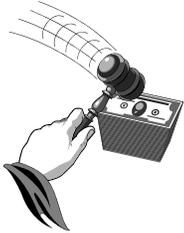


Memorandum to Clients

November, 2004

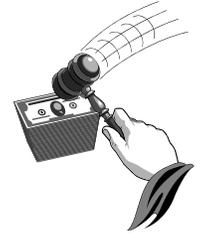
News and Analysis of Recent Events in the Field of Communications

No. 04-11



FCC, takin' care of bid-ness

FM Auction Action: A Recap



By: R.J. Quianzon
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With 450 applicants starting to bid on the day after Election Day, slightly more than 100 remained standing two weeks later. With the end of the FCC's first open auction of FM spectrum looming in sight at press time, it looked like U.S. taxpayers would be nearly \$200 million dollars to the good, in exchange for which they would be handing over 275 or so construction permits. The final prices for frequencies were expected to range from \$4,000 for Kotzebue, Alaska, to \$7 million for Pacific Junction, Iowa (Omaha).

Many of the most active bidders (and most likely winners) in the auction were no strangers to the broadcasting industry. The smart money figured that an affiliate of Marathon Media/3 Point would likely end up the winning bidder on more than 40 licenses (15% of those at auction) with

bids totaling close to \$40 million. Former Clear Channel CEO Randy Michaels was looking good for 20 licenses, for which he made unadjusted bids totaling about \$13 million – but don't feel that sorry for him, because he will receive a 35% discount for being a "new entrant" to the broadcasting industry. The criteria for "new entrant" status are based upon how many TV and radio stations, cable companies and newspapers an applicant owned or controlled on August 6, 2004. Although he has numerous connections and significant experience in the industry, Michaels owned no stations on August 6 and was entitled to the \$4.5 million discount. Similarly, former radio executives Jefferey Warshaw and Michael Driscoll have indicated that they will claim an \$8.75 million discount on their \$25 million bids for 10 stations. Not a

single one of the Warshaw/Driscoll winning bids was for less than \$1 million, including the \$7 million bid mentioned above for Pacific Junction, Iowa. Cumulus, which took no discount, was the likely winner in a dozen markets with bids totaling about \$12 million.

Procedurally, the winning bidders will have until an as-yet unannounced deadline (likely until mid-December) to pay 20% of their winning bids as a down payment. Engineering support and full applications for the new stations must be submitted to the FCC before the end of the year. After typical FCC processing and an opportunity for opponents to file petitions against the applications, the FCC will grant construction permits to qualifying winning bidders who remit the remaining 80% of their bids. Winning bidders will then have the standard three-year construction period during which to build their stations.

During the course of the auction, several bidders submitted complaints to the FCC about other bidders and their eligibility to participate in the auction. In all instances the FCC

(Continued on page 11)

The auction rules prohibit bidders from discussing the auction with one another until several weeks after the auction is over. Even though the auction is over, you are still prohibited from discussing the auction with other participants.

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Out with old, in with the new (and the previously used)

Democracy In Action

The fall-out from Election 2004

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Now that the Presidential election is over, Washingtonians get to enjoy the quadrennial game of guessing who is leaving, who is staying, and who will be the next person coming back in through the revolving doors of the Federal government. We already know, for instance, that we will have a new Secretary of State, Attorney General and Secretary of Commerce (and that last change could have a significant impact on communications issues, since NTIA falls under Commerce's jurisdiction). And apart from the major cabinet offices, there are a series of changes both on the Hill and at the FCC which could end up changing the way broadcasters toil in the field.

On the Hill, where the Republicans still control both the House and the Senate, we will have a number of scheduled changes on the Senate side due to previously-established procedural rules which determine the schedule for changing committee chairmanships. First of all, we will have John McCain (R-Arizona) leaving as head of the Senate Commerce Committee, to be replaced by Senator Ted Stevens (R-Alaska). On the Democrat side, Daniel Inouye (D-Hawaii) is expected to replace Ernest Hollings (D-South Carolina), who retired.

In the House, Joe Barton (R-Texas) will continue as Chair of the Energy and Commerce Committee, with Fred Upton (R-Michigan) as Chair of the Telecommunications and Internet Sub-Committee. John Dingell (D-Michigan) will remain as the ranking Democrat of the Full Committee, with Ed Markey (D-Massachusetts) continuing on the Sub-Committee.

These changes will take place after the new Congress is sworn in in January. What we don't know is whether the Republicans, because of their increased majority in both Houses, will seek to increase their members in these Committees.

At the FCC, the Republicans will remain in control of the five-member Commission. Although no formal announcement has been made (and, to the contrary, the Chairman has suggested that he doesn't plan to go anywhere), a number of observers expect Chairman Michael Powell to leave in the Spring of 2005. By that time, it is anticipated that he will have moved forward for Commission vote the items which he views as important to his legacy.

Republicans Kevin Martin and Kathleen Abernathy are expected to stay at least through the first half of 2005. Although Abernathy's term has already expired, she can stay until the end of the next Congress. However, unless she is given a chance to replace Powell if and when he leaves as Chair, there is speculation that she will leave for the private sector, where she previously worked. Kevin Martin, who has strong political backing – not only did he work on the President's campaign in 2000, but his wife works with the Vice President – may well have an inside track on the Chairmanship after Powell leaves. However, there has been some talk about fellow Texans coming to D.C. to find seats on the FCC. It is probably too early to know exactly what is going to happen there.

On the Democratic side, Jonathan Adelstein has demonstrated an impressively phoenix-like nature, arising out of the ashes to get a last minute reprieve from President Bush apparently as part of a Hill agreement involving held-up judicial nominations. Adelstein's initial nomination provided a long-running soap opera when it got hung-up in the Senate because of political wrangling. And he was marked as a dead man

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Indecent Programming - Ten months after the Janet Jackson incident aired during the Super Bowl – and two months after CBS was fined for the incident – ABC is taking a crack at the FCC’s indecency meter. A recent Monday Night Football introduction featured a nude (or so she seemed) actress seducing a football player into spending the first quarter of the game with her. The segment aired at 9:00 p.m. , and shortly thereafter, ABC apologized for the stunt. However, FCC Chairman Powell does not seem amused by the latest installment of football flesh follies. During an interview, Chairman Powell expressed disappointment with the broadcasting tactics and, specifically addressing the Monday Night Football issue, questioned whether Walt Disney would be proud of what ABC had done. The FCC indicates that it has already received complaints from viewers.

ABC faced a similar dilemma only a few days earlier as it planned to air the movie *Saving Private Ryan* on Veterans Day. Although ABC and its affiliates previously had aired the unedited version of the movie and complaints had previously been filed with *and denied* by the FCC, affiliates were wary this year. The movie, which contains graphic violence and adult language, was not aired by several affiliates around the nation. One of the measures by which the FCC judges indecency considerations is a “contemporary community standard”. Affiliates around the country expressed concern that the evolving “contemporary standard” may have recently evolved into a standard that no longer accepts this movie. Having created this difficult conundrum for broadcasters, the FCC declined to help them out of it: it announced that it would not “pre-clear” broadcast material, and it left the decision of whether or not to air the movie with the broadcaster.

In yet another Sweeps Weeks development, a CBS affiliate in Ohio broadcast footage of a nude journalist (from a distance) reporting on a nude art exhibition. However, unlike the Super Bowl, Monday Night Football and *Saving Private Ryan*, the newscast was aired at 11:00 p.m. FCC officials are quoted as responding to the nude news with reference to the fact that indecency limitations are enforced by the FCC for broadcasts between 6:00 am and 10:00 pm. These time parameters exist based upon the theory that children in the audience are less likely to be listening or viewing between 10 p.m. and 6 a.m. in the morning.

Decent Programming, But for Money - The licensee of an Indiana public television station paid a \$1,000 fine and entered into a compliance plan after it admitted that some of its

underwriting acknowledgments were actually advertisements. As part of the new compliance plan, the station will conduct training courses for its employees and its “advertisers”. In addition, the station must now run any underwriting acknowledgments through a multi-level internal process. Noncommercial radio and television licensees must ensure that they strictly adhere to the FCC’s limitations on underwriting acknowledgment to avoid FCC enforcement actions.

Focus on FCC Fines

By: R.J. Quianzon
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In another NCE “advertising” decision, the Commission admonished a low power FM station in Wisconsin for broadcasting advertising announcements. Of particular interest in the FCC’s decision in this case was the Commission’s suggestion that non-commercial underwriting acknowledgments – *i.e.*, the NCE equivalent of spots – ranging from 36-49 seconds are of “excessive length”. While the FCC’s rules and precedents do not establish any absolute time limit for proper underwriting announcements, the Commission seems to feel that the longer an announcement rambles on, the more likely it is to lose its non-commercial focus and instead cross the invisible (except in hindsight) line into advertising. And, apparently, the Commission figures that that line is likely to get crossed if the announcement clocks in at 36 seconds or more.

Public Files - FCC agents remain diligent in their inspections of stations, including the stations’ public files. The Feds descended upon stations in Missouri, Mississippi and Louisiana recently and issued fines for public file lacunas. A noncommercial FM station in Lebanon, Missouri, got spanked with a \$4000 fine for not having a contour map or “The Public and Broadcasting” manual in its file. Although the Missouri fine could have been \$10G’s, the FCC cut them a break because everything else was in the file. An AM station in Baton Rouge was whacked with a \$20,000 fine for public file, fencing and EAS violations. The station provided the FCC with copies of police reports indicating that a robbery had occurred at the station. The station suggested that certain public file documents were discarded when the station was cleaned up after the robbery. The FCC didn’t buy it. Instead, the Commission found that the station had admitted to willfully discarding public file documents. Finally, the Commission thumped a Senatobia, Mississippi, AM station to the tune of \$21,000 for failing to allow access to its public file, antenna problems and defective EAS equipment.

Other EAS fines include - A Palm Springs, California, low power television station failed to install and operate its EAS

(Continued on page 12)



Bureau makes a u'ey in Denver

Bureau Grants Waiver, Rescinds Waiver, Eliminates Waiver

By: John C. Butcher
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In a recent, unexpected move, the Media Bureau reversed course on the so-called “Denver Waiver”.

The “Denver Waiver” reflects an effort by the FCC to adjust its general allotment standards – developed for universal application to all situations across the country – in acknowledgment of the fact that some circumstances don’t fit conveniently into a universal mold. Under the “Denver Waiver”, the FCC waived Section 73.313(d) of its rules for a number of stations in the Denver, Colorado area, allowing them to exclude from their antenna HAAT calculation the four radials extending over the Rocky Mountains. The problem was that those pesky mountains messed up the validity of the FCC’s standard contour prediction method. The obvious answer: ignore the mountains.

Since the mid-1980s, the Bureau has granted a half-dozen or so waivers under this policy, citing the unique conditions around Denver – the Rocky Mountains to the West and flat terrain toward the population centers to the east – as justification for essentially providing full Class C protection to stations whose antenna heights are below class maxima.

However, when three Denver stations recently requested waivers in connection with minor modification applications they filed, the Bureau denied the waivers and dismissed the applications.

The Bureau based the about-face on the increased demand for FM spectrum since 1986, demand amply demonstrated by the number of parties objecting to the proposed modifications. Some of those objectors sought to provide new or improved service that would otherwise be precluded by grant of the requested waivers. Noting recent population growth in areas west of Denver, the Bureau deemed new service to such population centers more important than continuing protection to Denver Waiver stations. According to the Bureau, continuation of the Denver Waivers would frustrate Commission policy favoring additional service over protection of existing

stations in excess of actual licensed station parameters. This is a variation on the policy behind the Commission’s creation of the Class C0 designation in the technical streamlining proceeding.

In addition to the screeching tires of the Bureau’s turnaround, a couple of other aspects of the decision are worth noting. First, its reference to Commission precedent notwithstanding, the Bureau’s decision was largely unanticipated, even, apparently, by the Bureau itself – all three modification applications and waiver requests were originally granted by the Bureau. These grants were rescinded when the Bureau “discovered” that last minute informal objections had been filed to the applications by an environmental group and a competing broadcaster.

After rescission of the grants, a slew of objections from other broadcasters with competing interests followed, objections that the Bureau ultimately endorsed. Which just goes to show that it is never too late to have your hopes dashed at the FCC – even last-minute objections can derail an apparently grantable application.

Second, while the Bureau rejected most of the objections raised by the environmental group, it agreed with the group’s claim that the location of the subject towers near the historic Lariat Trail and the National Register-listed Buffalo Bill’s grave implicated the National Historic Preservation Act (NHPA). Via footnote, the Bureau indicated that replacement of an existing structure constitutes an “undertaking” for purposes of the NHPA. However, reinforcing the view that size matters, the Bureau further noted that construction of a replacement tower that does not “substantially increase the size of the existing tower” within stated parameters would not fall under the purview of the NHPA.

Stay tuned for more developments. As this decision demonstrates, you never can tell when, where and what new logic will emerge from the busy minds at the FCC.

This just goes to show that it is never too late to have your hopes dashed at the FCC – even last-minute objections can derail an apparently grantable application



*Prudent, successful exercise of discretion
or craven, wholesale surrender? You make the call.*

NAB Drops Challenge to SDARS "Local" Programming

By: Steve Lovelady
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As faithful readers of this publication will recall, in our May issue we told you about a petition by the National Association of Broadcasters (NAB) asking the FCC to declare that Satellite Digital Audio Radio Service (SDARS) licensees – *i.e.*, XM Radio, Inc. and Sirius Satellite Radio, Inc. – are not allowed to deliver local programming content to the public. The NAB wanted to stop XM and Sirius from broadcasting local traffic and weather reports to SDARS subscribers. The FCC received over 25,000 comments on this petition over the last few months, mostly from XM and Sirius subscribers who wanted to continue receiving local content.

Now the NAB has voluntarily asked the FCC to dismiss the NAB's own petition without prejudice (a legal term-of-art meaning the NAB will be free to come back later and file another petition on the same subject seeking the same or similar relief). According to the NAB, it wants more time to present evidence to the FCC about recent and rapid developments in SDARS technology and programming trends, and the harm caused thereby to local terrestrial radio. In its dismissal request, the NAB specifically mentioned the development of new addressable satellite radio receivers with global positioning system technology and the \$650 million deal between XM and Major League Baseball as examples of two events that have occurred since the NAB filed its original opinion.

The FCC routinely granted the NAB's request for dismissal on November 10th. Not surprisingly, the NAB and XM characterized the dismissal differently. According to the NAB's spin, the FCC "granted NAB's request to present new evidence regarding efforts by XM and Sirius to cir-

cumvent rules that bar them from offering local program content."

XM put a different spin on the FCC's action, claiming in a press release that the "NAB end[ed] the process it started by its petition, thereby leaving in place the rules and regulations that enable XM to provide [local] services." XM

went on to crow that "[t]his is a *complete vindication* [emphasis added by us] of our position that XM has complied and continues to comply with FCC rules." XM speculated that the NAB withdrew its petition at the last minute because the FCC was about to rule against the NAB.

Point-Counterpoint

NAB: FCC has "granted NAB's request to present new evidence."

XM: The dismissal of the NAB petition "is a complete vindication of [XM's] position."

One thing that both sides can agree upon is that SDARS technology continues to rapidly evolve. One day after the FCC dismissed the NAB's petition, XM announced that its new "XM NavTraffic" product had been recognized by the Consumer Electronics Association

as a "Best of Innovation 2005 Honoree." This new technology displays current traffic information on a driver's vehicle navigation system display screen, personalized to the driver's current location and planned route. The information is received via XM's excess bit stream capacity outside the active audio broadcasts. It is available as an option on certain 2005 Acura and Cadillac models, and soon as an aftermarket add-on for all automobiles.

And on the programming side, in case you've been living in a cave and haven't heard the news, in October Howard Stern announced that, at the conclusion of his current contractual commitments on the broadcast side, he is taking his show (and, he presumably hopes, his millions of listeners) to Sirius.



(Continued from page 2)

by pundits just a few days before his re-nomination. But his appointment this time around was apparently rescued by backroom maneuvering by Senate leaders looking for approval of a number of judicial nominations which had been held up by the Daschle Senate. Ironically, Adelstein had worked for Daschle, who has now been defeated and will be leaving the Senate.

Michael Copps, the road warrior, remains in place and is expected to continue to irk Michael Powell and the other Republicans. Adelstein has been a supporter of Copps in many of his battles with the majority.

Whether it is going to involve more regulation of indecency, more tweaking of the DTV roll-out, or further developments on the spectrum reallocation front, the upcoming year will certainly be an interesting one.

December 1, 2004

DTV Ancillary/Supplementary Services Report - All licensed DTV facilities must file a report on FCC Form 317 to state whether the station has provided ancillary or supplementary services for a fee during the period from October 1, 2003, through September 30, 2004. If such services have been provided, the station must state the revenue received and must also make payment equal to five percent of the gross revenues received, and also submit both an FCC Remittance Advice (Form 159) to the Commission

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

Radio Renewal Pre-Filing Announcements - Radio stations located in **Kansas, Nebraska, and Oklahoma** must begin pre-filing announcements in connection with the license renewal process.

Television/Class A/LPTV/TV Translator Renewal Applications - All television, Class A TV, LPTV, and TV translator stations located in **Alabama and Georgia** must file their license renewal applications.

Radio Renewal Applications - All radio stations located in **Colorado, Minnesota, Montana, North Dakota, and South Dakota** must file their license renewal applications.

Radio and Television Renewal Post-Filing Announcements - All radio stations located in **Colorado, Minnesota, Montana, North Dakota, and South Dakota** and all television stations located in **Alabama and Georgia** must begin their post-filing announcements in connection with the license renewal process, and continue such announcements on December 1 and 16, January 1 and 16, and February 1 and 16.

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

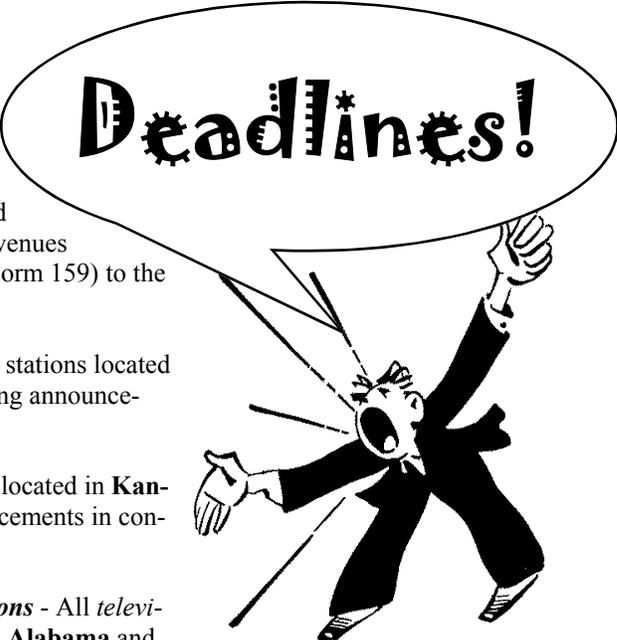
Radio and Television Ownership Reports - All radio stations in **Colorado, Minnesota, Montana, North Dakota, and South Dakota**, and all television stations located in **Alabama and Georgia** must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All reports filed on FCC Form 323 or 323-E must be filed electronically.

January 10, 2005

Children's Television Programming Reports - For all commercial 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. Documentation demonstrating compliance with the commercial limits in children's television must also be placed in each station's public inspection file.

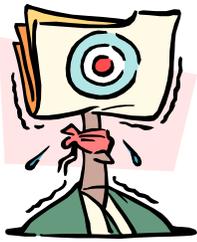
February 1, 2005

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



Deadlines!

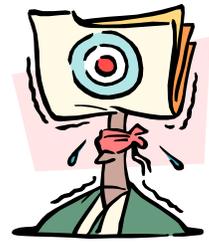
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Caveat renewal applicant

Content-based Renewal Challenges On the Rise

By: *Michael Richards*
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Sinclair Broadcast Group may have backed down from its pre-election plan to run a film produced by anti-John Kerry activists as a news documentary, but the company remains in the political cross hairs.

A petitioner calling itself “Free Press” is challenging the renewal of several stations owned either by Sinclair or by another company controlled by the mother of Sinclair’s chairman, David Smith. Free Press describes itself as “a non-profit organization working to involve the public in media policymaking and to craft policies for a more democratic media system.”

Free Press says it would have filed its petition against Sinclair even if Sinclair had never planned to air the film critical of Senator Kerry. Free Press opposes Sinclair’s production of local newscasts on stations across the country from a central newsroom at its Maryland headquarters. The petition complains that “Sinclair uses its ‘News Cen-

tral’ to camouflage its cutbacks in local community coverage”. Free Press also alleges that Sinclair “inserts commentary disguised as news reporting, often failing to disclose that the commentary is not from someone in the local community.”

The petition also recites a number of allegations of misconduct that have previously been reviewed and adjudicated by the Commission, as well as non-broadcast business activities by one of the brothers controlling the company – according to Free Press, this represents “a continuing pattern of abuse” which should be held against Sinclair in the evaluation of Sinclair’s renewal applications.

The FCC has, over the past decade, almost invariably granted every renewal application that was put before it. Even when faced with petitions to deny such applications, the Commission has almost never even designated a license

(Continued on page 12)



Deadlines!

(Continued from page 6)

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

Television/Class A/LPTV/TV Translator Renewal Applications - All television, Class A TV, LPTV, and TV translator stations located in **Arkansas, Louisiana, and Mississippi** must file their license renewal applications.

Radio Renewal Applications - All radio stations located in **Kansas, Nebraska, and Oklahoma** must file their license renewal applications.

Radio and Television Renewal Post-Filing Announcements - All radio stations located in **Kansas, Nebraska, and Oklahoma**, and all television 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 five (5) or more 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.

Radio and Television Ownership Reports - All radio and television stations located in **Arkansas, Kansas, Louisiana, Mississippi, Nebraska, New Jersey, New York, and Oklahoma** 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.



Bureau eschews pick and choose

Bureau Criticizes À La Carte Option For MVPC Programming

By: John C. Butcher
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Just as this issue of the Memorandum to Clients was going to press, the Media Bureau released its Report detailing the (few) pros and (numerous) cons of an à la carte pricing model for cable and satellite programming. As previously reported in these pages, last May members of both the House and Senate requested that the FCC weigh in on the potential for à la carte pricing in MVPD markets to reduce MVPD rates and increase viewer control over channel and content selection. Hopping right on the project which Congress had dumped on the Commission's doorstep, the Bureau conducted a symposium and solicited public comments on the positives and negatives of an à la carte regime. Based on a quick study of the resulting Report, here's an account of the Bureau's less-than-warm embrace of the à la carte model.

According to the Bureau, an à la carte model would *not* lower subscription costs or promote viewer choice. Instead, the Bureau concluded that the average cable or satellite subscriber would most likely see an increase in his or her monthly bill. And to make matters worse, that price increase would be accompanied by a dwindling supply of channels from which to choose.

The Bureau's thinking goes like this. Under an à la carte system, MVPD providers would incur higher operational costs as a result of more complex infrastructure, customer service, and billing requirements. (Obviously, having to provide for and then track (for billing purposes) millions of individualized, household-by-household program selections will cost the MVPD folks more than the tiered programming bundles currently offered.) And these costs would be passed on to subscribers. According to the Bureau, only those customers purchasing fewer than nine networks would actually see their cable or satellite bill reduced. The average MVPD customer, who regularly watches 17 channels, would get hit with a rate increase somewhere between 14% and 30%.

The Bureau also concluded that à la carte pricing would

have a detrimental impact on the diversity of programming options. Under an à la carte system, networks would no longer be assured inclusion in a basic programming tier, and many niche market providers would have to bump up marketing efforts in order to attract viewers. And while these same special interest networks would thus be incurring (presumably) greater promotion costs, they would also likely be taking a corresponding hit in their advertising revenue. The loss of ad revenue combined with increased marketing and operational costs could drive many niche market networks out of business, thereby reducing the options available to viewers.

The Bureau's negative assessment of à la carte pricing extended to both a pure à la carte approach and a partial, voluntary one. The same cost increases would apply whether an à la carte model was mandated across-the-board, or introduced as an option alongside tiered programming. Ei-

ther way, these cost increases would be passed on to subscribers.

Rather than focus on à la carte as the solution to high prices, the Bureau recommended that Congress provide incentives for increased competition in the MVPD market. The Bureau noted the emergence of USDTV as an alternative to cable and satellite and the entry of phone companies into the video marketplace (think SBC/Microsoft) as positive developments in this direction. With regard to viewer control over channel and content selection, the Bureau suggested that video-on-demand technology and digital video recorders (e.g., TiVo) as well as the V-chip ultimately offer better means to improving viewer control than the à la carte model.

The Bureau also addressed the practice of tying the acquisition of rights to a popular program network to the purchase and carriage of less popular program networks, say, for example, in the context of retransmission consent negotiations. Interestingly, the Bureau concluded that

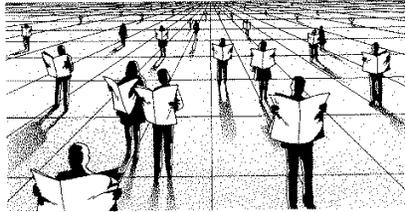
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The Bureau concluded that the average cable or satellite subscriber would most likely see an increase in his or her monthly bill. And to make matters worse, that price increase would be accompanied by a dwindling supply of channels from which to choose.

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

Updates on the News

AM Singleton List Out – The Commission has released a second list of “singleton” AM applications. As you will recall, the FCC opened a window for the filing of new and major change AM applications last January. Because of the complexity of AM applications, the staff must study the specific proposed facilities of each of the applications in order to determine whether any of them are mutually exclusive. The process is extremely time-consuming, as demonstrated by the fact that it has taken nearly a year for the staff to issue two lists of applications which have been found (at least preliminarily) *not* to be mutually exclusive with any others. The lucky folks on the list now have until January 18, 2005 to get their long-form application (FCC Form 301) on file and pay the fee.



Unamended Radio Applications

Out – Perhaps out of sorts as a result of the rejection of its new (well, they *were* new, back in July, 2003) ownership rules, the Commission has taken the somewhat drastic step of dismissing applications which were filed on “old” (*i.e.*, June, 2002) versions of FCC Forms 301, 314 and 315 which (a) were still pending as of October 8, 2004 but (b) were not amended by November 8, 2004. As you will recall, the “new” ownership rules became effective, and then were stayed, and then became effective again (at least to a limited extent), all over the course of more than a year. While all that back-and-forth was happening, folks were still filing applications for construction permits (Form 301) and assignments and transfers of licenses (Form 314 and 315, respectively). Since all those forms include questions whose meaning depends on the ownership rules in effect at the time the forms are completed, the precise status of the “new” rules was of some significance.

Finally, in October, 2004, the Commission announced that it had approved new versions of those forms which had been updated to be consistent with the “new” ownership rules. In a public notice issued on October 8, 2004, the FCC announced a deadline of November 8, 2004 by which any then-pending radio applications which had been filed on the June, 2002 versions of those forms would have to be amended to demonstrate compliance with the “new” ownership rules. And in a follow-up public notice, issued November 18, the Commission announced that it was thereby dismissing more than 100 applications which had not been amended by the November 8 deadline.

We hear that applicants who were on the dismissed list may be able to get back in the door by filing petitions for reconsideration.

And the FCC has since announced that anybody with a radio application (Form 301, 314 or 315) filed on a version of the form earlier than the June, 2002 version must amend their applications by December 18 or face dismissal. The amendment must demonstrate compliance with the “new” local radio ownership rules.

Given the Commission’s quick trigger finger (as evidenced by the issuance of the first dismissed list less than two weeks after the October 8 amendment deadline), we suspect that we can be looking for a second dismissed list before the end of the year. Potentially affected applicants should act accordingly.

And finally – The *Memorandum to Clients* staff wishes all our readers a Happy Thanksgiving!!!



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tying arrangements may well be counter to the public interest because they can lead to less-than-optimal use of channel capacity.

However, the Bureau ultimately punted, recognizing that (a) Congress established the retransmission consent process and (b) it might be imprudent for the Bureau to conclude that that process is not working as intended. Covering its, er, bases just in case, the Bureau also suggested that if there’s a problem, it ought to be addressed by the antitrust folks.

At the end of the day, the Commission praised the Media Bureau’s Report and Congress praised the Commission. Interestingly, there may be some empirical evidence supporting the Bureau’s position. Our idealist neighbors to the north have an à la carte cable regime, and the Canadian experience suggests that the Bureau might be onto something. According to some observers, unexpected costs, deteriorating quality of service and reduced consumer choice have accompanied the Canadians’ actual experience with this otherwise fine-sounding idea. That suggests that there are valid reasons to reject the à la carte model (over and above the fact that “à la carte” sounds, like, too French).

FM ALLOTMENTS ADOPTED –10/23/04-11/17/04

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
NJ	Burlington	20.5 miles N of Philadelphia, PA	248B	04-150	None
TX	Smiley	61.5 miles SE of San Antonio	280A	02-248	TBA
GA	Dawson	23 miles N of Albany	251C3	04-33	None
GA	Pinehurst	116.9 miles S of Atlanta	252A	04-33	None
GA	Dexter	130 miles S of Atlanta	276A	04-69	TBA
TX	El Indio	139 miles S of San Antonio	236A	04-169	None
AL	Boligee	98.6 miles NE of Birmingham	297A	04-213	TBA
MS	Vaiden	76.7 miles N of Jackson	271A	04-216	TBA
FL	Cross City	111.2 miles S of Jacksonville	249C3	04-195	TBA
FL	Key Largo	49.2 miles S of Miami	237C3	04-196	TBA
ID	McCall	90.2 miles N of Boise	228C3	04-197	TBA
ID	McCall	90.2 miles N of Boise	238C3	04-198	TBA
ID	McCall	90.2 miles N of Boise	275C3	04-199	TBA
ID	McCall	90.2 miles N of Boise	293C3	04-200	TBA
CA	Quincy	102 miles N of Sacramento	265A	04-164	None
CA	Portola	110.6 miles N of Sacramento	269A	04-164	TBA
CA	Susanville	83.6 miles NW of Reno, NV	262A	04-164	TBA

FM ALLOTMENTS PROPOSED –10/23/04-11/17/04
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State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
WY	Cheyenne	96.8 miles N of Denver, CO	229C2	04-402	Cmts -12/16/04 Reply-12/31/04	Drop-in
WY	Encampment	81.41 miles SW of Laramie	285C2	04-402	Cmts -12/16/04 Reply-12/31/04	Drop-in
OK	Maysville	46.8 miles S of Oklahoma City	251A	04-404	Cmts -12/16/04 Reply-12/31/04	Drop-in
TX	Bertram	94.7 miles N of San Antonio	248A	04-407	Cmts -12/27/04 Reply-01/11/05	Drop-in
TX	Hawley	11.6 miles NW of Abilene	269A	04-408	Cmts -12/27/04 Reply-01/11/05	Drop-in
NJ	Port Norris	52.5 miles S of Philadelphia, PA	299A	04-409	Cmts -12/27/04 Reply-01/11/05	Drop-in
TX	Woodson	64.2 miles N of Abilene	298A	04-410	Cmts -12/27/04 Reply-01/11/05	Drop-in
OH	Georgetown	42 miles ESE of Cincinnati	276A	04-411	Cmts -12/27/04 Reply-01/11/05	Drop-in
OH	Mason	20.2 miles S of Cincinnati	249A	04-411	Cmts -12/27/04 Reply-01/11/05	Drop-in
KY	Salt Lick	60.7 miles E of Lexington	249A	04-411	Cmts -12/27/04 Reply-01/11/05	Drop-in

Notice Concerning Listings of FM Allotments

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



(Continued from page 1)

declined to halt the auction, deferring any consideration of the allegations until such time as a winning bidder is declared. If the winning bidder turns out to be a party against whom accusations were leveled, the Commission will consider those accusations at that time.

For now the FCC has not announced when it will conduct its next auction of FM frequencies. If this auction is any indicator, the next auction should be conducted soon to seize on the untamed exuberance displayed by many of the bidders this month.

Readers who were bidders in this auction are reminded that the arcane auction rules prohibit bidders from discussing the auction with one another until several weeks after the auction is over. In other words, even though the auction is over, and even though you may have dropped out of the bidding after just the first couple of rounds, you are still prohibited from discussing the auction with other participants. If you were a bidder in the auction, we suggest that you not discuss the auction with other participants until you have checked with us to confirm that the prohibition has been lifted. If you are contacted by another bidder, the auction rules require you to report the contact to the FCC.



(Continued from page 7)

renewal for the long and arduous hearing process which would be the necessary first step to non-renewal. So when viewed through the lens of history, the noisy charge being mounted by Free Press may not be viewed as much of a real threat.

Nonetheless, when the robber on the street claims to have a gun in his pocket and a willingness to use it, you pay attention, even if you suspect that the threat is not all that real. So it is when petitions seeking denial of license renewal – *i.e.*, the death penalty – start to roll in. And paying attention is particularly appropriate nowadays in light of the fact that the regulatory pendulum has in recent years been swinging farther in the direction of increased regulations. There's no telling when a regulatory-minded Commission might suddenly decide that the time has come to get the attention of the broadcast industry.

Even if a petition is eventually dismissed, it is likely to delay considerably a station's renewal grant. Without such a grant, a licensee can be left in business purgatory – potentially unable to sell an affected station, encountering greater difficulty obtaining financing or investment capital and suffering defections from worried employees until the potential mushroom cloud of a lost license dissipates.

The Free Press petition against Sinclair is but the latest attack by policy activists on renewal applications. Earlier this year, Former FCC Commissioner Gloria Tristani, who now heads the Office of Communication of United

Church of Christ, spearheaded a petition challenging license renewals for both Fox-owned and Paxson-owned stations for alleged violations of children's programming rules. Two cases do not turn a tactic into a trend. But the threat of annihilation can be a potent threat – and activists appear to be re-discovering it.

Interestingly, in all of these challenges the core issue appears to be a broadcaster's editorial choices. Such an attack, if successful at the FCC, could well run afoul of the First Amendment in the courts. It is more than a little ironic that attacks directed to programming content are being brought by organizations which might ordinarily be associated with the left side of the political spectrum, the side which has tended to cast itself as a defender of civil liberties against overbearing governmental regulation. One would think that the last thing such organizations would want to do would be to encourage the government to involve itself in the subjective evaluation of programming content.

In any event, after a relative lull in license renewal challenges in the last renewal cycle or two, it appears that the heat of opposition (organized or otherwise) may be being turned up. The ease with which like-minded individuals or groups are able to galvanize themselves for a common purpose through, say, email and the internet may aggravate that phenomenon. All of which is to say that, if your most recent license renewal application has not yet been granted, you should not take anything for granted: in this day and age, an ounce of prevention is clearly worth a pound of cure.



(Continued from page 3)

equipment; FCC says, "that'll be \$6,400 please". A Riverhead, New York, AM station was nicked for \$2400 for not conducting weekly tests of its EAS equipment during several weeks in the Spring of 2003. A Hilo, Hawaii, FM licensee took a \$1300 hit for not conducting EAS testing. However, its fine was reduced because the licensee had implemented corrective measures before the FCC inspection which uncovered the problem. (Engineers take note – the "corrective measures" included firing the station's engineer.)

Towers - As always, eagle-eyed FCC agents constantly scouring the nation for tower problems managed to fine more than a half dozen stations this month. Berwick, PA: \$20,000 for failure to register, light and lock an AM antenna. Paris, TX: \$8,000 for failure to register and lock an AM antenna. Nacogdoches, Texas: \$2500 for not painting an antenna. Harrisonville, MO: \$10,000 for not painting or maintaining good antenna visibility. Lee's Summit, MO: \$10,000 for failing to light antenna at night. Louisa, KY: \$2000 for not registering an antenna. And Hobbs, NM: \$8000 for not maintaining antenna visibility.



FHH - On the Job, On the Go

In November, **Paul Feldman** attended the Telco TV Convention in Orlando, Florida.

Harry Cole was interviewed on NPR's *Marketplace Morning Report* concerning ABC's controversial promo for *Desperate Housewives* which introduced *Monday Night Football*.

THE USUAL GANG

The November, 2003 *MTC* featured a crossword containing the names of 13 FCC Chairmen. This year we go introspective: this puzzle contains the first names of all 24 (count 'em, 24) currently active FHH attorneys. Some of the names look as you might expect them, others show up as homonyms. Three of the names (Ms. Victory and Messrs. Richards and Weiss) span two clues – that is, to get the full name you have to combine two words. Our newest arrival, Mr. Butcher, shows up in Scottish form. (He got here late -what can we say?) And if you're counting your answers, remember that you're looking for only 21 separate names, since three names are shared by two attorneys each.

Need help? Email cole@fhhlaw.com for hints and we'll get right back to you – at no charge.

ACROSS

- 1 Official proceedings
 5 ___ of approval
 9 Fourth base?
 13 Swabs
 17 Successful 1804 Weehawken combatant
 18 Germanic (abbr.)
 19 Leave out
 20 Italian petroleum giant
 21 Talked gustily
 23 Seabiscuit, e.g.
 25 BPOE member
 26 Wicked
 27 McCarthy, Vincent or Simmons
 28 Mountain nymph
 29 Peter Fonda role (1997)
 30 Swedish actress Andersson
 31 Prince ___ (Aladdin pseudonym)
 32 What fog does
 35 Dust cloth
 36 Neither Rep. nor Dem.
 37 Understood, beat-style
 40 Euro predecessor
 41 Elementary particle
 44 British conservative
 45 Royal Siamese tutor
 46 Ode prefix
 47 Woosnam or McKellen
 48 Jeans material
 49 Signs without signing
 50 Woes
 51 ___ Kooky Byrnes
 52 U.S. broadcast service abroad
 53 Emblem
 55 Sunshine unit
 56 Cereal grass
 59 Help
 60 Hint
 61 "___ Let The Sun Catch You Crying"
 62 Insult in the 'hood
 64 Units of cloth and lightning
 67 Shellac component
 68 Cons' counterparts
 69 What : means in a ratio
 70 Ancient concert halls
 71 Simultaneously
 73 Commemorative stone slab
 74 Quilting occasion
 75 White House pet, circa 1964
 76 In what manner
 77 Rhett or Brett

- 78 NRC antecedent
 79 Tilt
 81 Sound made by snakes or leaky tires

- 82 Tiny fly
 85 Yankee Hall of Fame catcher
 86 Destination of winding Maui road
 87 Fleming, Linkletter or deco
 90 Impractical idealist
 92 What monarchs do to their people
 94 Racist organization
 95 Protection (var.)
 96 Swiss river
 97 Gourd
 98 Part of a child's counting rhyme
 99 Remainder
 100 Breyers alternative
 101 Dundee denizen

DOWN

- 1 French cleric
 2 Sift through
 3 Pacific island
 4 ___ Gratia Artis
 5 Even ___
 6 Chilling
 7 Cave Bear author
 8 Alternative to LLC
 9 Sinai
 10 Muscat resident
 11 PC input devices
 12 Aout, par exemple
 13 New Zealand aboriginal
 14 Shrek, e.g.
 15 Galileo's drop site
 16 Exceeded the limit
 22 Purposeful
 24 Nelson or half-nelson
 27 1958 Oscar winner
 29 Alma mater of one U.S. pres.
 30 Wild party
 31 Mass. cape
 32 Tunisian port
 33 Sea eagles
 34 Bitter herb
 35 Decomposes
 36 Charged particle
 37 Adams or Corleone
 38 Kingston sch.

- 39 Locker locus, usually
 41 Gloomy covering
 42 Orderly
 43 Far out!
 44 Greenish blue
 46 Oaf
 48 Blockhead
 50 Wading bird
 51 Macabre Amer. author
 52 ___ ordinaires (table wines)
 54 ___ Hari
 55 Donna, Condi or Elmer
 56 Othello, e.g.
 57 Citation, Villager, Ranger, Pacer or Corsair
 58 Honorific or championship
 60 Playground game
 61 Sketched
 63 Rise majestically
 64 Type of sled
 65 Poetic tribute
 66 Spike or Ruta
 67 Actor Herbert
 68 Unit of loudness
 69 Belonging to an Addams cousin
 71 Muscle spasm
 72 Asian cuisine
 73 Lazy ___
 75 Cad
 77 Sprees
 78 The ___ of defeat
 79 One of 18 rois
 80 Excrete
 81 Pilose or hirsute
 82 Ribbon, lavalier or cardioid, e.g.
 83 Cleese compatriot
 84 John, Dizzy or Daffy
 85 Like an omelet, inverted
 86 Leader
 87 With (fr.)
 88 ___ Man (Emilio Estevez film film, 1984)
 89 Gait
 91 Star-spangled banner in relation to the ramparts
 92 Actress Charlotte
 93 Roman fertility goddess

