

# Memorandum to Clients

November, 2003

News and Analysis of Recent Events in the Field of Communications

No. 03-11



## Broadcast Flag Approved

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In a high-profile slugfest between Hollywood studios, on the one hand, and consumer and high tech interests, on the other – with broadcasters caught in the middle – the FCC has approved the use of DTV “broadcast flags”. The term “broadcast flags” refers to computer codes which are embedded in TV programs when they are produced; the “flags” are designed to prevent the unauthorized retransmission of digital TV programs on the Internet. Score one for Hollywood, which threatened to withhold fully-featured digital television programming until it was given piracy protection from Internet distributors of bootlegged content.

digital flag equipment will become increasingly prevalent and, ultimately, ubiquitous. The digital flag rules will allow for digital cable reception without a set-top box, as well as the full panoply of services that digital TV will offer.

*By July 1, 2005, anything that has a television tuner in it must be equipped to allow digital flags to function.*

The good news for broadcasters is that they need do nothing additional, as programming will be produced with digital flags built-in. Only when broadcast stations produce their own programming must they decide whether or not to incorporate a broadcast flag into that programming. This means no station need purchase additional equipment unless it wishes to protect content that it produces.

By July 1, 2005, anything that has a television tuner in it – whether it’s a TV set, a VCR, DVD recorder or a computer – be equipped to allow digital flags to function. Anything that doesn’t have a tuner does not have to accommodate these security measures. The FCC says old equipment will continue to work, so consumers won’t be forced to buy new equipment – although as they upgrade,

But in a tactical retreat, the FCC steered its flagship into safe harbors, putting off for another day deciding the outcome of some of the most contentious issues surrounding full deployment of the “flag”. The FCC has initiated a “further rulemaking” to decide the many issues arising from the simple reality that television sets and computers will become increasingly intertwined and less distinguishable in the next few years.

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In that rulemaking, the Commission will take up cable operators’ desire to digitally encrypt “basic tier” service – the cheapest cable service that always includes over-the-stations. Cable operators say this will allow them to offer cable service as the core of a “home network” that brings DTV, broadband Internet and other services to consumers. Currently, cable systems are banned from encrypting basic tier service.

The Commission is also seeking comment on concerns raised by the Electronic Frontier Foundation (motto: “defending freedom in the digital world”) that FCC further action on digital flags not hinder the development of improved software affecting not only broadcasting, but all Internet-based services.

The most hotly contested issues put off for another day involve how to allow consumers to continue to exercise the kind of rights they now enjoy – to record broadcast programming and view it at another time or in another place. Consumer groups have complained that a digitally flagged program re-

(Continued on page 5)



*Local-palooza?*

## FCC Localism Tour Cranks Up

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**T**he tents went up, the chairs were unfolded, the jugglers and the fire-eaters got set to perform, and the ringmasters ran the show on October 22, 2003, in Charlotte, North Carolina. Chairman Powell, and Commissioners Copps and Adelstein, made the trip to Charlotte to kick off the first of a series of town meeting-type get-togethers supposedly designed to provide a forum for the government and its citizenry to exchange information and opinions about localism in broadcasting.

Representatives of large broadcasters, such as Liberty Corporation, Infinity Broadcasting, and NBC, and small and noncommercial broadcasters all spoke to the importance of localism. In addition, Congressman Watt (D-NC12) and Congressman Price (D-NC4) attended and gave brief remarks noting the importance of local broadcasters and the need for more local programming and being responsive to the needs to the local community. The Commission also reserved an hour of time for the public to speak, including national country music star Tift Merritt. Ms. Merritt's music is allegedly not aired on the local country stations because her record company would not pay large radio stations for the airtime. The webcast of the hearing can be found on: <http://www.fcc.gov/realaudio/publicforums.html>.

One of the underlying themes of the comments presented by the Commissioners and the Congressional representatives was that the North Carolina radio stations' renewal applications are currently pending, with the opportunity for public comment on those applications closing on November 1, shortly after the conference. In that connection, the Commission released a three-page guide, entitled "Public Participation in the License Renewal Process" which provides detailed information on how and where to file petitions to deny and informal objections against renewal applications. This guide is posted on the Commission's website at: [http://www.fcc.gov/localism/renew\\_process\\_handout.pdf](http://www.fcc.gov/localism/renew_process_handout.pdf).

Various speakers from the private sector generally cluck-clucked about the importance of localism, with each of the broadcast executives not surprisingly assuring the audience that their respective stations are especially concerned about serving the needs and interests of the local audience. Ms. Merritt's allegations concerning a perceived connection between her lack of airplay and her inability to pay for airtime – a subject which would seem to be of at least some importance in light of recent reports of increased attention to payola allegations – did not seem to attract the attention of the Commissioners in attendance. And in the end, everybody went home.

The precise purpose of these dog-and-pony shows is not entirely clear. Obviously, the Commission wishes to create the impression that it attaches considerable importance to the theoretical concept of "localism", but the Commission has already made that clear. Field trip junkets are hardly necessary to re-make that point. And broadcasters who appear at these confabs know in advance that "localism" is viewed as a "good thing" by the agency, so it's very unlikely that any broadcaster is going to say anything that might suggest that her/his operations are anything but 1000% local. And any member of the public who might wish to express criticism about one or another station will simply be invited to file a petition or objection in connection with that station's renewal, an exercise which historically serves little purpose other than to spin wheels and generate attorneys' fees.

Still, the next meeting is scheduled to occur in San Antonio in December, although the specific date has yet been set. We will provide a summary of the high-air balancing rodeo from San Antonio once it is available.

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- Last December, this column reported that an AM license in Moultrie, Georgia, was at risk of being revoked by the FCC. The FCC had sent an agent to investigate the AM station and found numerous operational problems with the station. The agent also discovered that the station was not being run by the actual licensee, but rather by a potential buyer.

A party to this proceeding claimed that the licensee and a potential buyer had entered into "an oral time brokerage agreement." When the licensee and the potential buyer could not agree on a selling price for the station, the potential buyer cut a deal with the licensee's major lender. The potential buyer purchased an outstanding loan from the lender and foreclosed against the licensee. The potential buyer advised the FCC that it had an "oral TBA" and now owned the property and equipment of the station. Yet another layer of fun was added when the first potential buyer decided that it did not have sufficient time to devote to broadcasting and sub-leased all of the equipment and entered into a further TBA with a third party.

The FCC sent an order demanding an explanation to the original station licensee and also to the potential buyer. As we reported last year, the original licensee was entitled to a hearing "to explain the circumstances and the FCC would have the burden of proving that misconduct did occur."

In the end, the original licensee did not explain the situation to the FCC. In fact, the licensee refused to tell the FCC *anything*. FCC records indicate that officers of the licensee received FCC Orders demanding an explanation, but chose to ignore them. Although the FCC's description of this station's operations indicate that there were technical violations and unauthorized transfers of control of the station, the license was revoked because the licensee never responded to the FCC.

Although this is an extreme case, clients are reminded that any decisions involving a change of control in a licensee's ownership, programming, personnel and finances should be reviewed carefully to ensure that FCC regulations are met. And just as importantly, licensees should respond to inquiries which are directed to them by the federal agency which regulates them.

## Focus on FCC Fines

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- A noncommercial educational FM station faces a \$4000 fine for failing to properly disclose the rules of a contest it conducted. FCC rules specify that licensees who conduct contests must fully and accurately disclose the material terms of the contest and must conduct the contest substantially as announced. In this instance, the station -- a community college -- conducted a contest during a pledge drive and did not make it clear to listeners that pledges were not required in order to enter the contest. The college also stated that it placed the rules for the contest on its internet web site; however, it did not post the rules until two months after the contest was over. Clients are reminded that the FCC provides some flexibility with its contest rules, but the rules still impose clear requirements governing the conduct of contests, perhaps the clearest of which is that the material terms of the contest must be disclosed. In the design and implementation of any station-conducted contests, licensees should be careful to specify precisely how the contest is to be conducted and winners determined, and licensees should then be equally careful that those terms are all communicated to the station's listeners.

-The FCC continues to fine pirates for unauthorized operations at the rate of \$10,000 per violation. An Orlando pirate -- aptly named Rum Runner Lounge -- was fined for operating at 95.9 MHz and a southwest Florida pirate, using his real name, was fined for operations on 100.5 MHz. The FCC continues to fine radio pirates and occasionally confiscates their equipment. Presumably if the FCC had a brig, it might even throw the pirates in, since flogging and keelhauling might present Eighth Amendment "cruel and unusual punishment" problems.

FCC agents continue to stumble across antennas that are improperly painted or which do not display the FCC assigned tower registration number or contact information. Stations which have been fined this month include: \$11,000 Bay Minette, Alabama - failure to post registration number and EAS violations; \$ 10,000 Cabo Rojo, Puerto Rico - faded and chipped paint; \$ 3,000 Wetumpka, Alabama - planks missing from perimeter fence; and \$ 2,000 Marshall, TX - deteriorating orange and white paint bands.

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*First a freeze on minor mods, and then . . .*

## New and Major Change AM Window Set to Open in January

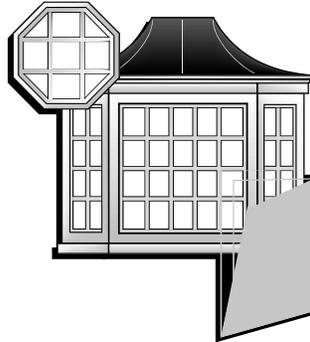
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**T**he Commission has announced an auction filing window for proposals for new AM stations and major modifications to existing and authorized AM facilities. The window will be open from 12:00 a.m., Eastern Time, January 26 to 6:00 p.m., Eastern time, January 30, 2004.

To avoid the possibility of mutual exclusivity with new and major change applications submitted during this auction filing window, the Media Bureau will institute a temporary freeze on the acceptance of AM minor change applications. The freeze will start at 12:01 a.m., Eastern time, January 12, 2004, and will remain in effect through January 30, 2004. Proposals submitted in the filing window must protect all minor change applications filed before January 12, 2004. Any AM minor change applications filed during this freeze will be dismissed.

To participate during the open window period, all applications for new or major modification of authorized facilities must file an FCC Form 301 application (Section I and Section III-A Tech Box, only) and an FCC Form 175. Both forms must be filed electronically and no fees will be due at the time of filing. Note that

applicants must reference the file number of their Form 301 application in their Form 175 application or the Form 301 application will be dismissed. Similarly, applications that do not contain the required engineering information by the close of the filing window will not be considered. No amendments to the AM new or major modification filing window 301 application, technical or otherwise, will be accepted between the close of the application filing window and the public



release of the public notice using the mutually exclusive application and the close of the specified settlement period.

In view of the relatively complicated AM allocation rules, if you have any interest in filing an application during the window, you should take immediate steps to determine what, if any, facilities might be available to you. The determination ordinarily requires a detailed study by an engineer familiar with the rules. If you have any questions about how to get started in this process, feel free to call on us for suggestions.



*Court says "yes"*

## All-Digital TV Tuner Rule Upheld

**All consumer sets must include DTV by 2007**

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*A new voice for Latino broadcasters*

## A New Broadcasting Association is Born

**FHH's Frank Montero at the helm**

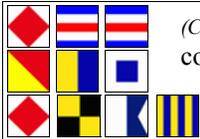
**A** group of independent Spanish language broadcast companies, as well as financial institutions, networks and other service providers to the Spanish media industry, have come together to form the Independent Spanish Broadcasters Association (ISBA). And serving as ISBA's acting Executive Director is none other than FHH's Francisco Montero.

The Association hopes to promote and develop ownership, business opportunities and access to capital for independent Spanish language broadcasters in the face of massive industry consolidation. ISBA will also foster employment and management opportunities for Hispanics and Latinos in the media industry and related industries.

The Association is open to TV and radio broadcasting companies, financial institutions, networks and other ser-

vice providers which focus on the growing Hispanic market in the United States. However, the primary membership focus will be independently owned non-publicly traded Spanish language broadcasting companies. ISBA was formed to give a voice to independent Spanish language broadcasters in their effort to increase opportunities for capital formation, acquisitions and advertising revenue.

Frank Montero has held a number of positions through which he has helped to promote increased opportunities for Latinos and others. He currently serves on the Executive Committee of the FCC's Federal Advisory Committee on Diversity in the Digital Age. Anyone interested in information on ISBA, including materials on how to become a member, should contact Frank at (703) 812-0480 or by email at [montero@fhhlaw.com](mailto:montero@fhhlaw.com).



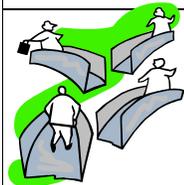
*(Continued from page 1)*

corded in the living room may not play in the bedroom or at a neighbor's house. The FCC seeks comments on establishing a "personal digital network environment" so the Internet could be used to view recordings to which you are entitled where and when you want, without allowing you to exchange the recordings through file sharing.

Moreover, many public interest groups, together with FCC Commission Michael Capps, complain that the hallowed tradition of clipping excerpts from news reports for political or civic purposes or criticism could be compromised if the Commission allows too much digi-

tal flag protection. So far, the Commission has not barred the use of digital flags on news and public affairs programs – one of the most common genres of locally-produced television programming. But this issue is likely to percolate as the multi-media digital culture of the Internet continues to grow and supplant more traditional ways of communicating ideas and information.

As we've seen with music file sharing, these kinds of issues promise a battle royal. If you want to raise your flag in these proceedings, please let us know. Comments are due January 14, 2004; replies are due on February 14.



### FHH - On the Job, On the Go

**Frank Jazzo** and **Hope Cooper** of the FCC's Media Bureau conducted a political broadcasting seminar for the New Mexico Broadcasters Association in Albuquerque on Friday, November 21.

### Holiday Reminder

FHH WILL BE CLOSED ON NOVEMBER 28 (THE FRIDAY AFTER THANKSGIVING)  
AND DECEMBER 26  
(THE FRIDAY AFTER CHRISTMAS).

WE WISH YOU SAFE  
AND HAPPY HOLIDAYS.



Agreement may help FCC identify tower violations

## FCC and NIMA To Share Tower Data

By: Jennifer Wagner  
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**T**owers are multiplying across the countryside like rabbits, and tracking such proliferation is like herding cats. It's been difficult for the FCC and other federal agencies to keep watch over who is building what where, so some of those agencies have now decided to join forces. In light of that, it would be a good idea for broadcasters to make sure they have all their ducks in a row.

The FCC and the National Imagery and Mapping Agency (NIMA) entered into a Memorandum of Understanding in late October to exchange unclassified database information on tower locations on a quarterly basis. The two agencies will also work with other federal agencies to ensure that the comprehensive information they compile is available for national security and aircraft navigation safety.

Under the Memorandum of Understanding, the FCC will provide information contained in its Antenna Structure Registration (ASR) database. The ASR contains information about antenna structures throughout the United States.

The FCC's rules require that the owner of any proposed or existing antenna structure must register the structure with the FCC if it is used by a FCC licensee and if it requires notice of proposed construction to the Federal Aviation Administration (FAA). NIMA is a national intelligence and combat support agency that provides information related to physical features and geographically referenced activities in support of national security.

The FCC intends to use information from NIMA to improve the accuracy of its ASR database and to monitor ASR compliance. The information will be made publicly available through agency databases, and may be particularly valuable to licensees interested in collocating facilities. In the meantime, broadcasters should review information regarding their structures in ASR and make sure that it is complete and accurate.

Adoption of the Memorandum of Understanding has been in the works for a year. The agencies initially com-

pared databases in May and found 437 possible tower sites in the NIMA database that would require registration under the FCC's rules but were not entered in ASR. That raised red flags for the FCC and resulted in further investigation and notices sent to the folks controlling those advising them of possible FCC rule violations.

Additions to those same agency databases will now be compared every three months. NIMA will forward information that appears on its list but not in the FCC's data-

base to the FCC for review and possible enforcement action. If the FCC finds that a site referred to it by NIMA is not in compliance with FCC rules, the FCC will issue a Notice of Potential Violation letter asking the site owner to bring its tower structure into compliance with FCC rules within a specified time period. If the site owner does not comply, the FCC could then issue a Notice of Violation, which may include a fine and other penalties.

FCC staff has noted that most violations will likely result from the construction of new cell towers, whose aspiring en-

trepreneurial builders are often not as well-versed in FCC rules and regulations as established broadcasters. However, FCC staff has also noted that review of the FCC's ASR database would be prudent for broadcasters.

As we have chronicled in these pages for years, the FCC is not shy about levying fines for tower-related violations, including failure to register a tower structure. The likelihood that the Commission might identify any particular unregistered tower has, however, been somewhat limited, largely because of the limited resources available to the Commission. The Memorandum of Understanding gives the FCC a new and effective source of information concerning potential violations, a source which will be on the lookout for potential violations and which will be making its updated information available to the Commission on a quarterly basis. If you are a tower owner and are not absolutely confident that the registration status of your tower(s) is in apple-pie order, you may want to take the time now to doublecheck it.

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*The Memorandum of Understanding gives the FCC a new source which will be on the lookout for potential violations and which will be making its updated information available to the Commission on a quarterly basis.*

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*A blast from the past*

## Payola In The Headlines Again

By: Ann Bavender  
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**R**ecent remarks by Senator John McCain (R-AZ) and FCC Commissioners Jonathan Adelstein and Michael Copps have put “payola” in the headlines again. As we reported last year, “payola” has been a sleeper issue for decades, but changes in the broadcast industry brought it back to the front burner, with Congress and the Commission possibly prepared to turn up the heat.

“Payola” is the acceptance of (or agreement to accept) money, services or anything of value in return for broadcasting music or other programming disclosing the acceptance on the air to the broadcast public at the time of broadcast. The Communications Act and FCC regulations have prohibited “payola” for decades. Initially it came in the form of payments or gifts by record companies to radio station programming directors or DJs in exchange for the playing of certain music on the air. This was often done secretly without the knowledge of station management.

In recent years, “payola” has allegedly taken new forms. For example, last year some industry observers suggested that consolidation in the radio industry had given large radio group owners the leverage to force record companies to pay radio stations before the stations will play the music of the record companies’ artists. But, according to those observers, the stations sought to skirt the prohibition on “payola” by accepting payments from the record companies directly, but rather through third parties who claim that they are paying the stations, on behalf of the record companies, for the privilege of consulting for the stations and to obtain advance copies of the stations’ music playlists.

This month, still newer alleged forms of “payola” have made headlines. A newspaper article revealed that at least one TV station is charging guests to be interviewed by its news anchors on what looks like a regular interview show. While that pay-for-on-air-interview was disclosed in the credit roll at the end of the program, the initial press re-

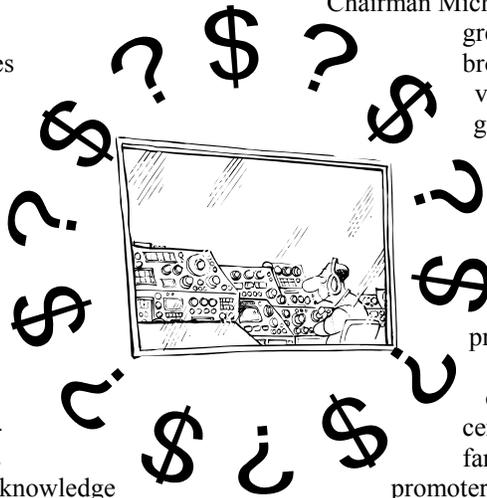
ports questioned whether the quick-moving, teensy type of the credit really alerted viewers to the practice. Another newspaper reported that radio stations are requiring artists to appear at concerts sponsored by the stations in order to be played on the air.

After reading the articles, Senator McCain wrote to FCC Chairman Michael Powell asking “whether Congressional action is necessary to ensure broadcasters do not continue to deceive viewers through such ‘sham’ programs...or to preclude radio stations from demanding performances from musicians as compensation for air time.”

FCC Commissioner Copps responded that pay-for-interview practices warrant an official inquiry.

FCC Commissioner Adelstein criticized the pay-for-interview and concert-for-air time tactics, but then went farther, questioning the “independent promoters” system which had been a focus of some discussion last year. In Adelstein’s view, it is curious that “independent promoters” pay radio stations for the privilege of consulting them, since in most industries the company receiving the benefit pays the consultant. He cited payments of \$400,000 annually to big-market stations and an annual record industry cost of \$150-300 million. Of course, the promoters view their situation differently – as they see it, their payments get them advance access to important internal data, data which are important to their ability to serve their own clients, the record companies.

While last year’s complaints regarding “payola” practices by large radio groups apparently contributed to the FCC’s decision to further restrict its ownership rules for radio, it is not yet known how the FCC will respond to the current calls for inquiry. But when the dust settled last year, despite all the expressions of interest by members of Congress, no formal action expressly directed against “payola” in any of its forms was taken. It is unclear whether the renewed concern about such practices will get any farther off the ground this year. Stay tuned.



**December 1, 2003**

- 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 ancillary/supplementary 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, permittees.

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

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

- 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.

- 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.

- 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.

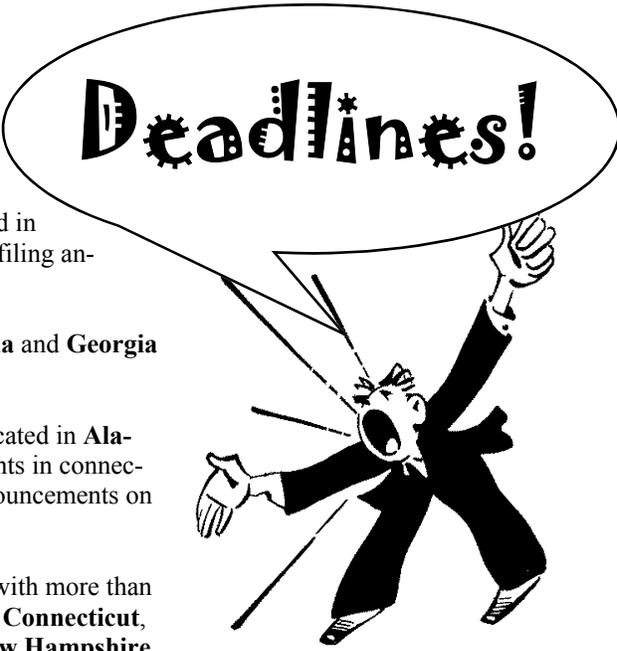
**January 10, 2004**

- 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.

- 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.

**January 26-30, 2004**

- As indicated in the article on page 4, between January 26-30, 2004, the Commission will permit the filing of applications for new AM stations and major changes to existing stations.



**Deadlines!**

(Continued on page 9)

*Signs point to yes, but some must concentrate and ask again later*

## FCC GRANTS SOME DTV EXTENSIONS, DENIES OTHERS

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**T**he Commission has recently granted an additional six-month extension of time to complete construction of digital television (DTV) facilities to a group of 104 stations, while it denied extensions to seven others and deferred any decision with regard to 30 TV satellite stations.

Because the applicants were seeking their third construction permit extensions, the applications were considered and acted upon by the full Commission. While the Commission had earlier delegated authority to the Media Bureau to grant two six month DTV permit extensions, it determined that extension request beyond the first two must be considered by the full Commission. Since the deadline for all stations to have begun DTV transmissions passed over eighteen months ago, most stations still not able to be on the air with at least minimum DTV facilities are now in the position of seeking a third extension.

The Commission accepted a variety of justifications for the requested extensions. They included such factors as adverse weather, unexpected equipment failures, delay or failure in delivery of equipment, and natural disasters. Some stations claimed that they faced difficulties in ob-

taining necessary local, state, or federal approvals needed for the construction of new towers, although the stations involved have diligently sought to overcome those obstacles. Other stations were said to be awaiting Commission action on modification applications, channel change rule making proceedings, STA requests, or assignment applications. Further extensions were granted to another group of stations due to ongoing financial difficulties which the stations were working to resolve. Some of the licensees had proposed a staggered timetable for completing construction of the multiple stations owned by the same parties.

Thirty other stations which operate as "satellites" had their construction deadlines deferred. Satellites are terrestrial stations which are authorized to retransmit all or part of the programming of a parent station, which generally is co-owned with the "satellite". In a pending DTV rule making proceeding, the Commission has asked for comment as to whether such stations should be allowed to turn in their digital authorizations, forego simulcasting, and simply make an overnight switch to DTV broadcasting at the end of the transition period. Given the pendency of this issue,

*(Continued on page 10)*

**Deadlines!**



*(Continued from page 8)*  
**February 1, 2004**

- Radio stations located in **Indiana, Kentucky, and Tennessee** must begin their pre-filing announcements in connection with the license renewal process.

- All radio stations located in **Arkansas, Louisiana, and Mississippi** must file their license renewal applications.

- All radio stations located in **Arkansas, Louisiana, and Mississippi** must begin their post-filing announcements in connection with the license renewal process, and continue such announcements on February 1 and 16, March 1 and 16, and April 1 and 16.

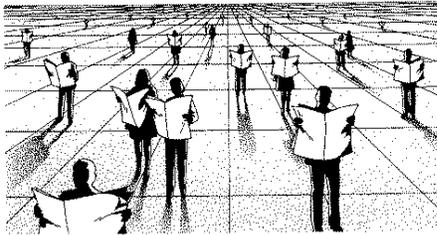
- All radio and television stations with more than five (5) full-time employees located in **Arkansas, Kansas, Louisiana, Mississippi, Nebraska, New Jersey, New York, and Oklahoma** must place EEO Public File Reports in their public inspection files. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

- All commercial and noncommercial radio stations located in **Arkansas, Louisiana, and Mississippi** 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.

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

## Updates on the News

– Where, you may ask, is our monthly update on the trials and tribulations of the new ownership rules? This month, as it turns out, there have been no major developments on that front. Oh sure, the date of the oral argument in the Third Circuit appeal of the new rules got put back to February 11, 2004. And at least one trade publication reported that Republicans in the Senate now believe that they are getting the “upper hand” in the Congressional sparring over possible legislative repeal of the rules. But then, just as this edition was going to press, Congress reportedly reached some agreement through which the new rules (or at least certain portions of the new rules) would be legislatively overruled by language to be included in the appropriations bill which is moving through Congress . . . which would in turn set up a possible veto drama, if the President makes good on his earlier threats to put the kibosh on such legislation. But otherwise, it’s been quiet on the ownership front.



– There have been signs recently that the Commission may be gearing up to address the long-simmering issue of the must-carry status of DTV operations, once the broadcast industry completes its conversion to digital. Congress has indicated that the “primary” video signal should be entitled to must-carry, but the Commission has thus far not announced exactly what that’s supposed to mean. Also up in the air is the must-carry status of the multicasting which is expected to be a feature of DTV operations. Those issues went unresolved in the Commission’s last major statement in this area, and that was in January 2001, almost three years ago. Some observers believe that some or all of these issues may be addressed by the FCC before year’s end. We shall see.

– Those of you who do your own electronic filing through the FCC’s

CDBS system (you know who you are) may have noticed a slight, er, balkiness in the system in recent weeks. The Commission’s staff has acknowledged that an “upgrade” to the system which the FCC implemented a couple of weeks ago has had the unfortunate and unexpected effect of creating major problems with the system, resulting in serious slow-downs in the filing process. That, of course, is not a welcome circumstance at any time, and particularly now, with deadlines for ownership reports, renewals, AM applications and a variety of other items facing us all. The staff has indicated that, if they can’t get the problems fixed in a matter of a few days, they plan to try to revert to the system as it existed before the “upgrade”. And if that doesn’t work, they will consider some form of across-the-board extension of filing deadlines that can’t be met because of the “glitch”. In the meantime, we understand that the staff is willing to consider individual requests for relief from deadlines on a case-by-case basis. So if you find CDBS chewing on your filing for an unusually long time while your deadline ticks ever closer, you may want to get on the horn (or have us get on the horn) to the staff to see what, if anything, might be done.

– Confirming the fear that, in the war between comprehensible language and arcane acronyms, acronyms are winning, the Cellular Telecommunications and Internet Association recently sent this message to its members:

D.SPIDs/OCNs

Trading Partner OCNs for SOA SPID of “X” and LSMS SPID of “A”:

NOTE: Please list all 4 Digit OCN’s per NPAC SOA SPID. If you have more than one SOA SPID, please indicate which OCN’s belong to each.



(Continued from page 9)

the Commission decided to defer the construction deadline for satellite stations until the matter is resolved one way or another.

Seven stations had their extension requests denied. The common thread leading to denial was the Commission’s conclusion that these stations had not taken sufficient actions during the most recent extension period or provided any new reasons to justify further delay. The good news for stations in this group, however, is that they were nonetheless provided a final six months in which to complete DTV construction. The stations were admonished, and they must submit

periodic reports on progress to the Commission. These stations also face the added threat of additional sanctions if they fail to submit the required reports, if the Commission determines that they were acting in bad faith, or if they fail to commence DTV operation within six months.

Taking all of the decisions together, it appears that the critical factor in determining whether a station will be granted another extension boils down to “what have you done for me lately.” Any stations seeking more time to complete construction need to show that they have taken reasonable steps to resolve any problems which may be standing in the way of beginning even low power DTV operation.

## TALES FROM THE CRYPT

## COMPARATIVE HEARINGS (1946-2003): REQUIESCANT IN PACE

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The long era of standard comparative hearings at the FCC gasped its final breath this month with the close of the Biltmore Forest, NC FM case. Old-timers will recall with fondness or dismay the days when the award of new broadcast construction permits depended on how many hours you were going to work at the station, whether or not you belonged to the Elks Club in the community of license, and whether or not you were a female Aleut.

The Biltmore Forest case began in 1987 with the filing of 14 applications for the small community outside Asheville. Former ALJ Wally Miller had his picture snapped with two applicants before summarily dismissing them from the case and savaging several others as he weeded out the crowded field. Orion Communications initially won the comparative contest, but then the case entered a Kafkaesque labyrinth.

The Court of Appeals reversed the FCC's decision in 1994 on the grounds that the FCC's comparative criteria were invalid, as it had just decided in the landmark *Bechtel* case. Orion, owned by the family of Zeb Lee, an Asheville broadcast icon, raced to go on the air. It began broadcasting despite the court's decision, only to have the FCC rule that it must cease operations and let an interim operator composed of all the remaining applicants run the station.

A near riot ensued on the day the new interim operation began. Rumors abounded that Orion planned to encircle the broadcast station with armed paramilitary units in defiance of the FCC order. While the paramilitary units proved imaginary, Orion did refuse to stop transmitting, and the simultaneous transmissions over Asheville clashed into cacophony. A federal judge refused to intervene, Orion supporters at the courthouse cursed the interim operators as agents of the devil, and Orion finally, tearfully, signed off with vows to keep on fighting. The tables turned a year later as Orion convinced the Court in Washington that they were entitled to keep operating, and the interim operators were unceremoniously evicted.

In the meantime, the FCC finally got the authority in 1997 to award licenses by auction rather than hearings. Inevitably, the applicant who won the auction, Liberty Productions, was one who had been basically disqualified earlier on misrepresentation grounds. As night follows the day, the other applicants petitioned against the Liberty application. When Liberty and the second-place auction bidder tried to settle the case, the FCC refused. More than a year and half after the close of the auction, the FCC finally awarded the license to Liberty. For a second time, Orion sobbed its way off the air. The Court of Appeals, which had now seen this same group of applicants no less than six times, prolonged the appeal excruciatingly, first dismissing two of the remaining four applicants on grounds that they had filed their appeals *too early* (!) and then taking more than six months after the oral argument to uphold the FCC.

The sole surviving competitor, Biltmore Forest Broadcasting FM, Inc., owned by long-time broadcaster Mac Miller of Pensacola, FL, felt aggrieved enough to take the case to the Supreme Court. After literally hundreds of thousands of pages of documents had been generated in the case over its

fifteen-year history, the Court brought matters to a curt close with a one-page, one-sentence order issued on November 3. Biltmore Forest at long last has a permanent licensee, albeit one who has been LMAing the station to somebody else since last year.

The history of this case illustrates much of what was wrong with the comparative hearing process. While the applicants were unusually litigious and in some ways fanatical, the FCC and the courts at every stage of the case took years to resolve the contested issues when months would have been enough. Sheer longevity became a primary virtue, as a number of the applicants died of old age as the case dragged on. One lawyer in the case spent some time in federal prison; others put their children through college on the fees generated. In the end, although communications lawyers may rue the passing of comparative hearings, the Biltmore Forest case demonstrates why that lunacy had to stop.



<b>FM ALLOTMENTS ADOPTED –10/23/03-11/18/03</b>
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State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
TX	Mertzon	25m SW of San Angelo	278C2	02-243	TBA
TX	Marathon	120m SW of Odessa	278C2	02-243	TBA
TX	Encino	80m SW of Corpus Christi	283A	02-341	TBA
FL	Maitland	7m N of Orlando	237C3	03-24	None
VA	Stephens City	50m W of Richmond	252A	03-12	None
TX	Crowell	60m W of Wichita Falls	293C3	03-168	TBA
LA	Florien	10m S of Many	242A	03-169	TBA
OK	Wright City	15m W of Broken Bow	226A	01-255	TBA
CA	Lamont	20m SE of Bakersfield	247A	03-64	TBA
CA	Cambria	35m NW of San Luis Obispo	287A	03-182	TBA

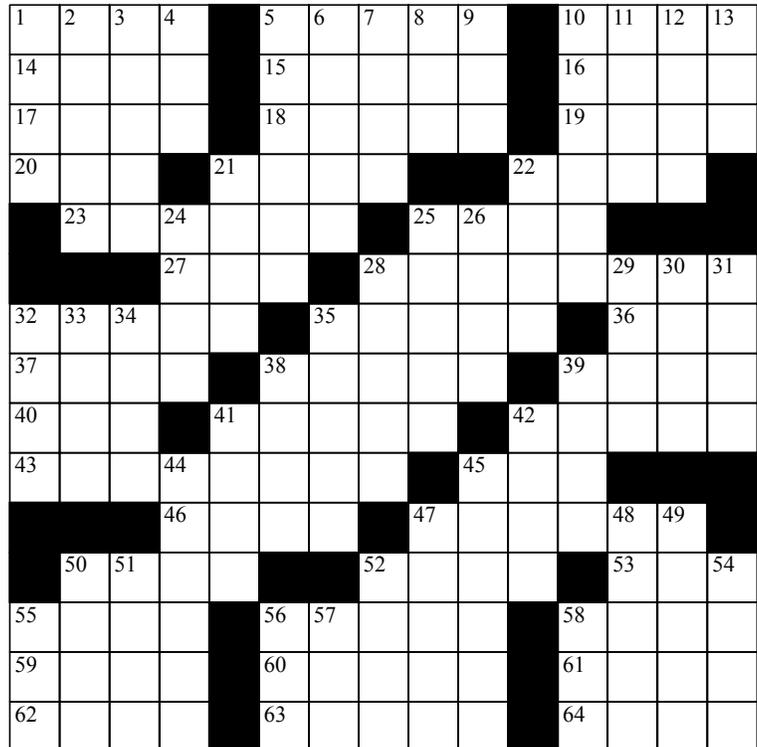
<b>FM ALLOTMENTS PROPOSED –10/23/03-11/18/03</b>
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State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
OH	Pickerington	15m SE of Columbus	278A	03-238	Cmts - 01/15/04 Reply-01/30/04	1.420
NC	Creedmoor	19m N of Raleigh	260C3	03-232	Cmts - 01/05/04 Reply-01/20/04	1.420
NC	Nashville	9m E of Rocky Mount	257A	03-232	Cmts - 01/05/04 Reply-01/20/04	1.420
NC	Gatesville	35m W of Elizabeth City	257A	03-232	Cmts - 01/05/04 Reply-01/20/04	1.420
PA	Mt. Union	15m SE of Huntingdon	292A	03-231	Cmts - 01/05/04 Reply-01/20/04	1.420
PA	Centre Hall	12m E of State College	258B1	03-231	Cmts - 01/05/04 Reply-01/20/04	1.420
GA	Waverly	50m N of Jacksonville, FL	239A	03-223	Cmts - 12/15/04 Reply-12/30/04	1.420
GA	Greenville	50m SW of Atlanta	281C1	03-223	Cmts - 12/15/04 Reply-12/30/04	1.420
MI	Grand Ledge	15m W of Lansing	225A	03-222	Cmts - 12/15/04 Reply-12/30/04	1.420

## Your Furnitureship

In honor of the annual Chairman's Dinner which is being held by the FCBA in December, we offer this puzzle, which contains the names of 13 former FCC Chairmen hidden (for the most part through homophones) in the correct answers. Note that one Chairman's name is split between two clues (27A and 52D) – that is, you have to put the two answers together to get the homophone.

The first person who correctly identifies all 13 Chairmen named in the puzzle will be given due recognition in a future issue of the Memo to Clients. Entries should be addressed to [cole@fhhlaw.com](mailto:cole@fhhlaw.com).



### ACROSS

- 1 Annoying person
- 5 Travis Bickel, e.g.
- 10 Where job one is quality
- 14 Assistant
- 15 Lofty nest
- 16 Mine yields
- 17 Latin article (e.g., Winnie \_\_\_\_ Pooh)
- 18 Name-words
- 19 Standard measure
- 20 Pinky, Peggy, Spike or Bruce
- 21 Breathe hard
- 22 "\_\_\_\_ Three Lives"
- 23 Groundskeeping equipment
- 25 O \_\_\_\_ Mio
- 27 Beatnik home
- 28 Candybar
- 32 Cool
- 35 Leg bone
- 36 Stage tribute to Capote
- 37 Tears
- 38 Mr. Television
- 39 Follows chow or lo
- 40 Very skilled person
- 41 Move rhythmically
- 42 Railroad stopover
- 43 Sully
- 45 Swiss river

- 46 Dies \_\_\_\_
- 47 \_\_\_\_ up (energizes)
- 50 Williams or Aaron
- 52 CFR contents
- 53 Consume
- 55 Pottery oven
- 56 Susan Lucci role
- 58 Pay to play
- 59 Prefix denoting "one's own"
- 60 Setting
- 61 Soft cheese
- 62 Reverse unwanted yard growth
- 63 Like Holland's waterways
- 64 Checked out

### DOWN

- 1 Follow
- 2 \_\_\_\_ Coyote (Road Runner nemesis)
- 3 Ran in neutral
- 4 Type of shirt
- 5 Unfounded story
- 6 Ages
- 7 Very dry
- 8 Storage container
- 9 Chris Squire, Jon Anderson, et al.
- 10 More offensive

- 11 French river
- 12 John (the Lone Ranger), Britt (the Green Hornet) or Charlotte (the Commissioner)
- 13 1st Sun. in Apr. to last Sun. in Oct.
- 21 Mountain top
- 22 Kuryakin (Solo's partner)
- 24 Concerns of some students
- 25 Fine fur
- 26 Theater award
- 28 Type of beer
- 29 Tex. school
- 30 Dixie Chicks, e.g.
- 31 Seek out
- 32 Catch a \_\_\_\_ (rowing miscue)
- 33 \_\_\_\_ Krispies
- 34 Cockney aspirations
- 35 Deal in stolen goods
- 38 Vamp Theda
- 39 Chi. financial exchange
- 41 Bogarde
- 42 "Strange \_\_\_\_" (Doors album)
- 44 S.S. \_\_\_\_ (Gilligan's ship)
- 45 Norse gods' homeland
- 47 Tea type
- 48 "\_\_\_\_ the Eighth, I am"
- 49 Composer Erik
- 50 Raw \_\_\_\_ (early Eastwood vehicle)
- 51 It's a sin to tell \_\_\_\_
- 52 Cafe Americain proprietor Blaine
- 54 \_\_\_\_ off (drove)
- 55 \_\_\_\_ Rock
- 56 Kooky Byrnes's first name
- 57 Things (Lat.)
- 58 Vigoda or Lincoln

### 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.*