CARP proceeding may be initiated to resolve the question of rates. In other words, it may be some time before the new structure is finally in place.

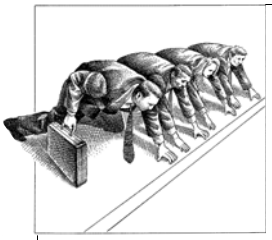
Still, if and when the new rates do take effect, they will establish the royalties for streaming currently underway. If you are now streaming, you should pay careful attention to any developments relating to the royalty rate structure, because eventually those fees will have to be paid.



FHH - On the Job, On the Go

Frank Jazzo and ***Frank Montero*** will be attending the New Mexico Broadcasters convention in Albuquerque from June 26th to June 28th. They will be giving a joint presentation on the FCC's new EEO rules.

Vince Curtis and ***Frank Jazzo*** will be attending the Mississippi Association of Broadcasters Annual Meeting at the Palace Casino Resort in Biloxi, Mississippi. On June 27, ***Vince*** and Roy Stewart will do an update on FCC doings. On June 28, ***Vince***, ***Frank*** and Roy will present a panel on the renewal process.



Gold rush of 2003, coming soon to a Federal agency near you?

Amid Bickering, FCC Rushes Toward Change of Broadcast Ownership Rules

By: Lee G. Petro
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As this edition of the Memorandum to Clients goes to print, the FCC is dotting the "I's" and crossing the "T's" on the new ownership rules to be announced on Monday, June 2, 2003. The new rules are expected to loosen both the national and local ownership limits for television, eliminate the newspaper/television cross ownership ban, and possibly redefine the local radio market for purposes of the multiple ownership rules.

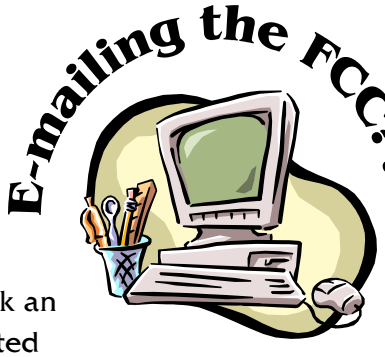
The anticipated changes have some envisioning a "gold rush" for television stations over the next several months, with many small and mid-size television groups either becoming larger, or selling out to large group owners. The elimination of the newspaper cross-ownership ban likely will lead to newspaper chains such as Tribune moving into their local markets to purchase television stations.

The most interesting part of this process has been the back-and-forth between Chairman Powell and Commissioners Copps and Adelstein regarding the vote on the new rules. Commissioner Copps, of course, has been conducting his own rump meetings on ownership in various venues around the country, despite the Chairman's determined non-endorsement of those sessions.

Some weeks ago, Chairman Powell announced that the rules would be released on June 2, 2003. Several Congressmen have expressed concern that the new rules will not be available for review and comment by the public prior to their release. (While the ownership proceeding has technically been subject to the notice-and-comment rule making process, unlike many such proceedings the Commission has not thus far announced with any precision exactly how it is proposing to revise the rules. Some commentators feel that this approach falls short of the FCC's obligations under the Administrative Procedure Act. With appeals of the soon-to-be-announced rule changes almost certain, we may eventually learn whether those commentators are right.)

With those concerns in mind, Commissioners Copps and Adelstein requested that the vote on the new rules be delayed for 30 days. Commissioner Abernathy, who has tended to be a staunch supporter of the Chairman, opposed the request, expressing confidence that the Commissioners have enough information now to make the decision. The Copps/Adelstein request was denied, much to the outrage of those two Commissioners, some members of Congress, and several leaders of the industry groups. Under normal circumstances, any Commissioner can request a one month delay on a particular Agenda Item. Chairman Powell bucked that tradition, however, asserting that the requested extension would only delay the process, leading Copps to complain that the rejection was "really disappointing" and that the Chairman was "run[ning] roughshod over the requests of the American people."

It is highly likely that the new rules will be challenged upon release. It is also likely that the television industry will go through a phase of consolidation harkening us back to the heyday of radio transactions after the Telecommunications Act of 1996. Our best advice is to hold on tight…



Those of you who send email to FCC staffmembers (and you know who you are), listen up!!! The Commission has changed its email addressing protocol. Now, the format for any Commission staffmember's address is "firstname.lastname@fcc.gov". So, to pick an arbitrary example, if you wanted to write to Commissioner Copps (whose old email address was mcopps@fcc.gov), you would use michael.copps@fcc.gov. No middle initials are used (except in the rare instances where two staffers have the same first and last names). But don't bother to change any existing addresses in your address book to reflect these changes - the old addresses will apparently continue to work for the indefinite future.

FM ALLOTMENTS ADOPTED –4/21/03-5/21/03

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
LA	Oil City	20 m E of Shreveport	300C2	02-199	None
MI	Cheboygan	75 m NE of Traverse City	249C3	00-69	TBA
MI	Onaway	30 m SE of Cheboygan	292A	00-69	TBA
OR	Depoe Bay	50 m E of Salem	262C2	02-255	None
OR	Garibaldi	70 m NW of Tillamook	288A	02-255	None
OR	Cottage Grove	14 m S of Eugene	288C3	02-255	None
OR	Veneta	13 m W of Eugene	288C3	02-255	None
OR	Toledo	5 m W of Newport	262C2	02-255	None
AR	Daisy	60 m N of Texarkana	293C3	03-42	TBA
CA	Trona	60 m N of Barstow	255A	03-30	TBA
OK	Muldrow	80 m SE of Tulsa	286A	03-29	TBA
OK	Rattan	140 m SE of Oklahoma City	258A	03-43	TBA
OR	Monmouth	10 m SW of Salem	236C3	03-41	None
OR	Lincoln City	50 m W of Salem	236C3	03-41	None
AL	Northport	2 m N of Tuscaloosa	225C1	01-104	None
AL	Tuscaloosa	40 m SW of Birmingham	225C1	01-104	None
AL	Gardendale	10 m N of Birmingham	247C2	01-104	None
AL	Homewood	5 m S of Birmingham	295C	01-104	None
AL	Dadeville	40 m NE of Montgomery	262A	01-104	None
AL	Orrville	45 m W of Montgomery	300A	01-104	None
AL	Goodwater	50 m SE of Birmingham	248A	01-104	None
AL	Jemison	40 m S of Birmingham	249A	01-104	None
AL	Thomaston	60 m W of Montgomery	249A	01-104	None
AL	Pine Level	30 m SE of Montgomery	248A (change of ref. coord. only)	01-104	TBA

FM ALLOTMENTS PROPOSED –4/21/03-5/21/03

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
NY	Glens Falls	40 m N of Albany	240A	03-105	Cmts - 06/23/03 Reply-07/08/03	1.420
NY	Indian Lake	80 m N of Albany	290A	03-105	Cmts - 06/23/03 Reply-07/08/03	1.420
NY	Malta	20 m N of Albany	289A	03-105	Cmts - 06/23/03 Reply-07/08/03	1.420
NY	Queensbury	50 m N of Albany	289A,240A	03-105	Cmts - 06/23/03 Reply-07/08/03	1.420
CA	Kernville	50 m SE of Bakersfield	289A	03-111	Cmts - 06/26/03 Reply-07/11/03	Drop In
TX	Archer City	120 m NW of Dallas	248C2	03-116	Cmts - 06/30/03 Reply-07/15/03	Downgrade from C1
GA	Savannah	125 m SE of Augusta	226C1	03-119	Cmts - 07/11/03 Reply-07/28/03	1.420
GA	Springfield	23 m N of Savannah	280C3	03-119	Cmts - 07/11/03 Reply-07/28/03	1.420
GA	Tybee Island	10 m SE of Savannah	280C2	03-119	Cmts - 07/11/03 Reply-07/28/03	1.420
TN	Lake City	25 m NW of Knoxville	244A	03-120	Cmts - 07/11/03 Reply-07/28/03	Drop In
TN	Chattanooga	100 m SW of Knoxville	243C0	03-120	Cmts - 07/11/03 Reply-07/28/03	Drop In

Notice Concerning Listings of FM Allotments

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

Late Breaking News

FCC Staff Changes Allotment Policy

In late May, as this issue was going to press, the FCC's staff announced that it is abandoning its previous policy of barring FM channel allotment proposals which are contingent on effective but non-final actions. Under that former policy, if you had an allotment proposal which was dependent on some other recently-adopted allotment, you had to wait until the earlier allotment became final, *i.e.*, no longer subject to reconsideration or review, even though the allotment had technically already become effective.

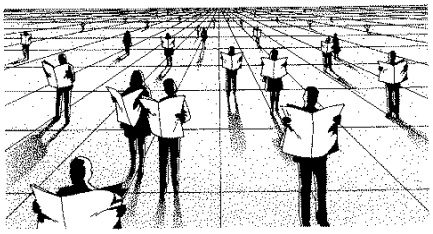
No longer. Now, if the earlier allotment has become effective, subsequent allotment proposals dependent on such earlier allotments will be accepted and processed by the staff. Note, however, that any approval of the later-filed proposals will be subject to the outcome of the earlier proceeding. In other words, if the earlier allotment is reversed or modified on reconsideration or appeal, the later-filed proposal would be subject to rejection if it is not technically compatible with the final version of the earlier allotment. The FCC's staff may in any event bar construction of facilities pursuant to the later-filed proposal in light of such factors as the complexity and scope of the earlier proceeding. And, of course, the staff always has the authority to stay the effectiveness of allocation orders for good cause.

If you are contemplating allotment proposals you should be sure to factor this change into your plans.

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

Updates on the News

In under the wire . . . or not. When the Commission establishes a deadline for, say, the filing of an application, the Commission usually means business. So if you miss the deadline, you'd better have a darn good excuse. That fact of regulatory life was illustrated by two decisions issued the same day in May. In the first, an applicant sought a waiver of the deadline for filing applications to participate in Auction No. 48. The FCC had announced months before that the deadline for such applications was March 21, 2003 at 6:00 p.m. (eastern time), with the window for the filing of such applications opening on March 6. So interested parties had two weeks in which to file their short-form applications, and since those filings were to be completed electronically, applicants had 24 hours per day to take care of business.



The guy asking for the waiver claimed that, when he tried to file his application, he got an error message from the FCC's server and, by the time he had been able to get the problem straightened out with the FCC's tech support folks, the deadline had passed and the window had closed. Which was not surprising, since he encountered the error message when trying to file at 5:55 p.m. on March 21, *i.e.*, five minutes before the deadline. (FCC records showed that he had actually logged onto the filing system at 5:24.)

The Commission didn't waste much time denying this waiver request. The Commission, as it turns out, is not at all sympathetic with folks who choose to wait to the last minute.

By contrast, another applicant seeking to bid in Auction No. 48 fared much better. This second applicant was bounced by the Commission for failing to file its upfront payment by the specified deadline. But according to the applicant, it had done everything it could to get its money into the FCC's hands by sending the money to its law firm nearly a week ahead of the deadline. The law firm deposited the check and, reasonably early on the deadline date, initiated a wire transfer of the payment to the Commission. As far the firm could tell, the wire seemed to clear, and that was that . . . or so they thought. As it turned out, in sending the wire, someone at the law firm had typed the ABA number in place of the account number, so when the wire arrived at the FCC's Mellon Bank depository, it was rejected. But the law firm didn't learn of that until the next day, when it was theoretically too late.

No problem, said the Commission. While it believed that the law firm might have been a tad more diligent, the Commission concluded that the applicant had acted diligently and should not be penalized for any lack of diligence on the part of its law firm.

The take-home message here is that the Commission remains determined to enforce very strictly its deadlines. The fact that the Commission cut some limited slack for an applicant which had done everything it could (and an applicant whose law firm took full responsibility for the lateness) does not alter that message. If you want to file an application, you should be sure to get a fix on the deadline(s) and plan to have your application and all associated materials ready to file well in advance of such deadline(s).

Diversity rampant. Chairman Powell has announced his intention (it's unclear whether any other Commissioners share his intention) to form a "Federal Advisory Committee" which will "assist the [FCC] in formulating new ways to create opportunities for minorities and women in the communications sector." The Committee will advise the Commission, prepare reports, make recommendations, develop "a description of best practices . . . for promoting diversity of participation" and so forth.

MDS/ITFS data on line For those of you interested in keeping up to date - really up to date - with the MDS/ITFS universe, the Commission has started (as of May 19) to post, at its website, daily and weekly databases of MDS/ITFS public access files. The daily postings include only the previous day's transactions; the weeklies contain complete license data for the MDS/ITFS service. If this is up your alley, go to: ftp://ftp.fcc.gov/pub/Bureaus/Wireless/Databases/ or http://wireless.fcc.gov/cgi-bin/wtb-itfsmdsdata.pl. The downloads are available as zip files.

Receiver standard comment deadline Last month we described the FCC's inquiry into possible regulation of receiver standards. The deadlines for responsive comments have now been established. Comments are currently due on July 21, 2003, and reply comments on August 18.

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First Class

MEMO TO CLIENTS NOW AVAILABLE BY EMAIL!

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