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Memorandum to Clients

December, 2003 | *News and Analysis of Recent Events in the Field of Communications* | No. 03-12

Recordkeeping requirements for broadcasters back on the books

Supreme Court Upholds McCain-Feingold Campaign Reform Act

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In a mind-numbing collection of opinions filling more than 275 pages, in December the Supreme Court affirmed the vast majority of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), known familiarly to many as the "McCain-Feingold Act". That law, enacted in 2002, sought to overhaul many aspects of campaign financing practices which ultimately − and, in the view of many, undesirably − affect the electoral process.

We are still reviewing the opinions of the various Justices, and do not pretend at this early date to have a firm handle on the totality of the Court's decision. However, in an initial run through the decision, we have identified the following items which should be of interest to broadcasters.

*The Court's decision does **not** mean that the BCRA may not be unconstitutional as applied in one or another particular situation.*

Candidate Certification for Lowest Unit Rate Entitlement

Historically, qualified candidates have been entitled, during the 45 days before a primary and 60 days before a general election, to the station's lowest unit charge for the same class and amount of time for the same period. The BCRA revised that entitlement to require that, in order to qualify for the lowest unit rate, the candidate must either (a) provide the station "written certification" that the candidate (and any authorized committee of the candidate) "shall not make any direct reference to another candidate for the same office" or (b) clearly identify herself at the end of the broadcast and state that she approves of the broadcast.

This new wrinkle remains intact following the Supreme Court decision, but not because the Court affirmatively upheld it. Rather, the Court dismissed various attacks on this provision because, the Court concluded, the parties raising the attacks did not have "standing" to do so. As a result, the certification requirement imposed by the BCRA remains in effect, but it may still be challenged at some future time.

Note that this provision does ***not*** impose any direct obligations on broadcasters. It is the obligation ***of the candidate*** to provide the station with the certification. But stations will still have to insist on being given the necessary certification (or confirm that the necessary tag-line ID is included) before charging the lowest unit rate.

Publicly Available Records

Under the BCRA, broadcasters are required to maintain (and make publicly available) records not only of requests ("candidate requests") made by legally qualified political candidates for time, but also of requests for time made by: (a) *anyone* seeking to broadcast a "message" (an "election message request") which refers either to a legally qualified candidate or to "any election to Federal office"; ***and*** (b) *anyone* seeking to broadcast a "message" (an "issue request") related to "a national legislative issue of public importance" or otherwise relating to a "political matter of national importance." Election message requests normally include messages from a candidate's supporters or opponents, along with other mes-

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The Scoop Inside

Run into any problems with CDBS lately?

Tips on Navigating the FCC's Electronic Filing Systems

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The FCC has several electronic systems for filing applications of various types. In the past, use of these systems was voluntary and merely an alternate form of delivering your application. Now, many forms ***must*** be filed electronically, including the renewals and ownership reports that are being filed now. In addition, all licensees *must* have an FCC Registration Number (FRN), which can be obtained electronically through the Commission Registration System (CORES).

When working properly, the FCC's electronic systems provide efficient and convenient filing service − including easy electronic payment of filing fees. They also increase the ability of everyone, regardless of their locations, to gain access to applications and other materials filed electronically.

When not working properly, however, these systems can provide hours of frustration, wasted time and, in the worst case, missed deadlines.

Recently, the FCC experienced an unusually long period of sub-standard service on one of its most used sites, CDBS (the Media Bureau's electronic filing system). Due to a faulty upgrade, starting in late October and continuing though November there were announced and unannounced downtimes (some eight hours or more), several days a week, for several weeks. When the system was "working," it was slow and inaccurate. In response to what we assume were numerous inquiries phone calls, the FCC extended all December 1 deadlines to December 8. Extensions of other deadlines were handled on a case-by-case basis.

Another necessary electronic system, the CORES system, contributes its own set of bewildering problems. As noted above, all licensees are required to have an FRN, which is obtained by using the licensee's Taxpayer Identification Number (TIN) (Social Security Number for individuals and Employer Identification Number for business entities). When a licensee obtains an FRN, a password is associated with that FRN. The password, usually set by the licensee, is used to confirm identification for electronic filing or fee payment. While the system for obtaining an FRN through CORES is easy to use and has few, if any, unscheduled downtimes, licensees sometimes experience mysterious password resets, by human or computer, that make it impossible for them to access their FRN account, or file electronically. There have also been cases where the FCC thoughtfully created an FRN for a licensee without their knowledge, with the wrong TIN and an unknown password. In many of these "bonus" FRNs, the contact person is also wrong.

There is hope for the weary licensee who just wants to follow the rules. We have assembled a few tips to keep you sane if you attempt to utilize CDBS and CORES during your personal electronic filing season:

CORES:

Determine if you already have an FRN: If you paid regulatory fees this year, or have filed any applications or paid any fees since December 2001, you should have at least one FRN. In the CORES system, click on the Search button and select advanced search. Type your TIN into the box marked "TIN" and search. If your TIN has been used to register an FRN, it will show up with this search. You can also call the FCC's CORES help desk (877-480-3201, Mon.-Fri. 8 a.m.-6 p.m. ET), or call your attorney to obtain the information you need.

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Focus on FCC Fines

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Will there be "indecency" in the Courts ? Infinity Broadcasting was hit with a $27,500 fine for a Detroit area afternoon drive-time broadcast in which, according to the FCC, an Infinity-owned station broadcast indecent language. A review of the procedural history of this case and the FCC's description of the Infinity responses, has led some to speculate that this case may be laying the groundwork for another trip to federal court for a decision on the constitutionality of "indecency" regulation.

The case began when the FCC staff sent Infinity a letter advising the operator that a complaint had been filed about a January 2002 broadcast in which on-air personalities invited listeners to call to discuss sexual techniques and practices. The person who sent the complaint to the FCC had recorded the broadcast and submitted a copy of the recording to the FCC. The FCC indicates that in its response, Infinity did not address the contents of the broadcast, but instead focused upon an assertion that FCC indecency rules are unconstitutional.

Not surprisingly, all five FCC Commissioners decided to handle this matter themselves. The Commissioners issued a notice that it intended to slap Infinity with a $27,500 fine, giving Infinity thirty days to pay the fine or to seek a reduction or removal of the fine. Infinity decided that it did not want to pay the $27,500 fine – the most recent balance sheets for Infinity's parent company shows that it has $760 million cash on hand. Instead, Infinity again asserted that the Commission's regime of fines for indecency was unconstitutional.

In the latest development, the Commissioners issued an order in which Infinity's constitutional arguments were dismissed. The Commissioners have given Infinity thirty more days to pay the $27,500 fine. Strategically, Infinity now has three choices: (1) pay the fine and walk away (an option which was also available in April); (2) pay the fine and seek review of the Commissioner's actions at a Court of Appeals; or (3) ignore the fine and wait for the FCC and the U.S. Justice Department to come after Infinity in a Federal District Court. This column will update readers in the event that this case develops into a full-fledged court battle. Until then, readers are reminded that the FCC currently has an indecency policy in place and is ready, willing and able to apply it. In fact, published reports indicate that the Commission has recently been subject to *increased* public and Congressional pressure to penalize broadcast "indecency". That additional pressure may be largely attributable to the staff decision, reported in this column in October, ***not*** to issue any fines for the broadcast of certain language which, despite its normally sexual connotation, was used in a non-sexual manner. At least one member of Congress has indicated an intent to introduce legislation making it unlawful to use such language in ***any*** context.

In short, the pressure may now be on to turn the heat up on arguably "indecent" language. Licensees should be aware of this and act accordingly.

Noncommercial means "Do Not Air Commercials" The FCC has released a pair of decisions which address non-commercial stations. In its decisions, the FCC issued admonitions, rather than fines, to the stations, one of which was in Michigan, the other in Florida, both of which were found to have broadcast commercial announcements inconsistent with the "noncommercial" limitations on this licenses.

In delineating "commercial" from "noncommercial" broadcast service, Congress established that advertisements are announcements (a) broadcast in exchange for any remuneration and b) intended to promote any service, facility or product of for-profit entities. Noncommercial licensees are prohibited from broadcasting advertisements, although they are permitted to air "underwriting announcements" which acknowledge, in a non-promotional manner, contributions to station operations.

The Florida station claimed that its broadcasts did not violate the first of the two Congressional standards because the station did not broadcast the material "in exchange for any remuneration." The Florida station explained that it allowed a local man to prepare and air a two-hour show every week. The "advertising material" was broadcast during this man's two-hour time slot and the station did not receive anything from the entities whose businesses were promoted during the program. The FCC disagreed. Although the station did not receive anything from the "advertisers", the FCC determined that the station ***did*** receive two hours of free programming from the local man – thereby satisfying the Congressional "remuneration" requirement.

The FCC flatly rejected any defenses by the Michigan station and determined that the station had been airing material which encouraged or invited business patronage and provided price references and made qualitative endorsements. For example, the station aired spots announcing $75 discounts, $19 sale prices and a sale to "really make your tail wag . . . Woof

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woof." The FCC also took the opportunity to remind the Michigan station that noncommercial restrictions for full power FM stations apply equally to FM translators.

FCC calls in $4000 pot for a full house The FCC fined an FM operator for failing to properly disclose terms of a contest when a contest winner failed to show-up to a cinema in time to get a seat. The radio station conducted a contest for two tickets to the movie premiere of Spiderman and duly presented the winner with movie theater passes. The winner showed up at the cinema but, due to the size of the crowd already in their seats, was unable to be attend the premiere.

The angry contest winner complained to both the station and to the FCC that the cinema was too crowded on the premiere night. In an effort to appease the contest winner, the station offered tickets to another movie that evening, tickets for another showing of Spiderman and several promotional items. However, the FCC wanted $4000 for the mistake and has issued the station a fine.

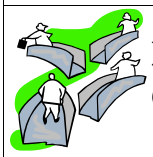
The Commission's contest rules require that all material elements of a broadcaster-run contest must be disclosed on the air. The FCC's decision in this case is based upon its view that a material rule of the contest was not disclosed. According to the Commission, when the station offered the tickets in its contest, contest winners should have been advised that if they arrived late to a premiere of a film, they might not get a seat. The FCC's version of the station's "violation" was that it did not disclose "the fact that the movie prize passes did not guarantee admission to the theater." The station has since changed its policy to advise contest participants that due to seating capacity, passes may not guarantee admission. Readers should evaluate what disclosures they provide to contest participants.

The viewers come marching one-by-one A stream of five viewers showing up at a Indianapolis TV station resulted in the station being hit with an $8,000 fine for failing to make its public file available to the public. In January 2002, a man who the station described as "consistently confrontational" entered the station and demanded the public file. The station advised the man that he would either have to wait or schedule an appointment to review the file. The man returned later in the day and was allowed to review the public file.

Six months after the first incident, a different man and his son came to the station to review the public file. The man and his son later claimed to the FCC that they were not given access to the public file; the station did not dispute that account. A few weeks later a woman arrived at the station requesting the public file. She later claimed to the Commission that she was given some of the documents but not what she believed to be a complete file. Two weeks later, a different man and woman arrived together seeking the public file. The woman submitted an affidavit indicating that she was not allowed to view the complete public file and the man indicated that he did see the public file. Of note, the FCC had difficulty believing the couple when the woman claimed that she did not see items which the man did. Moreover, the timing of the visits and complaints make the seemingly coordinated public file visits somewhat suspect.

Nevertheless, because the station did not deny that it had failed to immediately turn over its public file to the very first person in January or to the man and his son in July, the FCC assessed an $8,000 fine. In light of the inconsistencies from the other complainants, the FCC did not issue fines based upon their claims.

As we have observed in recent issues of the Memo to Clients, the Commission has demonstrated an increased interest in compliance with the minutiae of the public file rules. In light of that increased interest, licensees would be well-advised to take the time to confirm that their local public files are complete and that systems are in place to assure that any member of the public wishing to review the file is accommodated fully and promptly, consistently with the rules.



FHH - On the Job, On the Go

Michael Richards has been appointed by the Takoma Park City Council to a two-year term on the Ethics Commission of the City of Takoma Park, Maryland.

Congratulations to **Ali Miller**, *née* Shapiro, who recently returned to the working world from her honeymoon following her November wedding.

Holiday Reminder

FHH WILL BE CLOSED
ON DECEMBER 26
(THE FRIDAY AFTER CHRISTMAS).
WE WISH YOU SAFE
AND HAPPY HOLIDAYS.

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If you have your FRN but do not have a password: You need a password reset. 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.

Maintain your FRN: Even if you have an FRN and password, you are not in the clear. Please check to make sure the password still works. 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. Even if your password works, you should pull up your FRN account once in a while to make sure your information is accurate. Your address should be current and the contact person should be someone who still works for the licensee and can be reached at the telephone number listed on the FRN registration. This will streamline any corrections that may be needed in the future. All corrections of FRNs must be done through the CORES help desk and they will want to speak, if possible, to the contact person whose name was provided when the FRN was originally obtained.

Even if your FRN password works, you should pull up your FRN account once in a while to make sure your information is accurate.

CDBS:

To file on CDBS: You need a CDBS account number and password and an FRN and its password to file on CDBS. If you plan on paying electronically, or if you would like the computer to generate your 159 forms, you also need the EIN or SSN number of the party who will be doing the paying.

If you lose your account number or password: CDBS accounts are not unique (as are, by contrast, FRN accounts). You can open as many as you like. If you lose your account number, you can always open a new account. The FCC's help desk can sometimes find your account number, but you must have filed something from that account first. The FCC's help desk can reset your password.

If CDBS is slow: Check the status of the system on the E-Filing link at the top of the FCC's home page. If you see a lightning bolt or a red "X," go do something else. The system is down and waiting isn't worth it. If you see a green check, the system is supposed to be OK (but this isn't always accurate). If you are using Internet Explorer, try switching to Netscape. It is sometimes smoother. You can also try using the alternate server by clicking on "alternate" from the E-Filing menu instead of "main." If you still have problems, try filing early in the morning (before 10:00 am ET) or later in the evening (after 7:00 pm ET).

There are sometimes administrative solutions if you have a deadline you have to meet. Talk to your attorney about waivers, STA's or extensions of time to file.

Alphabet Soup

For the acronymically-challenged among you, here is a quick clip-and-save reference list of acronyms you may run into if you venture into the FCC's electronic filing system:

CDBS − **C**onsolidated **D**ata**b**ase **S**ystem (also known as the Broadcast Radio and Television Electronic Filing System) − Where you file Media Bureau Applications (except for auxiliaries − See ULS.)

CORES −**Co**mmission **Re**gistration **S**ystem − Where you get your FRN

EIN − **E**mployer **I**dentification **N**umber

FCC − **F**ederal **C**ommunications **C**ommission − The providers of all of this fun and excitement.

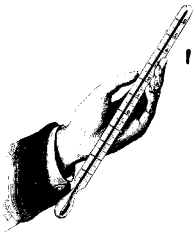
FRN − **F**ederal Communications Commission **R**egistration **N**umber − Substitute for your TIN

PASSWORD − Not an Acronym, but we can't remind you enough to keep track of it.

SSN − **S**ocial **S**ecurity **N**umber

TIN − **T**axpayer **I**dentification **N**umber

ULS − **U**niversal **L**icensing **S**ystem - Not covered in the article above, but used for broadcast auxiliaries, among other things.



"Interference Temperature" Proceeding Heats Up

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(*Editor's Note: This article was prepared for publication in a forthcoming FHH Telecom Law newsletter by Mitchell Lazarus, an FHH member and leading authority on unlicensed communications. The FCC proposals described in Mitch's article do* ***NOT*** *have immediate implications for broadcasters, and may never be adopted in the form outlined here. But they do illustrate the radically innovative approaches the Commission is contemplating for dealing, in the future, with interference among spectrum users. If you are interested in this proceeding and others like it and would like to be included on the FHH Telecom Law mailing list, please let us know.)*

The FCC has issued a combined Notice of Inquiry (NOI) and Notice of Proposed Rulemaking (NPRM) to explore the concept of "interference temperature" as a way to let unlicensed transmitters share licensed bands without causing harmful interference. Rather than merely regulate transmitter power at fixed levels, as in the past, this new scheme would govern transmitter power on a variable basis calculated to limit the energy at victim receivers, where the interference actually occurs.

Interference temperature is defined as the power created in a receiver by undesired emitters plus noise, expressed in units of degrees Kelvin. Conversion details for the *cognoscenti*:

interference temperature = (I+N in watts) / (bandwidth in Hertz) / (Boltzman's constant).

(Skeptics might argue that expressing power in temperature units, rather than more conventionally in watts, contributes little to the analysis.)

The NOI portion of the FCC's recent release outlines a long-term plan that presently consists mostly of variables and unknowns. The basic idea is to measure the "background" interference temperature due to noise and unintentional emitters in the vicinity, add to that the temperature due to the proposed transmission, and check whether the total is within some predetermined, non-interfering limit. If so, then the transmission can go forward without causing harmful interference. At least two elements of the scheme promise to be controversial. One is the matter of specifying the limits, which must be low enough to protect against interference yet high enough to permit useful unlicensed communications. The other is finding the right location to measure the interference temperature. Ideally this should be done at the victim receivers, with the results somehow communicated to the unlicensed transmitters -- but that could be difficult to arrange in practice. Even better (if feasible) would be a coordinated system that dynamically allocates unused "interference temperature capacity" among a population of unlicensed transmitters over a wide area.

The basic idea: measure the "background" interference temperature due to noise and unintentional emitters in the vicinity, add to that the temperature due to the proposed transmission, and check whether the total is within some predetermined, non-interfering limit.

The NPRM portion of the document lays out a less ambitious plan that might be implemented in the short term. It entails a simplified form of the interference temperature concept in two specific bands: 6525-6700 MHz and 12.75-13.25 GHz (excluding 13.15-13.2125 GHz). Both bands are allocated jointly for satellite uplinks and fixed microwave point-to-point communications. The FCC suggests starting with these bands on the grounds that: (1) the satellite receivers in orbit are a long way from any interfering transmitters; and (2) the fixed microwave receivers potentially subject to interference tend to operate at isolated, known locations, use highly directional antennas, have their antennas well off the ground, and generally tolerate interference well. The NPRM suggests that interference temperature limits be based on a signal-to-interference ratios of 30-50 dB, and estimates this could yield unlicensed EIRPs in the 30-36 dBm range. These power levels are relatively high for unlicensed devices generally, although comparable to those allowed for spread spectrum and U-NII transmitters.

The NPRM seems to contemplate measuring the interference temperature at the unlicensed transmitter, and using that value as an estimate for the "ambient" interference temperature seen by the fixed microwave receiver. It

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A way around a bump in the road to IBOC?

FCC Seeks Comment on Dual Antenna Operation

Proposal aimed at lowering cost for FM conversion to digital

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May you live in interesting times, goes the old Chinese curse. And these are certainly interesting times for broadcasters who have to deal with transitions from analog to digital. But now, if the FCC accepts the recommendations of an *ad hoc* technical group of the NAB, FM licensees interested in initiating digital operation on their current channels may be able to do so more cheaply than has been the case thus far.

While most of the attention has been on TV, FM radio stations are also on the cusp of a major digital transition. For more than a year FM licensees have had the option of broadcasting their signals digitally on their assigned analog channel. However, this "in-band-on-channel" (or "IBOC") option has been limited in a number of respects. Most notably, an FM station that wishes to transmit both an analog and digital signal must use a single antenna to transmit both signals.

The single antenna requirement was imposed because the initial evaluation of IBOC was made using only one-antenna systems. Since IBOC was found by the Commission to work in such systems, and since the Commission had no data showing the IBOC would definitely work in multiple-antenna set-ups, the Commission authorized use of IBOC only for single-antenna operations in order to safeguard against interference.

But as it turns out, single-antenna analog/digital operation is not the most efficient or cheapest way to do it. Among other things, using a single antenna can dramatically lower the effective radiated power of the station's digital signal. Most of the IBOC evaluation tests were conducted using a high level power combiner to deliver both the analog and digital signals to the common antenna. But that had the unhappy result of a 90% loss of the digital energy, which in turn necessitated a higher power (and, needless to say, pricier) digital transmitter.

There was a way around that problem, though: the "low power combined" method, which avoids the 90% combiner loss of the high power combiner, but requires installation of a large transmitter with sufficient power to amplify both the analog and digital signals. Life is full of trade-offs.

Following the initial FCC authorization of IBOC operation, the miracle of the marketplace did its thing, as equipment manufacturers looked for alternate, less expensive ways of delivering acceptable IBOC performance. One such alternative is the separate antenna approach, in which the broadcaster uses separate antennas, fed by separate transmitters, for the analog and the digital signals. This permits use of a digital transmitter requiring only about 10% of the power needed for the high level combining method.

Because of significant interest in the cheaper, separate antenna, approach, the NAB assembled an *ad hoc* technical group to test out that approach. Last July that group submitted its report to the Commission and, in December, the FCC announced that it would accept comments and reply comments on the report. You can find a copy of the report in the FCC's on-line docket files in MM Docket No. 99-325. (You can also find it by pointing your browser to the following address: http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6514287223. Note that the document is more than 100 pages long, so it may take a few moments to download).

In its report the NAB proposes that the Commission permit FM stations to use separate antennas for digital transmissions under the following conditions:

- The digital transmission must use a licensed auxiliary antenna;
- The auxiliary antenna must be within three seconds of latitude and longitude of the main antenna; and
- The height above average terrain of the auxiliary antennas must be between 70 and 100 percent of the height above average terrain of the main antenna.

The report also recommends that the Commission authorize use of antennas specially designed with interleaved or

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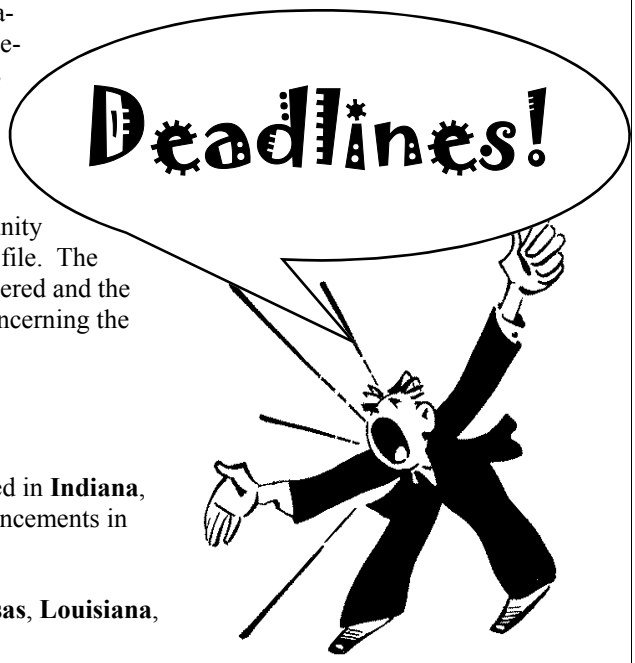
January 10, 2004

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. At the same time, certifications as to compliance/noncompliance with the children's television commercial limitations must be placed in the 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.

February 1, 2004

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

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

Renewal Post-Filing Announcements - 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.

EEO Public File Reports - 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.

Ownership Reports - 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.

REMEMBER THE ALAMO!

Yee-haw!!! The Commission's localism round-up stampedes into San Antonio on **January 28, 2004**, from 5:30-9:30 p.m. (Because of scheduling conflicts, that's a month later than originally announced.) Chairman Powell and his posse − consisting of Commissioners Abernathy, Copps and Adelstein − will be lending their ears to the Voice of the People, or at least the Voice of the People Who Show Up. The participants and agenda will be released in January.

Coping with the digital conversion

Broadcasters Seek to Redefine Must-Carry

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Unable to persuade the FCC to require cable systems to carry both analog and digital television channels during the DTV transition, broadcasters recently altered their must-carry demand. A new proposal was presented jointly to the FCC by the National Association of Broadcasters (NAB) and Association for Maximum Service Television (MSTV). The new proposal would allow a station to elect must-carry for either its analog or digital channel and retransmission consent for the other channel during the transition. Alternatively, a station could elect retransmission consent for both channels. The cable industry opposes the new proposal.

The FCC is expected to reject dual-carriage of both analog and digital channels after the DTV transition. As a last resort, broadcasters are seeking to obtain carriage rights during the transition.

The new proposal would additionally require cable systems to install technology by January 1, 2006 which both passes through the digital channel to digital television sets and downconverts the digital channel for reception on analog television sets at no additional charge on the analog basic cable tier. If a cable system failed to do so, stations could elect must-carry for both their analog and digital channels during the transition. Upon delivering the digital channel to both digital and analog sets, a cable system could cease carriage of the analog channel. Cable operators reportedly see this portion of the plan as a back-door attempt to obtain dual must-carry.

Broadcasters argued that the new proposal alleviates FCC First Amendment concerns with requiring cable systems to carry two channels from each station. They further stated that the proposal would protect smaller stations, which might be less likely to select digital carriage during the transition, and their viewers. Broadcasters also argued the proposal would provide an incentive for cable operators to upgrade their systems. Cable operators argued that, if stations elect must-carry for their digital channels, cable systems would be forced to also carry their analog channels since most subscribers rely on analog cable service. Broadcasters responded that cable systems would be free to choose between carrying both channels or upgrading their technical facilities to reach all subscribers, a business decision without First Amendment concerns.

The FCC is expected to issue a rulemaking decision early next year which permanently rejects dual-carriage of both analog and digital channels after the DTV transition. As a last resort, broadcasters are seeking to obtain carriage rights during the transition.

(Continued from page 6)

proposes that unlicensed transmitters in these bands be equipped with transmit power control (TPC), which continuously adjusts power to the minimum needed for successful communication, and also dynamic frequency selection (DFS), which automatically switches to channels least likely to cause interference. The FCC likens the combination of TPC and DFS to performing frequency coordination on the fly.

Comments are due 75 days after publication in the Federal Register, which may not occur until January or later.

(Continued from page 7)

stacked elements for analog and digital signals.

The FCC is taking public comment on these proposals through January 8, 2003. The Commission is accepting reply comments for another 15 days afterward, until January 23, 2003. Please let us know if you wish to make these times even more interesting by adding your comments to the official record.

(Continued from page 1)

sages which may be more neutral with respect to any particularly candidate. Issue requests are analogous to the issue-related programming formerly required under the now-defunct Fairness Doctrine.

The BCRA requires that, as to each such request, the broadcaster maintain a public record of the request, including:

- ☑ Whether the request to purchase time was accepted or rejected;
- ☑ The rate charged for the time;
- ☑ The date and time on which the message aired;
- ☑ The class of time that was purchased;
- ☑ The name of the candidate to which the communication refers and the office to which the candidate is seeking election, the election to which the communication refers, or the issue to which the communication refers;
- ☑ In the case of candidate requests, the name of the candidate, the authorized committee of the candidate, and the treasurer of that committee;
- ☑ In the case of election message requests and issue requests, the name of the person buying the time, the name, address, and phone number of a contact person for the buyer, and a list of the chief executive officers or members of the executive committee or of the board of directors of such person.

The Court expressly upheld all of these recordkeeping requirements.

In the Court's view, the burden which these requirements impose on broadcasters is neither intolerable nor invasive. To the contrary, the Court echoed the Commission, which in an analogous context held that such recordkeeping chores "simply run with the territory".

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In addressing the matter of "issue requests", the Court deflected the argument that the law's language (referring to "national legislative issue[s] of public importance" or "political matter[s] of national importance") is unconstitutionally vague. The Court did acknowledge that the burden on broadcasters, who would have to assess whether any particular request falls within that statutory language, might be disproportionate. But the Court declined to reach any conclusions, noting instead that the ultimate regulatory burden will depend on how the Commission interprets and applies this provision. In other words, while the "issue request" recordkeeping requirement has been upheld on its face, that requirement may still be subject to attack in particular cases, should the Commission's interpretation of that rule turn out to be oppressive to broadcasters.

As a practical matter, however, it is doubtful that the FCC will so interpret the rule. Informal statements from the Commission's staff indicate that the staff intends to interpret the "issue requests" requirement from a common sense perspective.

Although raised by the Court particularly with respect to the "issue requests" language, this last point relates broadly to the remainder of the BCRA. That is, the challenge which was brought, and which the Court decided, was a "facial" attack in which the challengers argued that the law as written was unconstitutional without regard to any particular factual context in which the law might be applied. The Court rejected that broad attack. But that does ***not*** mean that the BCRA may not be unconstitutional as applied in one or another particular situation. It is entirely possible that candidates or other affected parties may challenge portions of the BCRA's requirements in future years.

For now, however, it is safe to say that the BCRA has, for most purposes affecting broadcasters, been upheld.

Red Lion Rearing Its Head?

Interestingly, the portion of the Court's opinion authored by Justice Breyer twice cites the 1969 *Red Lion* opinion, noting that that case supports the notion that the FCC has a broad mandate to assure that broadcasters operate in the public interest. In *Red Lion*, the Court upheld the Commission's authority to adopt and implement the Fairness Doctrine based on the "scarcity rationale", *i.e.*, that spectrum is scarce and therefore the government may regulate it to serve the public interest. In recent years, the validity of the scarcity rationale has been questioned, and a number of observers have suggested that that rationale is effectively dead. But the Court's reliance on *Red Lion* in its recent decision could indicate that the reports of the death of the scarcity rationale are, to borrow from Mark Twain, greatly exaggerated. On the other hand, citation of *Red Lion* may mean nothing of the kind. We will just have to wait for a case in which the Court may address that question directly.

Preparing for a worst-case scenario

New Recommendations To Ensure Continued Operation During National Emergency

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A special FCC committee formed in the wake of the events of September 11, 2001 has adopted 49 recommendations to ensure continued operation and security of media facilities in times of a national emergency. The FCC's Media Security and Reliability Council (MSRC), made up of representatives from the broadcast, cable and satellite industries, adopted the recommendations in late November.

Key recommendations include:

- Media companies should have appropriate physical security at their key facilities.
- Media companies should take appropriate measures to assure the availability of backup power capabilities for their key facilities.
- Media companies with local news origination should ensure that they have robust and redundant ways to communicate with external news services and remote news teams.
- All local media in a market should collaborate to increase their collective geographic diversity and to establish redundant interconnections capable of supporting emergency operations.
- Media companies should develop and implement written disaster recovery plans, update them as events warrant, and regularly conduct emergency drills at least once a year.
- Media companies should have the ability to access alternate telecommunications capabilities.

The MSRC is a federal advisory committee that reports to Chairman Michael Powell. Chairman Powell formed the Council following the events of September 11, 2001, in order to study, develop and report on practices meant to assure reliability and security of the broadcast and multichannel video programming distribution industries. The 49 recommendations are designed to help broadcasters and other media assess their vulnerabilities when considering the possibility of deliberate terrorist attacks. The recommendations would also help broadcasters and other media prepare for natural disasters and equipment failures. In all cases, heeding the recommendations could allow broadcasters to take appropriate measures to prevent loss of service and to expedite rapid recovery.

The full list of recommendations adopted by the Council is available at http://www.fcc.gov.msrc.

With apologies to Paul Simon, we offer this piece of lyrical accomplishment to acknowledge the MSRC's report and recommendations. This is to be sung to the tune of "50 Ways to Leave Your Lover".

The problem's all inside your head
so said the FCC
The answer's easy if you
take it logically
We'd like to help you in your struggle to stay free
There's almost 50 ways to save your station

The FCC maintains
it's not their habit to intrude,
But MSRC members all
have worried, planned and stewed,
To make sure when the fan gets hit,
The public won't get screwed,
There's almost 50 ways to save your station.
Fifty ways to save your station.

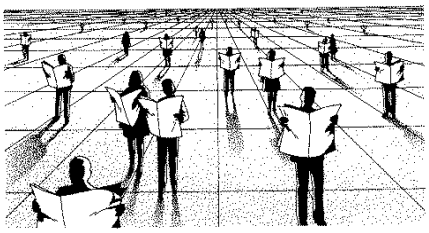
Just work as a pack, Jack
Make a backup plan, Stan
Disaster deploy, Roy
Just get yourself free
Try to be robust, Gus
You don't need to discuss much,
Security's key, Lee,
And get yourself free.

Do emergency drills, Phil,
Do 'em every year, Pier,
Make disaster plans, Hans,
Keep 'em up to speed.
Check your power source, Horst,
You'll need two or more, of course,
'Cause if you lose your juice, Bruce,
You're gonna need Plan B.

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

Updates on the News

We have a winner. We are pleased to announce the name of the talented and motivated individual who was first to submit his completed crossword puzzle from last month's issue, along with the correct identification of all 13 (count 'em, 13) former FCC Chairmen hidden in the puzzle. (*Drum roll please*.) And the winner is - **RALPH HALLER.** *(Trumpet flourish)* Ralph's entry arrived shortly after 9:00 a.m. the Monday after Thanksgiving, truly an impressive feat. Congratulations. Folks still working on the puzzle should let us know if they want a copy of the answers.



LPTV settlement window announced. If you filed an LPTV application in Auction No. 81 and you found yourself MX'd with other applicants and, therefore, sitting on a non-stop flight to Auction-ville, you have a last chance to get out before the bidding starts. The FCC is giving Auction 81 applicants until **March 5, 2004**, to submit settlements or engineering amendments which might eliminate the mutual exclusivity.

Gettysburg on the move. The FCC's office in Gettysburg, PA, has a new address for its off-site mailroom: 1280 Fairfield Road, Gettysburg, PA 17325. If you are shipping anything to the Gettysburg office by UPS, FedEx, Airborne, etc., you must use that address. If you're just sticking your submissions into the U.S. Mail, you can continue to use the old address (1270 Fairfield Road), and the USPS will divert it to the new address.

Closed captioning requirements increase next month. As of **January 1, 2004**, English-language TV stations will generally be required to provide 1,350 hours of captioned video programming per quarter, and Spanish-language station will be on the hook for 900 hours per quarter. Stations with annual gross revenues of less than $3 million are exempt, but they will still have to pass through to consumers any programming which they receive which has already been captioned.

FM ALLOTMENTS PROPOSED –11/19/03-12/16/03

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
GA	Ambrose	100m S of Macon	250A	03-246	Cmts - 01/30/04 Reply-02/17/04	1.420
AR	Greenbriar	40m N of Littlerock	296C3	03-247	Cmts - 01/30/04 Reply-02/17/04	1.420
TX	Whitewright	60m Nof Dallas	248C2	03-245	Cmts - 01/30/04 Reply-02/17/04	1.420
AL	New Market	50m NE of Decatur	227C2	03-244	Cmts - 01/30/04 Reply-02/17/04	1.420

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.

FM ALLOTMENTS ADOPTED –11/19/03-12/16/03

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
AZ	Ashfork	50m W. of Flagstaff	267A	02-12	TBA
AZ	Peach Springs	120m W. of Flagstaff	285C3	02-12	TBA
AZ	Fredonia	250 m N. of Phoenix	278C1	02-12	TBA
NV	Moapa Valley	60 m NE. of Las Vegas	224C	02-12	None
UT	Cedar City	200 m SW of Salt Lake City	221C	02-12	None
AZ	Tusayan	200m N of Phoenix	222A	02-12	None
UT	Beaver	175 m SW of Salt Lake City	246A	02-12	TBA
TX	Dripping Springs	25m W of Austin	285A	03-195	None
AR	Vilonia	25m N of Little Rock	224C3	03-23	None
OH	Racine	40m N of Charleston	226A	03-22	None
KY	Oak Grove	70m NW of Nashville, TN	232A	03-132	None
UT	Salina	80m S of Provo	233C	02-166	TBA
TX	Centerville	100 m SE of Dallas	274A	02-128	TBA
NM	Carrizozo	150m S of Santa Fe	261C2	03-69	TBA
NE	Hartington	120m N. of Lincoln	232C2	02-121	TBA
AZ	Leupp	40m E of Flagstaff	255C2	DA03-3922	None
ID	Sun Valley	120m NW of Pocatello	298C0	DA03-3922	None
LA	New Iberia	80m W of New Orleans	256C0	DA03-3922	None
LA	New Orleans	70m SE of Baton Rouge	258C0	DA03-3922	None
MS	Jackson	100m W of Alabama Border	242C0	DA03-3922	None
MS	Laurel	70m SE of Jackson	262C0	DA03-3922	None
NC	Greensboro	60m W of Raleigh	246C0	DA03-3922	None
TN	Trenton	80 m NE of Memphis	249C2	DA03-3922	None
UT	Tremonton	60m N of Salt Lake City	285C0	DA03-3922	None
WY	Cheyenne	10m N of Colorado Border	285C2	DA03-3922	None