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

Memorandum to Clients

January, 2004 — *News and Analysis of Recent Events in the Field of Communications* — No. 04-01

"Book him, Dan-O. Public File One"

Increased Enforcement On The Horizon?

By: Harry F. Cole
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The new year is upon us, and while it may still be too early to tell, there are strong indications that we should start calling it "Two Thousand Enforcement" rather than just "2004". The good old days, when the Commission seemed to lack the resources, and maybe also the inclination, to undertake strict enforcement of its rules are now fading in memory.

In their place, we have witnessed a steady increase in field inspections and a corresponding increase in forfeiture orders covering a wide array of rule violations, many of them of a (how shall we say this delicately?) somewhat picayune nature. And in at least several cases, it has turned out that the "violation" initially perceived by the Commission's staff was not, in fact, a violation at all. That suggests that the staff may be taking a particularly aggressive approach, placing the burden on the target licensee to demonstrate the error of the staff's position.

Most recently, last year we witnessed the unfortunate spectacle of the Commission issuing dozens of fines based on responses included in renewal applications, responses which reflected that the licensees in question could not certify with 100% confidence that they had, in a timely manner, in fact placed each and every required document in their local public files.

> *It is important to abandon any lackadaisical attitudes that may have developed while the enforcement bear slept. The bear, it appears, has awoken.*

And there are darker clouds on the horizon. As reported in the article on Page 3 of this month's Memo to Clients, there is an increasingly intense drumbeat building on the indecency front. Of course, in recent years the Commission has relaxed the showing which an indecency complainant must tender to trigger an official inquiry. No longer must a complainant submit a tape of the allegedly objectionable programming − now a reasonably detailed summary, based on recollection, may do the trick. With that relaxation combined with the hue and cry arising from the recent decision involving Bono's televised use of the "f" word, and the follow-up, equally televised use of the "f" ***and*** "s" words by Nicole Richie, it is not too much of a stretch to predict that indecency complaints will be on the rise in coming months.

This being an election year, politicians, too, have jumped on the bandwagon, proposing to amend the U.S. Code to specify certain words which absolutely positively cannot be uttered in any way, shape or form on the air. (This, of course, raises the difficult question of how broadcast news reporters and analysts will be able to inform the public of the content of the new law if reading the language of the law on the air would entail articulation of the bad words themselves. . .) A hearing was convened by the House Committee on Energy and Commerce at the end of January to examine the Commission's enforcement of its indecency policy.

And perhaps most chilling, Chairman Powell has called on Congress to increase the statutory limit for indecency violations ten-fold. This notion picks up a theme previously advanced by Commissioner Copps in his repeated critiques of the content of broadcast programming (which he characterizes

(Continued on page 11)

The Scoop Inside

FCC Proposes New Smart "Cognitive Radios" 2
Focus on FCC Fines 3
Recent Legislation Creates Tax Benefits for 2003 Returns 4
FM Translator Applications Are On the Move 6
M. Scott Johnson, Steve Lovelady, Join FHH 7
Deadlines 8
FCC Clarifies "Biennial" Filing Requirement for Ownership Reports 9
Overindulgence Brings Greater Government Scrutiny 10
Updates on the News 10
Closed Captioning Requirement Increases 11
FM Allotments 12-13

Cognitive? Ergo sum!

FCC Proposes New Smart "Cognitive Radios"

By: *Mitchell Lazarus*
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The FCC racheted radio technology another notch forward by adopting a Notice of Proposed Rulemaking on "cognitive radios." These are a step beyond software-defined radios, which the FCC first authorized just two years ago. The proceeding is one of several recent efforts by the FCC to anticipate and encourage emerging technological capabilities.

Where conventional hardware based radios are typically limited to only one frequency band, power, modulation, etc., a software-defined radio can alter those parameters just by running different software. For example, with appropriate prior authorization, a police officer might instantly convert a software-defined cell phone to a public safety walkie-talkie, and then back again. A cognitive radio takes the concept one step farther: it is a software-defined radio capable of making its own decisions on which operating characteristics to adopt, based on its location, or on signals it detects in the vicinity, or even on the time of day. The officer's cell phone might switch to walkie-talkie mode automatically when it detects an incoming message from the officer's dispatcher -- but only while located in that dispatcher's operating area. Or a pair of "smart" walkie-talkies might collaborate to find a channel free of interference for both of them. (Ordinary Wi-Fi devices already have a limited form of this capability.) Or an overloaded PCS base station might detect underused public safety capacity in the vicinity and lease that spectrum on the fly, handing out new channel assignments in real time to the handsets it serves -- and then relinquishing the spectrum instantly if a public safety emergency arises.

The NPRM seeks comment on several possible applications of cognitive radios, including

- increasing use of vacant spectrum in "white spaces";
- increasing opportunities for unlicensed operation without interference to licensed services;
- helping licensed services make best use of their own spectrum;
- facilitating spectrum leases to promote secondary spectrum markets;
- allowing public safety entities to instantly reclaim leased-out spectrum when needed;
- improving interoperability among the multiple radio systems used by public safety agencies;
- using higher transmitter powers in rural and underserved areas;
- facilitating radio-based networks; and
- promoting real-time frequency coordination with non-geosynchronous (NGSO) satellites.

Some of the capabilities the FCC discusses for cognitive radios are:

(Continued on page 5)

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Focus on FCC Fines

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FCC Rethinks Decision Regarding F-word A public outcry has arisen in response to an FCC staff decision not to fine stations for airing a performer's statement that receiving an award was "f-ing great." In its decision, described in the October issue of this column, the Commission's staff chose not to fine NBC for airing the Golden Globe Awards in which the pop singer Bono, lead singer for U-2, used a number of expletives − including "f-ing" as an adverb − to describe his elation. The staff decision is now being reviewed by the full five member Commission. The smart money says that the Commission will likely reverse the staff and hold that any form of the "f" word − and possibly other words − should be deemed to be "indecent" and thus subject to the usual limitations on the broadcast of indecency.

It would be dramatic understatement to say that this question has generated considerable public response. One report indicated that the Commission was receiving so many e-mails concerning the indecency question that it appeared that the Commission's e-mail system was becoming clogged, impairing the ability of anyone to get through. And, of course, the Fox network threw gasoline on the already raging fire when, in a live appearance by Mlles. Hilton and Richie of the Fox show *The Simple Life*, Richie dropped her own s-bomb ***and*** f-bomb, both of which were broadcast, at least on the East Coast.

The clamor created by the staff's decision has reached all the way to Capitol Hill. Several law makers, in response to the staff decision have discussed passing laws that specifically prohibit the use of certain words in broadcasting. Currently, federal law broadly prohibits the broadcast of, "any obscene, indecent or profane language by means of radio communication." At least one Representative has now proposed changes to that law to specify words (or variations of such words) which cannot be used. Interestingly, the proposed statute would characterize such prohibited language as "profane" rather than "indecent". This is an odd approach, since "profanity" has generally been viewed as language which offends religious sensibilities. The "f", the "s", and the big-long-"c" and -"m" words, all of which are targeted in the proposed legislation, have invariably been classified as "indecent", not profane. It is not clear why the sponsoring representative chose this approach. The success of his legislation cannot be predicted.

But even if the law is not changed, the odds certainly seem to suggest that the FCC will reverse its staff and conclude that "f-ing", used as an adverb in a non-sexual/non-defecatory context, is indecent. Whether that change will also lead to a fine imposed on NBC stations and NBC affiliates, or Fox and its affiliates, isn't clear. But it is widely understood that FCC Chairman Powell has circulated a draft order which will reverse the staff decision, and many in the industry believe that Powell's draft order has broad support from all four other Commissioners.

Powell Wants Fines to Increase Ten-fold In a recent speech, while alluding to the above brouhaha about indecency (or profanity, depending on who you're talking to), Chairman Powell called upon Congress to raise the maximum fines which the FCC can impose upon broadcasters. Claiming that the current maximum fines are "peanuts" and viewed by some broadcasters as simply a cost of doing business, Powell opined in a speech to the National Press Club that the limits on fines should be increased ten-fold in order to provide the FCC with an effective weapon in its efforts to control indecency on the airwaves.

Non-Commercial Station Fined $10,000 A San Francisco non-commercial television station has been fined $10,000 for airing advertisements on its station. In this instance, the cable operator which carried the station and a competitor station in the area complained to the FCC that improper commercial announcements for various advertisers, including plumbers, an airline and furniture stores, were being aired on the television station. The FCC reviewed transcripts of the promotions and determined that, sure enough, they were ads. The FCC prohibits non-commercial entities from broadcasting material in exchange for any remuneration that is intended to promote the service, facility or product of a for-profit entity. In this case the FCC determined that the spots which were being aired were clearly promotional.

In another instance of non-commercial broadcasting which also is important for all broadcasters, a federal court has restated that, in many cases, listeners or viewers cannot bring cases to court for FCC violations. The recent court case involved an FCC decision not to fine a non-commercial station which, the Commission had found, had broadcast an impermissible advertisement. The FCC admonished the station not to air ads in the future, but declined to impose any harsher penalty. A commercial station in the same market, upset that the non-commercial station had not been fined, took the case to court. The commercial station told the court that it was

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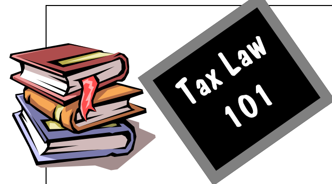
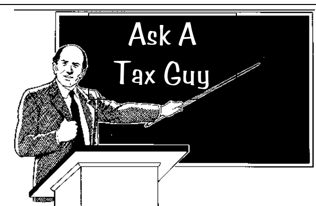


RECENT LEGISLATION CREATES TAX BENEFITS FOR 2003 INCOME TAX RETURNS



By: Donald B. Reynolds, Jr.
*Silverstein and Mullens **

In response to heavy pressure from the Bush administration, Congress passed the "Jobs and Growth Tax Relief Reconciliation Act of 2003" shortly before its Memorial Day recess last year. Many of the provisions included in the 2003 tax legislation affect income tax returns that both business and individual taxpayers will file for 2003.

The 2003 act accelerated previously scheduled individual income tax rate cuts and granted short-term tax incentives for certain types of business investment. In general, the main beneficiaries of the legislation are individual investors, small businesses planning to invest in new equipment, and middle-income families with minor children. Below, we have summarized several of the provisions of the 2003 act, which we believe are of particular interest to FHH clients.

15% Top Rate on Dividends, Capital Gains

For many individuals, the new law makes a deep cut in the tax on dividends received in 2003 through 2008. Instead of being taxed at an individual's top bracket–up to 35%–qualified dividends will be taxed at a maximum rate of 15% (less for taxpayers in the two lowest brackets). In general, dividends eligible for this preferred treatment must come from domestic corporations or "qualified foreign corporations," including corporations organized in U.S. possessions, foreign corporations whose stock is traded on an established U.S. securities market, and certain other foreign corporations to be designated based on criteria set out in the new law.

Under the new law, an eligible small business may deduct up to $100,000 of the cost of qualifying property, provided the total cost of all such property does not exceed $400,000.

Complementing the dividends tax cut is a cut in the top rate on most capital gains to 15% (a lower rate applies to individuals in the two lowest brackets). The rate reduction for capital gains applies through 2008. Unlike the dividends cut, however, the effective date of the capital gains cut is not retroactive to the beginning of tax year 2003. Rather, the new rate generally applies to sales on or after May 6, 2003. The prior-law top rate–generally, 20%–applies to most capital gains realized before that date.

Individual Income Tax Rate Cuts

The 2003 act also retroactively reduces the top four income tax rate brackets that apply to individuals to the levels previously scheduled to take effect in 2006. The following table summarizes these changes:

New rates for 2003-2010	Old rates for 2003	Reduction (percentage points)
10%	10%	0%
15%	15%	0%
25%	27%	2%
28%	30%	2%
33%	35%	2%
35%	38.6%	3.6%

As a result of these rate reductions, for the taxable year 2003, individual taxpayers are subject to a maximum federal income tax rate of 35%.

Increased Section 179 Expensing and Bonus Depreciation

The 2003 act provides two temporary incentives aimed primarily at small businesses. One provision retroactively increases the "Section 179 expensing" limitation to $100,000 (from $25,000) and the phase-out range to $400,000 (from $200,000). Also, this provision expands the category of eligible property–generally defined as tangible property other than real estate, such as machinery and equipment–to include off-the-shelf computer software.

Given the changes in the Section 179 rules, for taxable years beginning after December 31, 2002, an eligible small business may deduct up to $100,000 of the cost of qualifying property, provided the total cost of all such property does not exceed $400,000. The $100,000 and $400,000 amounts will be adjusted for inflation in taxable years beginning in 2004 and 2005. The law is scheduled to revert to the old rules, however, in taxable years beginning after December 31, 2005.

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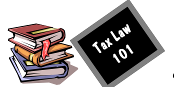

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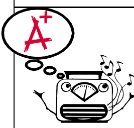
The other incentive provision increases "bonus" first-year depreciation to 50% (from 30%) for certain property acquired and placed in service after May 5, 2003, and before January 1, 2005. The 50% deduction generally applies to the same types of property that were eligible for the 30% bonus depreciation rules that applied to 2002 tax returns. Examples of qualified property include equipment, machinery, furniture, cars and trucks, and off-the-shelf computer software.

Under the rules adopted in the 2003 act, a taxpayer may claim an additional first-year depreciation deduction–for both regular tax and alternative minimum tax purposes–equal to 50% of the adjusted basis of the qualified property (*i.e.*, the property's cost) for the taxable year in which the property is placed in service. However, property for which the 50% additional first-year depreciation deduction is claimed is not eligible for the 30% additional first-year depreciation deduction that was enacted in 2002.

If the property also qualifies for the Section 179 expense deduction (discussed above) and the taxpayer elects to claim that benefit, the 50% bonus depreciation is still available, but the property's basis is first reduced by the amount of the Section 179 benefit before applying the 50% bonus. In addition, once a taxpayer claims the 50% bonus depreciation for an item of property, the basis of the property must be reduced by the 50% deduction before computing the otherwise allowable depreciation for the first year and later years.

The following example illustrates the substantial benefit of the 50% bonus depreciation rules. On September 1, 2003, a taxpayer buys and places in service office furniture that costs $400,000. Without the 50% first-year bonus depreciation (and assuming the taxpayer does not use the 30% additional first-year depreciation deduction or the Section 179 expense deduction), the maximum depreciation allowance under the traditional rules generally would be 14.29% of $400,000, or $57,160. In contrast, under the first-year bonus depreciation rules (and assuming again that the taxpayer does not take advantage of Section 179), the taxpayer first claims a deduction equal to 50% of $400,000, or $200,000. The $200,000 first-year bonus depreciation is then subtracted from the $400,000 original cost basis, leaving an adjusted basis of $200,000. The general first-year depreciation rate of 14.29% applies to the $200,000, yielding a further deduction of $28,580. The result is a total first-year depreciation deduction of $228,580 ($200,000 plus $28,580), or $171,420 more than under the general rules.

** Donald B. Reynolds, Jr., has practiced law with Silverstein and Mullens in Washington, D.C. since 1979, and specializes in tax and business planning for closely held businesses and their owners. Silverstein and Mullens has served as special tax counsel for over a decade to Fletcher, Heald & Hildreth.*



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- dynamic frequency selection, which allows a transmitter to choose an operating frequency based on signals from other transmitters in the vicinity;

- adaptive modulation that can modify transmission characteristics and waveforms in real time to make best use of spectrum;

- "heteromorphic" waveforms, which can allow signals on the same frequency to co-exist without interference;

- automatic transmit power control to keep emitted power to the minimum needed for reliable communications; and

- location determination (as with GPS) to select appropriate power and frequency for that location.

The NPRM also proposes changes to the equipment authorization rules for software-defined radios, including a requirement for applicants to identify a software-defined radio as such so as to trigger obligations pertaining to software security. And it seeks comment on new types of certification testing requirements needed to evaluate cognitive radios against the rules governing their multiple modes of operation.

Separately, the NPRM proposes to certify Part 15 unlicensed radios on frequency bands not authorized in the United States, if the radio is capable of determining its country of operation and selecting frequencies appropriate to that country.

Comments are due 75 days after publication in the Federal Register, which had not occurred at press time.

"They're everywhere, they're everywhere!!!"

FM Translator Applications Are On The Move

By: *Lee G. Petro*
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We all knew it was going to happen. Some of those thousands of FM Translator applications that were filed in August 2003 had to be accepted by the Commission, and released on public notice. So now the question is, what to do if you are the applicant or a full-power FM licensee seeking to protect your signal?

First, if you are the licensee of a full-power FM station, you may have grounds to object to a new FM Translator in your area if it can be shown that there is overlap between the proposed facility and the full-power station. In addition, even in the absence of overlap between the two signals, if it can be shown that the full-power station has actual listeners in the service area of the proposed FM translator, then the full-power station may have grounds for objecting to the proposed facility.

However, if you are an applicant that has an application for which an opposition has been filed, you should be aware that there are methods to show that the FM Translator will not cause the impermissible overlap between the stations, or that the full-power station will not suffer interference by your proposed facility. In fact, the Commission has repeatedly stated that the protection provided to full-power FM stations by the Commission's rules is ***not*** a strict go-no go situation, thus opening the door to alternative showings that full-power stations will not be affected by your application.

Finally, whether you are the license of a full-power FM station or the proposed licensee of an FM Translator, it is important to remember that FM Translators are secondary services, meaning that if actual interference occurs between a new FM Translator and a full power station, the FM Translator can be ordered to modify its facilities to remove the interference. And in a worst case scenario, if the interference cannot be eliminated, the translator can be ordered to cease operations altogether.

One practical consideration should be kept in mind. When a new translator application is "accepted for filing", the deadline for petitions to deny is a mere 15 days from the date of public notice of that acceptance. That shortened pleading cycle − petitioners against full-service applications normally get 30 days from acceptance to file their petitions − may prove helpful to translator applicants. Conversely, potential petitioners, knowing of the shortened pleading deadline, should be sure to keep a close eye out for new developments (*i.e.*, new translator applications in their vicinity on the same or an adjacent frequency as their full-service station). And now is the time be doing just that, as the FCC's daily public notices of broadcast applications now routinely include listings of anywhere from a couple to several dozen translator applications each day. You can find copies of these public notices on the FCC's website; you can also search for specific applications, or applications meeting certain criteria (*e.g.*, frequency, city, state), at the FCC's CDBS page (http://svartifoss2.fcc.gov/prod/cdbs/pubacc/prod/app_sear.htm).

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also a listener to the non-commercial station and had the right to sue to correct the FCC's Order.

The court went to great lengths to explain that although a listener may have the right to participate in an FCC hearing or proceeding regarding past programming, no such right exists in court. The listener/competitor was not claiming that the improper broadcasts were continuing, in which case it may have been able to ask the court to issue an injunction. Rather, the listener/competitor claimed that the previous broadcasts were improper and the FCC should have come down harder on the station. The court reminded the commercial station that the FCC decision was between the station and the FCC and did not involve the commercial station.

Clients are reminded that the FCC may be the only opportunity to be heard when complaining about a local station or a competitor's practices. Once the FCC has issued an opinion, to the extent that the opinion does not involve the complaining licensee, there may be no further opportunity to bring the wrongdoing station's faults to light.

Wilkommen, Bienvenu, Welcome

M. Scott Johnson Joins FHH

M. Scott Johnson is becoming a member of our firm in February, joining us from the Washington, D.C., office of Gardner Carton & Douglas. Scott's professional life, commencing upon his graduation in 1969 from Duke University School of Law, has been devoted to the practice of communications law.

He is well known for his representation of mass media clients including radio and television station owners, broadcast networks and satellite program distributors. Scott has also represented equipment manufacturers and provided counsel on the telecommunications needs of health institutions. He speaks frequently at radio and television broadcast conventions and seminars, including meetings throughout the country of state broadcast associations and national conventions of the NAB. He is a past board member of the National Television and Radio Political Action Committee, as well as a member of the Radio Advisory Committee for the Federal Communications Commission. Scott has been a member of the board of the Alabama Broadcasters Association since 1975, and in 1999 that Association named him "Broadcaster of the Year." He is also a past board member of the Center for Healthcare Management Systems, which advises the Hospital Information and Management Systems Society concerning telecommunications for health institutions throughout the nation.

Scott, a native Alabaman, graduated from Birmingham-Southern University before attending Duke Law School. He and his family now reside in Potomac, Maryland.

Wilkommen, Bienvenu, Welcome II

Steve Lovelady Joins FHH as Senior Counsel

FHH is also pleased to announce that **Stephen T. Lovelady** has joined us as a Senior Counsel. Steve is a 1978 graduate of Florida Atlantic University and a *cum laude* graduate of the University of Houston Law Center. He is a specialist in transactional matters who has served as an in-house corporate counsel and, most recently, as an associate in the D.C. office of Thompson Hine, a prominent Ohio law firm. Steve is admitted to the bars of Texas, Maryland and the District of Columbia.

We are confident that you will find Steve an excellent addition to our team. Steve can be reached at 703-812-0517 and on-line at lovelady@fhhlaw.com.

FHH - On the Job, On the Go

On January 20, **Frank Montero** moderated a panel discussion on senior debt at a meeting sponsored by the Financial Issues Subcommittee of the FCC's Advisory Committee on Diversity for Communications in the Digital Age. Frank is a member of that Committee. The discussion was held in the FCC's Meeting Room and was part of a day-long series devoted to improving the flow of capital to the media and telecom markets.

Raymond J. Quianzon attended the small telephone company (OPATSCO) winter conference from January 17-22, and will be attending the RES2004 Technology Summit in February where he will lecture, with **John Muleta**, Chief of the FCC's Wireless Telecommunications Bureau, on the status of telecommunications technologies.

Lee Petro attended the Wireless Communications Association International's 10th Annual Technical Symposium and Business Expo in San Jose, California, from January 21-23.

On January 29, **Frank Jazzo** moderated a continuing legal education seminar fo the Federal Communications Bar Association (FCBA) in Washington, DC on political broadcasting regulations. Joining him on the panel were **Bobby Baker**, Assistant Chief of the Media Bureau's Policy Division, and **Jack Goodman**, Senior Vice President and General Counsel of the National Association of Broadcasters. And on February 10, Frank will take his political show on the road, conducting a political broadcasting seminar for the Arkansas Broadcasters Association in West Little Rock.

Kathleen Victory will be participating on a panel on broadcast transactions at the annual American BarAassociation/FCBA presentation on "Representing Your Local Broadcaster" in Las Vegas on April 18, immediately prior to the NAB Convention.

Jennifer Wagner was admitted to the Bar of the U.S. Supreme Court on December 2, 2003.

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.

April 1, 2004

Renewal Pre-Filing Announcements - Television stations located in the **District of Columbia**, **Maryland**, **Virginia**, and **West Virginia** must begin pre-filing announcements in connection with the license renewal process.

Renewal Pre-Filing Announcements - Radio stations located in **Ohio** and **Michigan** must begin pre-filing announcements in connection with the license renewal process.

Renewal Applications - All radio stations located in **Indiana**, **Kentucky**, and **Tennessee** must file their license renewal applications.

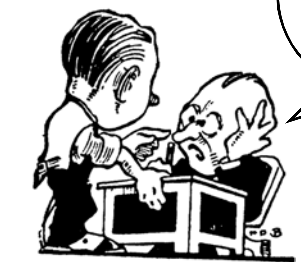
Renewal Post-Filing Announcements - All radio stations located in **Indiana**, **Kentucky**, and **Tennessee** must begin their post-filing announcements in connection with the license renewal process, and continue such announcements on April 1 and 16, May 1 and 16, and June 1 and 16.

EEO Public File Reports - All radio and television stations with more than five (5) full-time employees located in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, **Tennessee**, and **Texas** 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 in **Indiana**, **Kentucky**, and **Tennessee** must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All reports filed on FCC Form 323 or 323-E must be filed electronically.

DTV Simulcasting - DTV licensees and permittees must simulcast 75 percent of the video programming of the analog channel on the DTV channel. This requirement supersedes the allowance for operation with a reduced schedule.

FCC Clarifies "Biennial" Filing Requirement for Ownership Reports



For those of you who may be occasionally confused by the term "biennial", the FCC has added to the confusion. As we all know, biennial ownership reports are required to be filed by all broadcast licensees once every two years, on the anniversary of due date for the station's license renewal application. And a licensee is also required to file an ownership report at the time it files its license renewal application. As originally planned, the timing of the biennial reports was supposed to dovetail with the timing of the renewal application, so that no licensee had to file ownership reports in consecutive years.

The "clarification" means simply that licensees filing renewals in 2004 and 2006 will technically be filing "annual" ownership reports, and not "biennial" reports, along with their renewals.

Of course, the best laid plans of mice and men and the FCC often go awry. And this was no exception. When the current license renewal cycle cranked up last year, a number of licensees found themselves looking at the need to file ownership reports in consecutive years, rather than biennially. In other words, some licensees were required to file biennial ownership reports in, say, 2003, but then they were also required to file biennial ownership reports along with their renewals in 2004 − giving new and exciting meaning to the term "biennial".

To get the system back on track, the Commission has issued a "clarification" of its policy. The "clarification" provides that all commercial and noncommercial licensees scheduled to file renewals in 2004 or 2006 must still file ownership reports at the same time as their renewal, even if those licensees just filed "biennial" ownership reports the year before (*i.e.*, in 2003 or 2005, respectively). In other words, the "clarification" means simply that licensees filing renewals in 2004 and 2006 will technically be filing "annual" ownership reports, and not "biennial" reports, along with their renewals.

But proving that the Commission's heart is really in the right place, the "clarification" also provides that, when the ownership report is submitted in 2004 or 2006 (*i.e.*, at the time of the license renewal application), the licensee should characterize that report as "other" on the CDBS pre-form screen. That should simplify the filing process some, but more importantly, by calling the report an "other" report (as distinct from a "biennial" report, which is one of the other options), the licensee avoids having to pay a filing fee.

The lucky folks who get to file ownership reports in consecutive years include the licensees of commercial and noncommercial radio ***or*** television stations (depending on the applicable renewal filing date) in the states listed below.

RENEWAL APPLICATIONS DUE IN 2004 (licensees will file ownership reports and renewal applications in 2004, and then biennial ownership reports in 2006 and every two years thereafter):

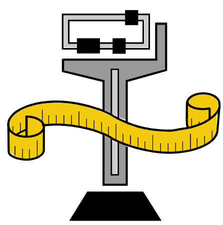
Radio − Arkansas, Colorado, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, North Dakota, Ohio, South Dakota, Tennessee and Wisconsin.

Television − District of Columbia, Commonwealth of Puerto Rico, Territory of the Virgin Islands, Alabama, Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia and West Virginia.

RENEWAL APPLICATIONS DUE IN 2006 (licensees will file ownership reports and renewal applications in 2006, and then biennial ownership reports in 2008 and every two years thereafter):

Radio − Delaware, Pennsylvania, New Jersey and New York.

Television − Territories of American Samoa, Guam, and Saipan, Alaska, Arizona, California, Connecticut, Hawaii, Idaho, Kansas, Maine, Massachusetts, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon, Rhode Island, Texas, Utah, Vermont, Washington and Wyoming.



Fat times for selling weight loss spots, but . . .

Overindulgence Brings Greater Government Scrutiny

By: *Michael Richards*
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Obesity is epidemic in America. And so are questionable ads for weight loss products that promise lots of gain without much pain, says the Federal Trade Commission. Call it over-reaching or call it fraud, the FTC wants broadcasters and other media outlets to right the scales of consumer justice by screening out commercials for slim-down products that make weightier claims than they can possibly deliver.

The government is ***not*** asking broadcasters to add dieticians to their sales teams to evaluate the science behind a prospective commercial. But it ***is*** asking them to refuse to run ads that make claims for diet products that "promise weight loss without sacrifice or effort" because they are "bogus and, in some cases, dangerous."

In practice, the FTC recommends that broadcasters "red flag" ads for nonprescription drugs, dietary supplements, skin patches, creams, wraps, earrings, or other products that are worn on the body or rubbed into the skin if they claim that the product in question can do any of the following things:

Cause weight loss of two pounds or more a week for a month or more without dieting or exercise;

Cause substantial weight loss no matter what or how much the consumer eats;

Cause permanent weight loss (even when the consumer stops using product);

Block the absorption of fat or calories to enable consumers to lose substantial weight;

Safely enable consumers to lose more than three pounds per week for more than four weeks; or

Cause substantial weight loss for all users.

After flagging these types of ads, the FTC recommends that broadcasters probe the advertiser's soft underbelly by demanding proof of their claims. Without proof, the FTC implores – ***but does not require*** – broadcasters to refuse to run a spot. The FTC reveals the skinny on evaluating weight loss claims at its website: http://www.ftc.gov/bcp/conline/edcams/redflag/whatyoucando.html.

This food for thought from the FTC is not binding on broadcasters; the advertisers themselves face legal action for false and misleading claims. The FCC generally defers to the FTC on deceptive advertising issues in which the station is nothing more than a paid conduit for the advertiser's claims. But the FTC does caution that a broadcast outlet which allows bogus items to be advertised among the smorgasbord of products promoted on its airwaves puts at risk the credibility of ***all*** of its advertisers, both legitimate and otherwise.

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

Updates on the News

Access to FCC limited – The up-again-down-again terror alert status that plagued the country during the year-end holiday season affected operations at the FCC. Access to the FCC Reference Information Center was limited during the elevated Code Orange phase, which meant that outside researchers seeking to review FCC files could not do their jobs. That, in turn, slowed down a number of transactions whose closings depended on successful completion of "due diligence" reviews of Commission files. At press time, the terror alert status had been lowered to Code Yellow, and things are back to normal. But parties involved in transactions should keep in mind that elevation of the alert status can have unexpected ripple effects which can interfere with the way things would normally be expected to work. Patience may be necessary.

Homeland security issues ahead? – And speaking of terror alerts, last month we reported on the steps which a special committee recommended to ensure continued operation and security of media facilities in times of national emergency. We have since heard that the Department of Homeland Security is taking those recommendations very seriously. How and when that interest might affect broadcasters is not clear, but don't be surprised if you hear more about efforts to secure media facilities in the coming months.

Closed Captioning Requirement Increases

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The Commission has reminded video programming distributors that the closed captioning benchmarks for ***new*** English and Spanish nonexempt video programming took effect on January 1, 2004 and will remain in effect until December 31, 2005. "New" programming is defined as analog video programming that was first published or exhibited ***on or after*** January 1, 1998 or digital video programming that was first published or exhibited ***on or after*** January 1, 2002. The benchmarks apply to both analog and digital new programming.

With regard to ***new*** nonexempt English language programming, a video distributor shall provide at least 1350 hours of captioned video programming per channel, per quarter. If the programmer has less than 1350 hours of new nonexempt English language programming per channel, per quarter, then all of its English language programming must be captioned. This benchmark is the last one allowing captioning of less than 100% of new English language programming. As of January 1, 2006, 100% of new nonexempt English language programming must be captioned.

With regard to ***new*** nonexempt Spanish language programming, 900 hours of programming must be closed captioned per channel, per quarter. This benchmark increases the requirement from 450 hours. The benchmark for 100% captioning of new nonexempt Spanish language programming is not until January 1, 2010, so there will be another partial increase in this requirement on January 1, 2006.

These closed captioning requirements are separate from programmers' obligations to make emergency information accessible to persons with vision and hearing disabilities.

(Continued from page 1)

as a "race to the bottom"). According to this notion, for a number of the largest broadcasters, the maximum indecency fines amount to little more than chump change. So such fines can be tolerated as a cost of doing business, and they serve no deterrent purpose. As the Chairman sees it, if the cost of the fines could be increased dramatically, deterrence would follow.

In view of Congress's obviously increased attention to indecency matters, and the indubitable attraction of any measure that would lead to increased revenue for the Feds, it appears likely, if not certain, that Congress will take Chairman Powell up on his suggestion that the limit for indecency fines be increased. A bill has already been introduced which would allow the Commission to whack a repeat indecency offender for as much as $3 million.

But once Congress starts down the road of increasing fine limits, what will stop it from raising fine limits across the board for ***all*** types of violations? If that were to happen, the Commission would arguably have an even greater incentive to ferret out apparent violations and issue substantial fines.

So as a practical matter, it is not unreasonable to assume that the trend toward increased enforcement will continue and that the Commission's enforcement activities will become even more aggressive.

How to react? The best way to protect yourself against forfeiture actions is to make sure that you are not in violation of any of the Commission's rules. Sounds simple, but that approach is certainly difficult, if not impossible. Still, by working with legal and engineering counsel and with your state broadcast association, you should be able to get a reasonably good handle on the areas in which the enforcement folks have demonstrated the most interest. And then you can take whatever steps may be necessary to assure that your operation is in compliance.

For a decade or more the Commission seemed to slack off on enforcement, and thereby may have created the impression in the industry that compliance with all the Commission's nitty-gritty rules was not all that important. Even if that perception was valid back then, it does not appear to be valid now. And with the real possibility that the fines to be imposed on violators may escalate sharply in the near future, it is important to abandon any lackadaisical attitudes that may have been developed while the enforcement bear slept. The bear, it appears, has awoken.

FM ALLOTMENTS ADOPTED –12/17/03-1/20/04

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
WV	Marmet	10 m. SE of Charleston	227A	03-164	None
VA	Lynchburg	80 m. W of Richmond	229A	96-100	TBA
VI	Charlotte Amalie	25 m. E of the Coast of Culebra Island, PR	257A	00-102	TBA
VI	Frederiksted	50 m. S of Charlotte Amalie	258A	00-102	TBA
VI	Christiansted	10 m. E of Frederiksted	293B	00-102	None
TX	Muleshoe	80 m. NW of Lubbock	227C1	02-251	TBA
TX	Big Lake	160 m. SW of Abilene	296C2	02-254	TBA
TX	Turkey	80 m. NE of Lubbock	269A	02-370	TBA
TX	Presidio	200 m. SE of El Paso	292C1	02-239	TBA
AL	Gurley	15 m. E of Huntsville	231A	02-114	None
AL	Meridianville	10 m. N of Huntsville	262C2	02-114	None
AL	Carrollton	80 m. W of Birmingham	231C0	02-114	None
TX	Silverton	80 m. NE of Lubbock	252A	03-72	TBA
OK	Leedey	90 m. W of Oklahoma City	297A	03-73	TBA
TX	Memphis	75 m. SE of Amarillo	283A	03-75	TBA
NM	Carrizozo	60 m. SE of Albuquerque	261C2	03-69	TBA
NE	Hartington	120 m. NW of Omaha	232C2	02-121	TBA
TX	Centerville	Midway between Houston and Dallas	274A	02-128	TBA
UT	Salina	90 m. S of Provo	233C	02-166	TBA
UT	South Jordan	10 m. S of Salt Lake City	223C2	02-14	None
UT	Naples	4 m. SE of Vernal	223C2	02-14	None
UT	Coalville	25 m. NE of Salt Lake City	276C	02-14	None
ID	Rupert	40 m. E of Twin Falls	291C0	02-14	None
UT	Payson	15 m. S of Provo	221A	02-14	None
UT	Wellington	70 m. SE of Provo	237C3	02-14	TBA

FM ALLOTMENTS ADOPTED –12/17/03-1/20/04 *(continued from previous page)*

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
UT	Castle Dale	80 m. SE of Provo	271C3	02-14	TBA
AZ	Leupp	150 m. N of Phoenix	255C2	DA03-3922	None
ID	Sun Valley	90 m. W of Boise	298C0	DA03-3923	None
LA	New Iberia	25 m. S. of Lafayette	256C0	DA03-3924	None
LA	New Orleans		258C0	DA03-3925	None
MS	Jackson		242C0	DA03-3926	None
MS	Laurel	70 m. SE of Jackson	262C0	DA03-3927	None
NC	Greensboro	50 m. W of Raleigh	246C0	DA03-3928	None
TN	Trenton	80 m. NE of Memphis	249C2	DA03-3929	None
UT	Tremonton	40 m. N of Ogden	285C0	DA03-3930	None
WY	Cheyenne		285A	DA03-3931	None

FM ALLOTMENTS PROPOSED –12/17/03-1/20/04

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
WY	Newcastle	20 m. SE of Osage	258C0	03-258	Cmts - 02/17/04 Reply-03/03/04	1.420
WY	Pine Haven	40 m. E of Gillette	260A	03-258	Cmts - 02/17/04 Reply-03/03/04	1.420
MI	South Haven	50 m. SW of Grand Rapids	279A	03-257	Cmts - 02/17/04 Reply-03/03/04	1.420
MI	Hartford	10 m. S of South Haven	252A	03-257	Cmts - 02/17/04 Reply-03/03/04	1.420
AL	Littleville	10 m. N of Russellville	278A	04-12	Cmts - 03/12/04 Reply-03/29/04	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.

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