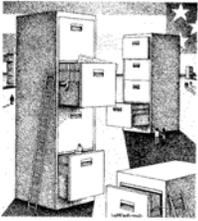


Memorandum to Clients

October, 2003

News and Analysis of Recent Events in the Field of Communications

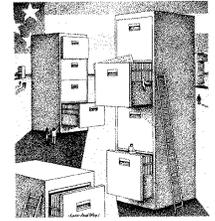
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28 renewal licensees fined \$3,000 each

FCC Enforces Public File Rule In the Name of “Localism”

By: Harry F. Cole
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Who says the FCC doesn't have a sense of humor?

Only a few months ago, the Commission was getting lambasted by just about everybody – citizens, members of Congress, pundits, you name it – for abandoning the concept of “localism” in connection with its multiple ownership rules. So what does the Commission do? In October it whacks a couple dozen radio renewal applicants with fines for public file violations in an in-your-face move that effectively snarls “yeah, we’ve got your localism, we’ve got it right here.”

How did we get to this point, what should licensees do in light of the FCC’s new interest in “localism”, and what does it all mean?

To understand the recent fines, we have to go back to the 1980s, when the Commission adopted the “postcard renewal”. Before then, the then-triennial renewal process involved a long-form application which required the compila-

tion and submission of boatloads of detailed information about each station’s operations. In a hail of deregulatory rhetoric, the Commission abandoned that “long-form” approach in favor of a simple postcard with a limited number of “yes/no” questions. It all seemed so easy.

You would have to be sure that each report was placed in the file by the applicable deadline, and the applicable deadlines stretch back over eight years. Can you really be sure that they were put in on time?

But, as some observers warned years ago, the seemingly easy “yes/no” questions set up a trap. For example, one question on the renewal form asks the renewal applicant to certify that “the documentation required [by the Commission’s public file rules] has been placed in the station’s public inspection file at the appropriate times.” Of course, the desirable answer to that question is “yes”, meaning that the applicant can certify that it has fully complied with the public file rule.

But wait a minute. The public file rule requires that the licensee prepare and place in its public file a significant number of different items at different times over the course of the eight-year license term. There are quarterly programs/issues reports, biennial ownership reports, EEO reports, correspondence from the audience, etc., etc. So in order to be sure that your “yes” answer is in fact accurate, you would have to know for sure that *all* of those materials were in fact placed in the file *at the correct times*. That means that, even if your file does happen to contain 32 separate program/issues reports, you would have to be sure that each one was placed in the file by the applicable deadline, and the applicable deadlines would stretch back over eight years. Can you really be sure that they were put in on time?

And what happens if, being the diligent type, you look through your public file before answering the question on the form, and lo and behold, you find that maybe one or two of the quarterly program/issues reports have gone missing, even if you’re pretty sure that they were placed in the file way back when, when they were supposed to be?

As tempting as it may be simply to answer “yes” to the public file question on the form, that “yes” answer carries with it an

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The circus is (still) in town . . .

Ownership Rules, Re-Re-Redux

By: Alison J. Shapiro
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What's been going on with media ownership? Everything and nothing. While we have seen no earth-shattering developments on this front in the last month, the rich stew of FCC regulation, Congressional consternation and judicial examination has continued to simmer quietly.

Most importantly, the stay imposed by the U.S. Court of Appeals for the Third Circuit in early September relative to the new media ownership rules remains in effect. That means that all the old pre-June 2, 2003 FCC Forms have been reinstated, which is causing headaches for folks who filed applications after that date, but before the stay.

As far as Congress is concerned, it looks like legislation affecting the new media ownership rules will not get to see the light of day. While the Senate has formally disapproved of the new rules, that disapproval will have no significance unless the House adopts the same resolution of disapproval and the President signs off on it. The House does not appear to be in any hurry to join the Senate on this point, although some House Members have publicly claimed that they have a majority in favor of doing so (their suggestion being that a vote is being blocked by the Speaker for political reasons). Whatever may be the case, the House has gone out of session except for one day a week which is being devoted exclusively to work on appropriations bills, so don't expect any action there in the near future. And even if the House were to join the Senate, the White House has made "veto" noises. But a number of observers question whether the President would use his first veto on this type of issue.

On the Senate side, in addition to the resolution of disapproval adopted last month, there have been some separate efforts to address the 35% television ownership cap. Those, however, are currently stuck in an appropriations bill. At this point, it is unlikely that that issue will be taken up by the full Senate. Rather, the bill will be placed in an Omnibus appropriations bill with five or six other departments' appropriation bills that the Senate won't have time to consider. So the Senate will pass one big bill instead of individual bills. But the Chairman of the Senate Appropriations Committee has discussed stripping the 35% cap out of the bill when the Senate goes to conference with the House.

Perhaps the most interesting non-development in October was the indirect suggestion that the Commission's staff does not intend to continue to implement the "flagging" policy which was in effect prior to June 2, 2003, relative to assignment and transfer applications. That suggestion was reported in the trade press in mid-September, but has not been formally confirmed in any public notice by the Commission. Several public interest groups have filed a Petition for Reconsideration charging that the staff's reported refusal to continue "flagging" is a violation of the court's stay of the new rules. As of this writing the FCC has not responded to that pleading.

Further reports on "flagging" indicate that the staff has informally advised parties whose applications were previously subjected to "flag" treatment that those applications will not be processed until the appeals and reconsideration of the ownership rules have been wrapped up – which will likely be some time off. Amazingly, the staff has reportedly advised applicants in that position that they might want to dismiss their old applications, and then re-file them right away, as newly-filed applications will apparently not be subject to "flagging". Please let us know when this starts to make sense.

Meanwhile, mark your calendars for January 12, 2004. That's the date for oral arguments before the Third Circuit.

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Cathedral Contest: Stations fined \$357,500; Contestant Dies

In the second largest fine ever to be handed down by the FCC for broadcast indecency, Infinity has been slapped with thirteen \$27,500 fines (one for each of its stations which broadcast the objectionable programming) totaling \$357,500. The fines relate to the notorious broadcast by Infinity in August, 2002, of a contest in which contestants were encouraged to engage in sex in notable public locations. (See August 2002 *Memo to Clients*). The incident which was the focus of the FCC's and the public's attention involved a live broadcast from St. Patrick's Cathedral in New York describing the, er, contest-related activities of the "winning couple" inside the Cathedral. The New York City police arrested the contestants and a radio announcer.

Three of the five FCC Commissioners issued separate statements referring to the broadcasts as "filth", "callous" and "egregious". One of the Commissioners admonished his fellow Commissioners for being too timid with Infinity and noted that the largest fine ever, \$1.7 million, was also assessed against Infinity. Infinity has 30 days to pay the large \$357,500 fine or appeal the fine.

As for the criminal cases against the participants, the radio announcer pleaded guilty to disorderly conduct, must perform 7 days of community service or can appeal the sentence. Five days before the criminal trial for the "winning couple", the man, a 38 year-old Virginia resident, dropped dead of a heart attack. No appeal is available.

\$55,000 Indecency Fine for Talking Sex with High School Kids Clear Channel has been slapped with two \$27,500 fines, one for each of two morning shows in which its on-air personalities spoke with 16-year-old girls and other students at their Catholic high school about sexual activities at the school. On the first day, the morning call-in show involved the two high school sophomore girls describing sexual activities which, they claimed, took place at various locations in the school. It is reported that the girls were suspended later that day. The following day, six other students from the school called the show and, after discussing the girls' suspensions, continued the discussion about alleged sexual activities at the school.

All five of the FCC Commissioners voted on this indecency case and imposed what three of the Commissioners claimed was the maximum fine available to punish the station. One dissenting Commissioner called for a hearing to revoke the station's license and another Commissioner, although agreeing to the fine, noted that he believed the fine could be much higher. The Commissioners were particularly disturbed that

these broadcasts were directed at children under the age of 18, a segment of the population whom the government is charged to protect. Due to a clerical error, the FCC published the names of all of the children involved in the calls.

No Fine for Four-letter Words In contrast to the two fines discussed above, the FCC found that an utterance by a performer at an awards show was *not* indecent. Upon receiving a Golden Globe award, Bono, the lead singer for U-2, used an expletive several times to describe how great the event was.

In its common use, the expletive is a synonym for sexual activity. However, the FCC determined that the word was being used as an adjective rather than as a description of a sexual or excretory activity and thus was not indecent. Clients should continue to use caution with the Supreme Court's (or George

Carlin's) "seven dirty words" in an effort to avoid an enforcement action before the FCC. However, this decision *does* indicate that the occasional use of those words in a context not involving sexual or excretory activity may be permitted.

4 in 20 Broadcasters Baking the Sky The FCC zapped four different Los Angeles area broadcasters – Infinity, AMFM, Telemundo and Radio One – with fines of \$10,000 each for exceeding radio frequency radiation limits. FCC agents took a trip to an antenna farm in Los Angeles and noted that the area

around the farm was not marked as being a radiation hazard to the general public. The agents got particularly charged up when they discovered that the public areas around the antenna farm, including a post office and public park, were being exposed to radiation at levels which were nearly 200% of the level which the Commission permits for RF exposure to the general public.

The FCC agents returned to the antenna farm the following day and methodically contacted each of the twenty broadcasters who were located there. The stations were ordered to reduce their power sequentially so that the FCC could trace which transmitter or transmitters was or were producing the excess radiation. The agents found that, shockingly, four of the transmitters were generating signals in excess of the FCC's maximum permissible exposure limits. Notably, although one of the four stations was only 10% over the limit, when combined with the other three excess broadcasts, the transmitters were truly lighting up the sky.

Clients are reminded that the FCC is very strict about its radio frequency regulations and protection of the public. Please

(Continued on page 4)

Focus on FCC Fines

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ensure that the your transmitters comply with the FCC's radiation exposure limits which are found at Section 1.1310 of the Commission's Rules.

Note also that, as indicated in the article on renewal preparation (see page 11), certification of compliance with RF standards is an essential element of the renewal application.

Station Fined for Unauthorized Broadcast of Harassing Phone Call

As reported in this column last October, an Arizona radio personality called the widow of a baseball player who had died a few months earlier and asked her whether she had an extra seat to a game or would like to go on a date. An outraged local paper published the FCC enforcement bureau's telephone number and encouraged listeners to call and complain. The FCC took no action regarding, and made no reference to, the content of the broadcast. Instead, the FCC issued the station a \$4000 fine (a pittance compared with the two maximum fines above) for broadcasting a telephone conversation without informing the other party of the broadcast.

Public File Errors Cost 28 Stations Fines As noted in the story on page 1, the FCC fined 28 stations for not adequately complying with public file requirements. Each station was fined \$3000, which is \$1000 less than the standard fine for these violations. The FCC indicated that it was giving the stations a break for voluntarily disclosing their non-compliance in their renewal applications.

Florida Station fined \$10,000 for Broadcasting Too Soon The FCC granted an Orlando television station a construction permit for its digital broadcasts. Recognizing that there may be interference to local mobile radios, the FCC stipulated in the construction permit that the station could **not** conduct program tests until the FCC granted specific authority. The station finished construction and began program tests. It told the FCC that it was

conducting the tests and broadcasting for several months. The station then reported that it had discovered that it was interfering with local mobile radios. Not amused, the FCC pointed out that it had put the restriction on the license specifically to assure that such interference would be identified and corrected **before** the commencement of routine program operations. The station was fined \$10,000 and required to comply with the interference condition placed on the license.

Towers and Antennas The FCC issued numerous fines for tower violations this month. Of particular note:

A tower owner was fined \$3,000 for failing to notify the FCC promptly of a change in ownership. This should serve as a reminder that, when you buy a station and the assets you acquire include a registered tower, you are required to inform the FCC of the change in the registered owner of the tower promptly.

And another owner was fined for having an unregistered 202-foot tower (towers over 200 feet must be registered). The owner claimed that it believed that the tower was only 199.5 feet tall, and it turned out that that was correct – except that that measurement did not include the three-foot concrete base under the tower which, when added to the tower height, pushed the overall height over the magic 200-foot level.

The following other fines were issued this month:

AM power violations (Merced, CA) - \$ 6,000;
Tower painting, lighting, registration (Junction, TX) - \$13,000;
Locked fences around towers (Lamar, CO) - \$ 5,500;
Tower registration (Payette, ID) - \$ 2,400;
Tower lighting, registration (Great Falls, MT) - \$ 8,800
Unlicensed STL (Custer, SD) - \$ 10,000
Unlocked fences around towers (Oshkosh, WI) - \$ 7,000
Tower painting, lighting, registration (Berwick, PA) - \$ 20,000.

On October 22, 2003, the Commission's traveling band went to Charlotte, North Carolina, to hold a public hearing on the importance of localism. As reported in last month's *Memo to Clients*, Chairman Michael Powell created a Localism Task Force to gather information and conduct outreach nationwide. That Task Force has announced that it will take to the road, conducting hearings in various communities throughout the county. The Charlotte gig was the opening performance of the tour.



At press time we had received no reports of exactly what went on at the Charlotte confab. According to the agenda, the Task Force representatives were to hear from several local broadcasters, and provide a "open mike" period for the public to provide information to the Commission.

Next stop on the tour - San Antonio, in December.

Providing the perspective of years of experience in Hispanic media

FHH's Frank Montero Appointed to FCC's Federal Advisory Committee on Diversity for Communications in the Digital Age

We are proud to announce that our own Francisco ("Frank") Montero has been appointed by FCC Chairman Michael Powell to serve on the Federal Advisory Committee on Diversity for Communications in the Digital Age. As reported in last month's *Memo to Clients*, Chairman Powell announced the formation of the Committee in early summer. The mission of the Federal Advisory Committee is to provide guidance to the FCC and Congress on policies and practices that could increase the diversity of ownership and create opportunities for minorities and women in all communications sectors, including media, telephony, wireless, as well as other related sectors of the economy. Specifically, the Committee will conduct hearings, and make reports and recommendations concerning the need for any laws, guidelines, incentives, regulations or other policy approaches to promote diversity of participation in the communications sector.

Frank's appointment is no surprise in view of his extensive work with Hispanic media companies across the country. In addition to representing his individual clients, Frank serves as counsel for both the Puerto Rico Broadcasters Association and the Independent Spanish Broadcasters Association, and as a board member of the Minority Media and Telecommunications Council. Frank also has significant public service on his résumé: he served as the Director of the FCC's Office of Communications Business Opportunities as an appointee of former FCC Chairman Bill Kennard. Understandably, Frank's appointment was endorsed by the Congressional Hispanic Caucus.

On September 29, 2003, the Advisory Committee held its inaugural meeting at FCC headquarters in Washington. Speakers included Chairman Powell, as well as Commissioners Abernathy, Copps and Adelstein. At the meeting, Chairman Powell noted, "The Advisory Committee has an historic opportunity to advance the cause of minority participation in communications companies." Powell also stated that "The Committee members are an extraordinarily accomplished group of leaders with a proven commitment to minority advancement."

During the meeting, Julia Johnson, the Advisory Committee's Chair, announced four subcommittees: Financial Issues, Transactional Transparency and Related Outreach, Career Advancement, and New Technologies. Frank is slated to serve on the Financial Issues Subcommittee, which will assess current practices regarding access to capital, and the Transactional Transparency and Related Outreach Subcommittee, which will assess current practices of how potential investment opportunities in telecommunications industries are identified and how that information is disseminated. The next full committee meeting is scheduled for January 26, 2004.

The Committee is encouraging the public to submit ideas, recommendations or strategies for increasing diversity of ownership and opportunities for women and minorities in the communications sectors. Frank would welcome your comments. He can be reached at 703-812-0480 or at montero@fhhlaw.com.



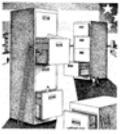
FHH - On the Job, On the Go

On September 23, **Frank Montero** gave a presentation on the multiple ownership rule changes and their impact on the Hispanic broadcast market at a Congressional staff luncheon hosted by Congressman John Conyers and Congresswoman Diane Watson.

On November 5, **Frank Jazzo** and **Harry Martin** will join **Roy Stewart**, Chief of the Commission's Office of Broadcast License Policy, in presenting a seminar on license renewal procedures to the Tennessee Association of Broadcasters in Knoxville.

Gene Lawson recently participated in an Advanced Business Law Seminar in Irvington, Virginia, which addressed, among other front-burner issues, the new standards for management liability and fiduciary duties from the Sarbanes-Oxley Act and reactions to the spate of corporate scandals (e.g., Enron).

And on a non-business note, **Ali Shapiro** will be getting married on November 15. Congratulations are obviously in order. You should also note that she will be taking her husband's name – so when she returns from her honeymoon in December, she will be **Ali Miller**.



(Continued from page 1)

awful lot of baggage which should be tied down before you commit to “yes”.

And let’s just say that you do make the effort and learn that, oops, you are missing one or two quarterly reports. What do you do? Again, the proper approach would appear to be to answer “no” on the renewal form, providing along with that answer an explanatory exhibit describing the nature of the omission and the steps taken to correct it. That would be the honest approach.

That’s what at least 28 renewal applicants did last Spring. And what did the Commission do? It fined them each \$3,000 for admitted public file violations. The FCC did not seem to care that some of those stations admitted to relatively extensive omissions, while others lacked only one or two reports.

Ominously, the Commission explained that the \$3,000 fines reflected a \$1,000 “downward adjustment” from the standard fine for public file violations, an adjustment based on the “voluntary disclosures of the violations”. That, of course, suggests that if a licensee were not as honest and failed to mention one or another omission from its public file, and if the FCC were to find out about both that omission *and* the licensee’s failure to mention it, the fine could be subject to an *upward* adjustment. A worse case scenario would be if the FCC were to uncover public file omissions and then determine that the licensee affirmatively chose not to tell the FCC about those omissions. Such misconduct could be viewed as misrepresentation or lack of candor, the penalties for which can be significantly greater than a \$3,000 or \$4,000 fine.

What, then, should you do when your renewal comes due?

First and most obviously, you should be sure to gather as much factual information as possible. If there isn’t any violation, you should have nothing to worry about – but you should review your files carefully enough to be certain that there have, in fact, been no violations.

If, on the other hand, you do uncover some information which makes a “yes” answer to the public file certification question uncertain, you should consult with the FHH attorney with whom you normally work, providing him or her with all available information and working with counsel to develop an appropriate response. It may be that you will end up fessing up, like the 28 folks who got fined did. In that case you would likely be fined, but probably no more than \$3,000. It may be that you can legitimately answer “yes” to the certification, but still include an explanatory narrative exhibit which lays out what you know,

so that the FCC can’t accuse you later on of withholding inculpatory information. It is unclear how the FCC might handle such an approach.

One thing that you should definitely do, no matter what you have done in the past, is to get a firm handle on what the local public file rule requires. If you do not have a detailed list of the materials that must be in the file and the deadlines by which they should be placed in the file, give us a call. We have recently updated the FHH primer on compliance with the public file rule, and we will be happy to provide you a copy for a modest charge.

Whether you choose to use our updated primer or obtain a list from somewhere else, you should in any event doublecheck the rule’s requirements against what you already have in the file, and you should develop internal procedures and tickler mechanisms to assure that you do not overlook future deadlines for placing additional materials in the file. It would also be handy to maintain a public file log in which you record what you place in the file and

when – that way, the next time your renewal rolls around, certification of compliance with the rules should be a breeze.

But that raises another question: will there really be a “next time”? Recall that, while the “yes/no” question was on the renewal forms in the mid-1990s’ round of renewals, the Commission did not spank everybody with fines, as it seems to be doing now.

One thing that you should definitely do, no matter what you have done in the past, is to get a firm handle on what the local public file rule requires.

Why, then, is the Commission cracking down now? According to Media Bureau Chief W. Kenneth Ferree, the crackdown is “consistent with FCC Chairman Michael K. Powell’s initiative to promote and protect localism in broadcasting.” Sound familiar? Since the first of the year, when the drumbeat over the new ownership rules became deafening, the Commission has attempted to justify those rules on the basis of a concern for localism.

So now, presumably in an effort to demonstrate how really, really dedicated to “localism” the current Commission is, it has singled out the public file rule as a crucial element in a station’s service to the public. And it’s going to enforce that rule with a vengeance.

Of course, analysis of the relationship between the public file rule and the public indicates to some that that rule has virtually nothing to do with the station’s programming service to the public. And we suspect that a survey of all broadcast station would reveal that members of the public have inspected the public files at only a very, very small percentage of those stations. And as far as the concept of “localism” goes, we should bear in mind that the public

(Continued on page 7)

Both notification AND response are now required

New Broadcast Auxiliary Coordination Rules Take Effect

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The FCC's newest prior coordination procedures for the Broadcast Auxiliary Service took effect this month. The procedures are designed to minimize interference between services sharing frequency bands.

With implementation of the new rules, prior frequency coordination procedures are now required for *all* TV and aural BAS and CARS frequency bands. The new rules specifically affect fixed BAS in the bands 944-952 MHz (950 MHz), 2450-2583.5 MHz (2.5 GHz), 6875-7125 MHz (7 GHz), and 12700-13250 MHz (13 GHz). The procedures were already in effect for aural and TV BAS stations in the bands 6425-6525 MHz and 17700-19700 MHz. For the 1990-2110 MHz band, the FCC will continue to maintain procedures that allow for local frequency coordination. However, the FCC's new rules supplement local frequency coordination procedures for fixed systems to require the submission of a certification attesting that all co-channel and adjacent-channel licensees and applicants potentially affected by the proposed fixed use of the frequencies have been notified and are in agreement that the proposed facilities can be installed without causing harmful interference to other users.

Requiring adherence to uniform frequency coordination procedures is expected both to reduce interference between services sharing a band and to ease the transition from analog to digital technology.

Proposed frequency usage must be prior coordinated with existing licensees, permittees and applicants in the area, and other applicants whose previously-proposed facilities could affect or be affected by the new proposal in terms of

frequency interference. Coordination must be completed prior to filing an application.

Coordination involves two separate elements: notification and response. To be acceptable, all applications and major technical amendments *must* certify that coordination, including response from notified parties, has been completed.

The new prior coordination procedures were supposed to take effect on April 16, but were delayed for six months to give licensees time to correct inaccurate information in the FCC's electronic database. The Society of Broadcast Engineers (SBE) had requested postponement of the new rules so that licensees could correct information in the FCC's database, including erroneous or missing receive site information such as geographic coordinates, antenna height, and make and model information. The mistakes were left over from licensing methods antedating the FCC's current Universal Licensing System (ULS). The flaws in those older licensing methods are evident from the fact that approximately 29 percent of all fixed point-to-point BAS license records included some mistaken information. Receive site information was not even required prior to 1974, which is why it was missing in many old licenses. The inaccuracies in the ULS would have seriously impacted prior coordination efforts to avert interference.

The SBE also asked the FCC to waive the \$120 filing fee for modification applications filed solely to provide information missing from the FCC's database, but the FCC denied that request.

(Continued from page 6)

file must be maintained at each station's main studio – but under the rules, any station's main studio can be as much as 25 miles from the community of license, and in some circumstances the studio can be twice or even three times farther away.

So you could make a decent argument that the public file rule is not related to "localism" in any meaningful sense.

But the Commission apparently needs to make some symbolic gesture to demonstrate to its disbelieving critics that the Commission wants to protect "localism". It's convenient to label the public file rule a linchpin to "localism" and vow strict enforcement in the name of that supposedly sacred concept.

How long will this go on? Certainly for as long as this Commission wishes to paint itself as a stalwart defender of "localism". That desire is in turn likely to last as long as the Commission is taking heat for its new ownership rules. Should that particular fracas die down, it is entirely possible that enthusiasm for aggressive enforcement of the public file rule will cool.

Until then, though, you should assume that public file violations will be subject to forfeitures, and you should act accordingly.

This article is a revised version of an article which is scheduled to appear in the author's "Cole's Law" column in Radio World magazine to be published on November 19.

Commercial FM channels available for potential noncommercial reservation

FCC Announces Standards and Deadline For Requests to Reserve Hundreds of Vacant Commercial FM Channels For Noncommercial Use

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The FCC recently opened the door for noncommercial broadcasters to attempt to reserve commercial FM channels for use solely by noncommercial stations. While such reservations have been permitted in the past, they have been extraordinarily rare, and the Commission has never laid out the welcome mat for them. Now, however, the FCC has given noncommercial broadcasters until November 21, 2003 to demonstrate which of 500 existing vacant commercial FM channels meet certain standards (described below) warranting the reservation of those channels for noncommercial operation. The 500 vacant channels include 350 which were scheduled for auction in 2001, but remained vacant after the auction was cancelled. Only seven vacant FM channels allotted prior to August 7, 2000 are affected.

The filing opportunity results from an FCC rulemaking establishing criteria for resolving conflicts among competing applications for new FM stations on commercial channels when those applications are filed by **both** commercial and noncommercial broadcasters. In 2000, the FCC issued its first decision in the rulemaking, requiring competing commercial and noncommercial applicants to participate in an auction in which the highest bidder would be granted the station.

However, a federal appeals court rejected that approach, finding that Congress precluded any arrangement under which noncommercial applicants might be required to pay for their channels. Back to the drawing board went the Commission. And in 2003, it came up with a new approach under which noncommercial applicants are barred from competing for a new FM station on a commercial channel once one or more commercial broadcasters file for that channel. Under that new approach, applications filed by noncommercial applicants will now be dismissed if one or more commercial broadcasters also apply for the channel.

Obviously, this new system puts something of a crimp in the plans of any noncommercial entity which had its eyes on one or more commercial channels. In an attempt to compensate for this, the FCC decided to open a one-time window during which noncommercial broadcasters could request that existing vacant commercial FM channels be reserved for noncommercial use. Such a reservation would

preclude the filing of commercial applications for those channels, thus assuring the availability of those channels for noncommercial applicants. The window opened on September 30 and will close on November 21, 2003.

Requests to reserve a vacant commercial FM station for noncommercial use must be filed with the FCC in the form of a petition for rulemaking to amend the FM table of allotments. Each petition must demonstrate that: (1) maximum class facilities at the allotment coordinates for the channel would provide a first or second noncommercial service to at least 10% of the population within the station's 1 mV/m contour **and** the number of people which would receive first or second noncommercial service is at least 2,000; **and** (2) technical rules preclude use of any noncommercial channel (*i.e.*, Channels 201-220) in the same area.



The FCC established a detailed test for demonstrating such preclusion from using a noncommercial channel. A circle must be drawn centered on the allotment coordinates with a radius one kilometer less than the distance to the predicted 60 dBu signal of a maximum same-class facility. Four equally-spaced locations must be placed on the circle, beginning with zero degrees. The reservation request must show that no station with maximum facilities can be authorized on any noncommercial channel at any of the four locations on the circle or at the city center coordinates for the allotment community. Alternatively, if a noncommercial station can be authorized at any of the five sites (four on the circle and at center city), the reservation request must show that none of the noncommercial stations which could be authorized would provide first or second noncommercial service to at least 10% of the population within the station's 1 mV/m contour. Please keep in mind that this description of the required noncommercial reservation showing is not intended to be complete and interested parties should seek assistance from a qualified engineering consultant.

Of course, commercial broadcasters will have an opportunity to oppose requests to reserve channels for noncommercial use. To successfully oppose a noncommercial reservation, a commercial broadcaster need only identify one location at which a station with maximum class facilities

(Continued on page 14)

November 21, 2003

Proposals to reserve certain vacant FM channels for non-commercial use - As described in the story on page 8, proposals to reserve for noncommercial use certain FM channels currently allotted for commercial use must be filed by November 21.

December 1, 2003

DTV Ancillary Service Report - Each DTV station licensee must file a report on FCC Form 317 with regard to whether it offers any ancillary or supplementary services together with its broadcast service. If a station has offered such services, and has charged a fee for them, then it must separately submit a payment equal to five percent of the gross revenues received and an FCC Remittance Advice (Form 159) to the Commission. The reporting requirement currently is applicable only to DTV licensees, *not permittees*.

Renewal Pre-Filing Announcements - Radio stations located in **Arkansas, Louisiana, and Mississippi** must begin their pre-filing announcements in connection with the license renewal process.

Renewal Applications - All radio stations located in **Alabama and Georgia** must file their license renewal applications.

Renewal Post-Filing Announcements - All radio stations located in **Alabama and Georgia** must begin their post-filing announcements in connection with the license renewal process, and continue such announcements on December 16, January 1 and 16, and February 1 and 16.

EEO Public File Reports - All radio and television stations with more than five (5) full-time employees located in **Alabama, Colorado, Connecticut, Georgia, Maine, Massachusetts, Minnesota, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, and Vermont** must place EEO Public File Reports in their public inspection files. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

Ownership Reports - All commercial and noncommercial radio and television stations located in **Alabama, Colorado, Connecticut, Georgia, Maine, Massachusetts, Minnesota, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, and Vermont** must file a biennial ownership report (FCC Form 323 for commercial stations and FCC Form 323-E for noncommercial stations). All reports on FCC Form 323 or Form 323-E must be filed electronically.

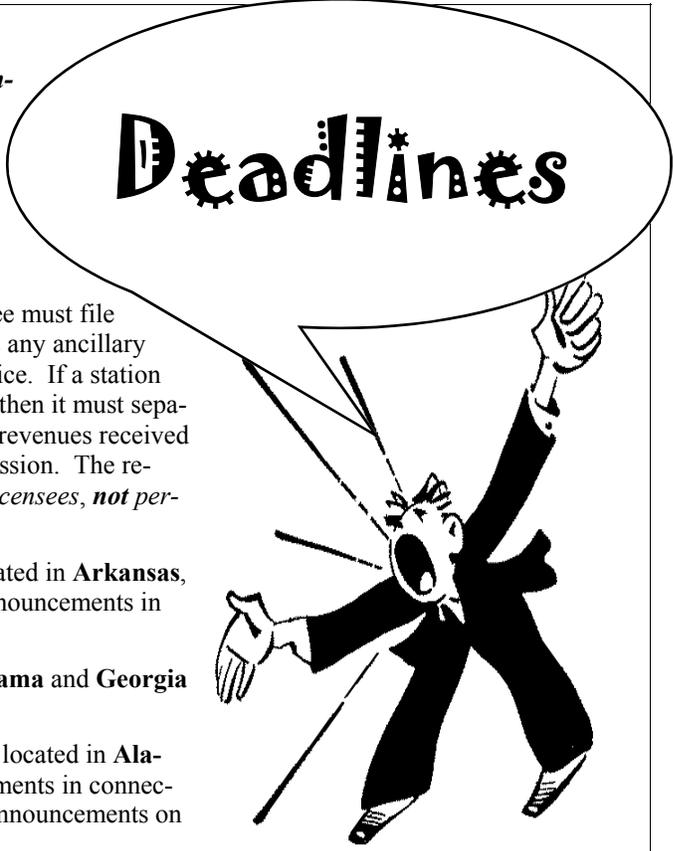
December 5, 2003

Settlement of LPFM Window IV - As described in the story on page 13, settlements of mutual exclusivities among LPFM applications filed in Window IV must be filed by December 5.

January 10, 2004

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.



Deadlines



For those of you whose time is coming

Renewals 2003: Be Prepared

By: Liliana E. Ward
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Have eight years gone by already? For some of you, it may seem that renewals were just yesterday. For others, this is your first time, and you didn't realize you had to do this so soon. Now that the first batch of renewal applications (filed last Spring) has worked its way through the FCC's processing line and emerged relatively unscathed (in most instances), we can give you a glimpse of what to expect.

At first glance, the renewal application seems a simple one -- a few yes/no questions, and maybe an attachment, if your engineer deems it necessary. But don't be fooled by its brevity. Each one of those yes/no questions is a certification, so if you answer "yes" you are promising that you have looked at your station, and its records, and can promise that your answer is 100% accurate.

This means that honesty is a requirement (as it should be), even when you have to report bad things about yourself. For example, in answering the public file question, many honorable and qualified licensees have reported that they missed an issues/programs list or two, or didn't put everything in the public file on time. The good news is that their renewals were granted. The bad news is that the Commission is not rewarding their honesty with leniency. Fines averaging \$3000.00 each have been levied against licensees who reported even minor public file infractions. (See the story on page 1.)

There is some good news, for now. There don't appear to be too many troublemakers primed to file petitions to deny against renewals. While some of the big, obvious targets (for instance, Clear Channel) have drawn some objections in some markets, for the most part all has been quiet on the petition to deny front.

That does not mean, however, that a licensee can or should think that the renewal process is a piece of cake. Proper preparation of your renewal may take some time. Here are some tips to help your filing go as smoothly as possible:

Do your homework – Take the time to really look at your public inspection file. Is everything there? If something is missing, can you recreate it or get a copy? Having this information is important if you want to be accurate in your

certification.

How about violations the FCC has discovered in the past. Do you have an accurate list of all of them? If you have had an adjudicated violation in the last eight years (or since you have owned the station, if you bought it within the last eight years) the FCC knows about it, they just want you to report it. It is important to be as thorough and accurate as possible.

Call an engineer – You will need an engineer to fill out the Commission's engineering worksheet so you can answer your engineering certification. If the engineering worksheet is not sufficient, the engineer will need time to create an exhibit for your application. Don't wait until the last minute.

Prepare your reports – Your renewal application requires that your EEO report and Ownership reports be filed before you file your renewal application. If you need guidance on the new EEO rules and record keeping requirements, we have an EEO primer available that may help you through that process.

Get your numbers ready – You must file your renewals and related reports electronically. To file on CDBS (the Media Bureau's electronic filing system) you need a CDBS account number and password and an FRN (FCC Registration Number) and its password. If you plan on paying electronically, or if you would like the computer to generate your 159 forms, you also need the licensee's EIN or SSN number.

If you cannot find your CDBS account number or password, feel free to open a new account for your renewals. But if you do, be sure to keep a record of the account number and password, as you are likely to need those as you draft the application on-line or attempt to submit any amendments which may be necessary.

If you paid regulatory fees this year, or have filed any applications or paid any fees since December 2001, you should have an FRN. If you don't have an FRN, or don't know what it is, you can check the FCC's website (www.fcc.gov), call the FCC's CORES help desk (877-480-3201,

Does the FCC Know Where to Find You?

As the NAB has recently helpfully reminded its members, a valid mailing address is essential for a smooth renewal process. Each station should confirm that the FCC has its proper mailing address (use the "Mailing Address" link on the Audio Division web page, www.fcc.gov/mb/audio). If necessary, you can request a change by filing FCC Form 5072, which can be downloaded from the FCC's Forms page.

(Continued on page 11)



Update on the streaming front

Court to Broadcasters: You've Got to Pay to Play On the Internet

By: Alison J. Shapiro
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Broadcasters streaming on the Internet have suffered another set-back in their efforts to avoid having to pay performance copyright royalties. On October 17, the U.S. Court of Appeals for the 3rd Circuit affirmed a lower court decision that radio stations must pay performance royalties for music streamed over the Internet, even though no such royalties must be paid for over-the air broadcasts.

You will recall that broadcasters argued that merely re-transmitting radio broadcasts in another medium (*i.e.*, the Internet) should *not* subject radio stations to performance royalties. That claim is based on the fact that broadcasters are generally free to broadcast recorded music without having to pay the owners of the recorded work for the right to do so. (Note that, in this context, the recorded work is distinct from the underlying musical work which is the subject of the recording. For example, a CD featuring Frank Sinatra singing "God Bless America" has two separate and distinct copyrights which may be protected: the copyright reflecting the underlying musical work, *i.e.*, the words and music to the song "God Bless America", and a second copyright reflecting the particular recorded performance of that song on that particular CD. The former copyright is normally held by the song's composer or his/her representative. The latter copyright is often held by the recording company which produced the CD.)

Broadcasters generally pay royalties to the holder of the underlying musical work through agencies such as ASCAP, BMI and SESAC. But broadcasters have not had to pay royalties to the owners of the recorded performance because Congress has viewed the existing relationship be-

tween record companies and broadcasters as mutually beneficial. That is, radio stations derive a substantial benefit from the availability of musical recordings because those recordings provide station with programming. And the holders of the recorded performance copyrights in those recordings derive substantial benefit from the broadcast of their works, which effectively promotes the sale of the recordings. Decades ago Congress decided not to interfere with that relationship, and all parties appear to have prospered reasonably well.



However, in the 1990s the music industry became concerned about the possible uncontrolled distribution of digital copies of recordings over the Internet. As a result, Congress amended the Copyright Act to create new royalty requirements for the digital dissemination of copyrighted works. The broadcast industry argued that those new requirements were intended to apply only to music downloading, and not to music streamed on

Internet radio stations. However, the Copyright Office and now two federal courts have disagreed. In the most recent ruling, the Third Circuit belittled the broadcasters' argument, noting that the broadcasters "must show something more than congressional silence to argue convincingly that Congress intended to lump AM/FM webcasting with over-the-air broadcasting to be exempt from the royalties."

The NAB is now considering whether to appeal further or take the battle to Capitol Hill. We will keep you apprised of any developments. In the meantime, if you have any questions concerning possible copyright obligations arising from streaming, please do not hesitate to call on us.



(Continued from page 10)

Mon.-Fri. 8 a.m.-6 p.m. ET), or call your attorney to obtain the information you need. If you have your FRN but do not have a password, call the help desk to have a new one assigned. This may take more than a day, so don't wait until the last minute. Finally, if you have an FRN and have your password, please check to make sure the password still works. We have encountered a couple of situations in which FRN passwords were reset by the computer (or by a person by accident) and needed "emergency" resets at the

last minute. To check if the password works, select the CORES link on the left side of the FCC's homepage and select UPDATE on the CORES homepage. The computer will ask for your FRN and FRN password. If the computer pulls up your FRN registration, the password works. If the computer tells you the password is invalid, you need a reset.

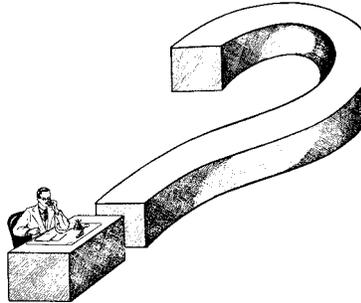
With some planning, the renewal filing process can go smoothly. If you have any questions about the renewal process, however, please feel free to contact us.

You want it when????

Enforcement Bureau Clarifies Due Diligence Request Procedures

By: Michael Richards
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The FCC's Enforcement Bureau feels your pain. Really. Like when you needed something yesterday for a due diligence review that had to be completed today. They feel the pain that comes from a panicked voice on the phone pleading for information that will allow a deal to proceed. And since the Enforcement Bureau does not really want to share your pain, it has issued new guidelines on due diligence requests to speed things along despite the Commission's limited resources.



For starters, the Enforcement Bureau will only respond to requests for information needed for such business transactions as station sales, financing or public offerings. The Enforcement Bureau says it no longer wants to see requests related to license renewal applications.

The Enforcement Bureau will also act parochially in the interests of efficiency. It will no longer give out any information about proceedings handled in any other FCC bureau or office. If you have a matter before another bureau, you must make a separate information request there.

Also, do not ask the Enforcement Bureau to give you information about previous enforcement matters that do not remain open today. You might get lucky and get an answer about matters that have been settled. But, officially, the rule is "such information can readily be obtained elsewhere."

What's more, expect the Enforcement Bureau to respond to requests with a new leaner and meaner due diligence report.

Lean because all you will get is confirmation of the mere existence of pending formal or informal complaints. Nothing more. No information about the nature of the complaint, the complainer or any investigative details.

Mean because you'd better follow the procedures precisely or the Enforcement Bureau might just not help you make your deadline. To get the swiftest service, either an attorney for a licensee, a station owner or the principal of

an entity owning a station must contact the Enforcement Bureau on one of two ways: you can either fax a signed due diligence request to:

Due Diligence Requests
Investigations and Hearings Division En-
forcement Bureau
Federal Communications Commission
202-418-1241

or submit a signed due diligence request attached as a PDF file to an email by submitting a signed due diligence request attached as a PDF (Adobe Acrobat) file to an email addressed to ebduedil@fcc.gov.

Under this new lean and mean policy, the Enforcement Bureau says the request must include the following:

- (1) name of licensee/company that is the subject of request;
- (2) current call sign (and any other call sign by which the facility has been identified since 1999);
- (3) facility identification number;
- (4) community of license/market/market number;
- (5) radio service (*e.g.*, AM, FM, TV, PCS); and
- (6) name, address, telephone number and e-mail address of requesting party.

The Enforcement Bureau warns that snail mail, hand delivery or overnight delivery services will likely delay your request. Use them if you want, but be aware that they are not favored by the staff and will slow things down.

The reward for those who follow the rules is that the Enforcement Bureau will try to deliver a written due diligence report in just five – count 'em – five business days. And no, you can't get an oral report sooner. In fact, you can't get an oral report at all. The written due diligence report is all the Enforcement Bureau will offer.

The bottom line: the Enforcement Bureau wants to make due diligence requests more routine for efficiency's sake. The more that you accommodate these routines, the more helpful the bureau's personnel can be – and the faster you will get the information needed to close your deal.

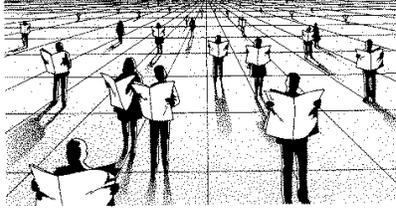
Stuff you may have read about before is back again . . .

Updates on the News

Silent Night, Holy Mackerel (encore) You may recall last year, just around Christmas time, SESAC won a verdict for more than \$1,000,000 for broadcasting a number of songs without permission to do so. (See the December, 2002, *Memo to Clients*.) Efforts by the station to get that verdict reversed have recently been rejected by the judge, so the \$1.2 million dollar judgment still stands.

FM Translator Applications, Where Are You??

If you who were among the cast of thousands who filed FM translator applications last March and you're wondering when you might expect some action, the word we get is, to paraphrase, "not real soon" – unless your application was a singleton. As you may recall, the first round of filings in March merely served to identify applications which were mutually exclusive with one or more others, and applications which were not mutually exclusive. A list of all the applications in the latter category was published by the FCC early last Summer, and parties on that list were required to file their full applications by August. Applicants which filed their full applications early (say, in July) may expect action on their applications in the next month or so. Applicants which filed in August may see action by the end



of the year. And as for the remaining several thousand applications which were mutually exclusive? We understand that the best they can hope for at this point is to see a list of all the mutually exclusive applications sometime in 2004. And once that list gets published, it's anybody's guess as to when the next step in the process might be taken.

LPFM Settlement Window Opened Until December 5, 2003

The Commission has announced that mutually exclusive LPFM applicants who filed in Window IV may enter into settlement agreements designed to eliminate their mutual exclusivity. To take advantage of this opportunity, applicants must file their agreements by December 5, 2003. As an incentive to try to settle, the Commission will waive its prohibitions against major change amendments and the payment of consideration for application dismissals. Mutually exclusive applicants which fail to settle will remain subject to the comparative point system, with ties under that system resulting in shared use of the contested frequency – which makes settlement look pretty good as an alternative.

Special Halloween, 2003 Mystery

THE CASE OF THE MISSING FM TRANSLATOR RENEWALS

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A number of applicants in the first license renewal cycle noted that, despite the fact that they had filed FM translator license renewal applications along with the applications for their primary stations, the translator renewal applications did not appear in the Commission's database (CDBS) at all. Likewise, there was initially no public notice of these applications' grant at the time that the primary stations' renewals were granted.

It turns out that the answer is fairly simple, if rather odd. According to the Commission's staff, when a licensee files a single renewal application which includes both a primary station and its translator – and, according to the renewal instructions, that's the way you're supposed to file renewals for translators commonly-owned with the primary station – the entry for the translator is essentially subsumed under that for the primary station. This treatment is analogous to the way that assignment and transfer applications involving more than one station are treated. Namely, the

assignment application for only the lead call sign appears in the main applications listing for the stations involved. Unlike the assignment/transfer situation, however, there currently is no separate portion of the publicly-available database where one may search for translator renewal applications.

Once the translator renewal application is granted, however, the license expiration date will be updated on the Commission's database. Thus, any applicant wishing to see if a translator renewal application has been granted can check the stated license expiration date on CDBS. Further, the Commission's staff has solved the problem of the public notices, and notices of both the filing and grant of the translator renewal applications should appear along with those of primary stations.

If you have any questions about this or other renewal oddities, please feel free to give us a call.

FM ALLOTMENTS ADOPTED -9/20/03-10/22/03
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State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
AZ	Camp Verde	30 m S. of Sedona	282C	03-160	None
MI	Harrison	8 m NW of Claire	280A	03-176	TBA
PA	Avoca	10 m SW of Scranton	276A	03-140	None
PA	Freeland	30 m SW of Scranton	253B	03-140	None
AR	Cove	10 m W of Red Rock	232A	03-143	TBA
TX	Robert Lee	40 m N of San Angelo	289A	03-146	TBA
TX	Bangs	10 m W of Brownwood	250C3	03-153	TBA
CO	De Beque	35 m NE of Grand Junction	275C3	03-154	TBA
TN	Pegram	20 m W of Nashville	273C1	03-51	None
CA	Ridgecrest	80 m E of Bakersfield	229A	03-145	TBA

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.



(Continued from page 8)

on the allotted channel can be authorized and provide first or second noncommercial service to at least 10% of the population within the station's 1 mV/m contour.

The FCC has released a list of the approximately 500 vacant commercial FM channels for which the FCC is accepting requests for reservation as noncommercial channels. A copy of the list is available on our website

at www.fhhlaw.com or may be requested from the FHH attorney with whom you normally work. If you have any interest in either preserving one of the listed channels for commercial use, or possibly in seeking to have one of the channels reserved for noncommercial use, you should take a close look at the channel **now** in light of the showings which the Commission has announced. The opportunity to seek reservation will close on November 21, so time is particularly short on that front.



Calendar Note

FHH will be closed both on Thanksgiving Day, November 27, *and* on Friday, November 28. Our offices will be open on Veterans' Day, November 11.

