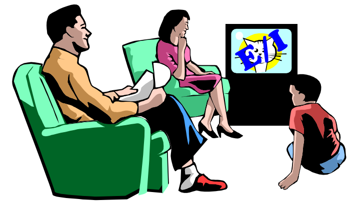
FLETCHER, HEALD & HILDRETH, P.L.C.

Memorandum to Clients

December, 2004 | *News and Analysis of Recent Events in the Field of Communications* | No. 04-12

New kidvid rules published



FCC Imposes New Children's TV Obligations for Analog and DTV Stations

By: *Anne Goodwin Crump*
703-812-0426
crump@fhhlaw.com

In the guise of examining digital television (DTV) broadcasters' obligation to carry children's programming on their additional digital channels, the Commission has adopted a number of new requirements. The changes were first announced in early September (*see* the September *Memorandum to Clients)*, but the complete text of the FCC's decision, which reveals considerable detail not previously publicized, was not released until late November. While the rule making proceeding's title suggests that the changes might be limited exclusively to DTV operations, ***most of the new requirements are applicable not only to DTV broadcasts but also to current NTSC facilities***. Since most DTV operators are also NTSC licensees, this does seem to have some logic, but it requires that all television licensees take note of the new rules ***now***, particularly in light of the fact that a number of them will be effective February 1, 2005.

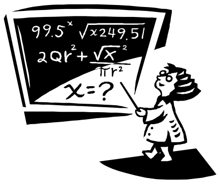
> *Most of the new requirements are applicable not only to DTV broadcasts but also to current NTSC facilities.*

The most significant changes effected by the Commission are as follows:

- adoption of a requirement that DTV broadcasters who choose to multicast additional streams of free programming will have an increased core programming requirement roughly proportional to the additional amount of all such programming that they choose to provide;
- limitation of the number of core program preemptions that a station may have and still meet renewal processing guidelines – the new rules provide that no more than 10 percent of core programs may be preempted in each calendar quarter;
- requirement that all stations, DTV ***and*** analog, display the "E/I" (*i.e.*, "educational/informational") symbol throughout a program in order for that show to count as core programming;
- clarification that the commercial time limits applicable to analog children's programming also apply to all DTV programming directed to children ages 12 and under;
- determination that, in order for displays of Internet website addresses during programming not to be counted as commercial material, the website must meet certain conditions. Those conditions include the requirements that the featured website offer a substantial amount of *bona fide* program-related material or other noncommercial content and not be intended primarily for commercial purposes; and
- revision of the definition of "commercial matter" to

(Continued on page 10)

The Scoop Inside

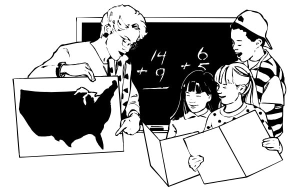


When size makes a difference, it's important to know . . .

How Big Is Your Market?

Sizing Up Markets Under the New Radio Ownership Rules

By: Ann Bavender
703-812-0438
bavender@fhhlaw.com



Since the Court of Appeals lifted its stay relative to certain aspects of the Commission's July, 2003 multiple ownership rules, the new Arbitron method of counting stations has been in effect. That method is used to determine both the number of radio stations an entity owns in a market and the total number of radio stations existing in the market. New interim rules for counting stations in non-Arbitron markets, and a new rule counting noncommercial radio stations in a market for multiple ownership purposes, have also become effective with the lifting of the stay.

Importantly, the number of stations an entity may own in a market has ***not*** changed; only the methods of calculating the number of stations owned by a given applicant and the total number of stations existing in a market have changed.

The Arbitron Method replaced the contour-overlap method of making those calculations. The contour-overlap method defined the number of stations owned by an entity in a market as all stations owned by that entity whose city-grade contours overlapped in one common area. Under this contour-overlap method, the "market" was then defined as the combined total contour areas of those stations. The contour-overlap method defined the total number of stations existing in the "market" as (i) the stations owned by the entity and (ii) all other stations whose city-grade contours overlapped ***any*** part of any of the contours of the stations owned by the entity.

Obviously, the contour-overlap method was difficult, if not impossible, to implement with absolute consistency because the definition of each "market" depended on the particular stations (and the particular facilities of those particular stations) held by the entity in question at the time of the proposed transaction necessitating the multiple ownership calculation. Added to the problem was the way the FCC counted the stations owned by the proponent.

Stations Located In An Arbitron Metro The Arbitron Method, on the other hand, uses the Metro Survey Areas (Arbitron Metros) established by Arbitron for determining compliance with the FCC's multiple ownership rules in Arbitron-rated radio markets. Arbitron has defined Arbitron Metros for most of the more populated areas of the country. Where Arbitron has defined a market as an "Arbitron Metro", that market will now be used by the FCC (as long as the Arbitron Metro boundaries of the market in question haven't changed in the last two years). The Arbitron Method thus arguably provides greater consistency and objectivity than the contour-overlap method.

The Arbitron Method does ***not*** rely solely on determinations by Arbitron, however. Arbitron merely defines the market. To calculate the number (and identity) of stations in any Arbitron-defined market, one must next utilize the Media Access Pro database maintained by BIA, a broadcast consulting service. The BIA database includes considerably greater detail about markets than do Arbitron's Metro market definitions. For example, Arbitron includes in Arbitron Metros only commercial stations that meet certain minimum reporting standards. BIA, by contrast, attempts to include every commercial and noncommercial licensed in the Arbitron Metro, as well as (in many instances) some stations licensed to communities outside the Arbitron Metro and foreign stations. For purposes of the FCC-mandated Arbitron Method, an Arbitron Metro includes: (i) commercial, noncommercial, and foreign stations which are designated by BIA as "home" to the Arbitron Metro (also know as "above-the-line" stations); and (ii) any other licensed commercial and noncommercial stations whose communities of license are located within the boundaries of the Arbitron Metro.

Stations Not Located In An Arbitron Metro The 287 Arbitron Metros cover about

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Fletcher, Heald & Hildreth
A Professional Limited Liability Company

1300 N. 17th Street - 11th Floor
Arlington, Virginia 22209
Tel: (703) 812-0400
Fax: (703) 812-0486
E-Mail: Office@fhhlaw.com
Web Site: fhhlaw.com

Supervisory Member
Vincent J. Curtis, Jr.

Co-Editors
Howard M. Weiss
Harry F. Cole

Contributing Writers
Ann Bavender, John C. Butcher, Harry F. Cole, Vincent Curtis, Anne Goodwin Crump, Steve Lovelady, Alison J. Miller, Lee G. Petro, R.J. Quianzon and Michael Richards

Focus on FCC Fines

By: R.J. Quianzon
703-812-0424
quianzon@fhhlaw.com

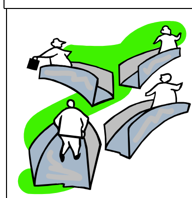
As reported elsewhere in this issue (*see* page 6), the FCC's crusade against indecency proceeded apace this past month. In addition, the FCC took the following enforcement actions.

"Main Studio Presence" requires "Presence" – After an FCC agent inspected a Missouri FM station three times and found nobody home, he fined the station. FCC rules require licensees to maintain a "meaningful presence" at their studios. In this instance, the FCC agent visited the station and, finding no one around, called the station manager, who scheduled a meeting the very next day at the studio. However, during that follow-up inspection, other than the manager, the station remained unstaffed and was not open to the public. Three months later, the FCC agent revisited the station and observed that there had been no change in the interim.

In response, the station cited an FCC decision in which the agency stated that employees were not expected to be "chained to their desks". In the Missouri situation, the station had three employees and two volunteers. But the FCC noted that the volunteers had no set schedule and the employees checked in at the studio in the morning and then again at the end of the day. According to the Commission, having employees (or volunteers) who show up only in the morning and afternoon to punch a time clock does ***not*** satisfy the FCC's meaningful presence test. Rather, the Commission expects that each station's main studio will in fact be staffed during regular business hours. The Commission imposed a $7,000 fine, later reduced to $1,000 because of the licensee's inability to pay.

Broadcasting phone call to Fidel - $3500; Broadcasting call to a help line - $4000; FCC discretion – inexplicable – It is well-established that, before a telephone call can be broadcast or recorded for reply, all participants in the call must consent. In Miami, two radio station personalities called Cuban President Fidel Castro and pretended to be the President of Venezuela. Shortly into the conversation, Castro was told that it was a prank and the call terminated (and an FCC investigation began). The station was fined $3500 for its violation. In a separate (but somewhat similar) incident, the FCC fined a radio station $4000 – $500 more than the Castro incident – for a call to a gambling helpline. Two on-air personalities at a Missouri station called a gambling helpline while broadcasting the same. The helpline assistant determined that the call was a prank, hung up, and promptly called the FCC, which was only too glad to issue a $4000 fine. It is not clear why this latter stunt was worthy of a larger fine than the Castro prank.

Non-Commercial Station Airs 3200 Commercials – After airing material from a dozen different companies for numerous months, a non-commercial Ohio station faces a $20,000 fine. The FCC reviewed eleven different "spots" that the non-commercial station aired over a 15-month period. The FCC found the material to be, in effect, advertising. The station admitted that the material was aired at least 3,149 times. One of the "spots" contained a segment in which an owner of the company proclaimed that he was "promoting who we are." Of course, non-commercial broadcasting regulations ***prohibit*** promotion. *Au contraire*, a licensee may not "promote any service, facility, or product" and the licensee must not run spots which contain comparative or qualitative descriptions, price information, calls to action, or inducements to buy, sell, rent or lease. All non-commercial licensees should be certain that their traffic, programming and on-air personalities are aware and consistently sensitive to the FCC's regulations.



FHH - On the Job, On the Go

On December 7, **Frank Montero** spoke at the Hispanic TV Summit in New York hosted by Reed Business Information (the folks who publish *Broadcasting and Cable* magazine). And three days later, **Frank** participated in a meeting of the FCC's Federal Advisory Committee on Diversity for Communications in the Digital Age. **Frank** was appointed to that Committee by FCC Chairman Michael Powell in 2003.

Lee Petro will be attending the Wireless Communications International Association Symposium in San Jose, California, from January 11-14, 2005.

Harry Martin and **Frank Jazzo**, along with **Roy Stewart**, Chief of the FCC's Office of Broadcast License Policy, will be conducting an FCC Update and TV License Renewal session at the Tennessee Association of Broadcasters' 2005 Winter Conference in Nashville on January 11, 2005.

The Contracts Guy visits the red light district

Avoiding Delay and Disappointment Arising from Unpaid FCC Debts

By: Steve Lovelady
703-812-0517
Lovelady@fhhlaw.com

As our faithful readers know, radio and television station owners have a new "red light" to monitor in addition to tower obstruction lighting and on-air lights. In an effort to collect past due debts owed to it, the FCC has established new rules and procedures to implement the Debt Collection Act of 1996. The Debt Collection Act is a federal law that allows government agencies to deny requests from persons under their jurisdiction in order to collect delinquent debts owed by such persons that agency.

From the Commission's perspective, the Act allows it to take advantage of the leverage which its licensing authority affords it: deadbeats who have ducked their payment obligations to the FCC can be convinced to pay if that's the only way that they are going to be able to get their applications granted. On the other hand, from the licensee's perspective, the FCC may be unreasonably holding applications hostage – a viewpoint that is particularly persuasive when it turns out (as it has in many instances) that the FCC's records concerning debt delinquencies are less than up to date and not entirely correct.

If an unpaid debt is discovered, the FCC will issue a "red light" and no further action on the application will occur until the delinquent debt is either paid or a good faith written challenge to the debt is submitted.

In an effort to enable persons seeking action at the FCC to find out whether they have any outstanding debts – or, more accurately, whether the FCC thinks, rightly or wrongly, that they have any outstanding debts – the FCC has implemented the Red Light Display System program. Under this new program, anyone who submits an application to the FCC will be checked for outstanding FCC debts before the application is processed and again before the application is granted. If an unpaid debt is discovered, the FCC will issue a "red light" and no further action on the application will occur until the delinquent debt is either paid or a good faith written challenge to the debt is submitted. After thirty days, the FCC will dismiss the application unless the debt is resolved (paid or payment plan agreed to) or challenged. The simple theory is that no party should receive a benefit from the FCC (*i.e.*, review and grant of an application) if it owes money to the FCC.

We know what you're probably thinking: "Wait a minute, Contracts Guy, do you mean that after I spent two long months negotiating a station purchase and putting together a thirty-page Asset Purchase Agreement, my assignment application can be held up or dismissed by the FCC because the current owner of the station has a 'red light' issue?" You bet your sweet 5-second delay device it can. And boy, can that be disappointing.

Here are a few suggestions to protect yourself by adding some new provisions to your standard Asset Purchase Agreement document:

Definitions: As a buyer of a station, you can and should define a new term –"FCC Debt" – broad enough to capture ***all*** debts that might cause the FCC to issue a "red light". The trick to watch out for is that, when it seeks to determine whether a red light-triggering debt is outstanding, the FCC searches its system not only under the FCC Registration Number (FRN) of the applicant, but also under ***all*** FRN's associated with the applicant's Taxpayer Identification Number (TIN).

(For those of you untutored in the intricacies of FRN's, this problem arises from a variety of causes, including the fact that a single entity can, and often does, obtain multiple different FRN's. Usually this occurs not so much by design as by convenience: since each FRN has a password associated with it, and since passwords can be lost or forgotten, and since, in the pressure of getting something on file, rooting around for that misplaced password tends not to be the most fruitful approach, folks often just sign up for a new FRN as a concession to the shortness of life.)

The FCC's staff has indicated to us that debts which are "associated with a TIN" include the records of ***any*** entity that has paid a debt on behalf of the applicant. Therefore, we suggest defining the term "FCC Debt" to mean: Any unpaid non-tax claim, obligation, or debt due to the FCC by a party and any and all entities that have made a payment to the FCC on behalf of such party. Also, in the definition of the term "Final Order" used for describing

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DTV 2005

By: Lee G. Petro
703-812-0453
petro@fhhlaw.com

Once the Times Square ball has dropped and the bowl games have been played and we have officially left 2004 and launched into 2005, we will cast aside the excitement of confetti and air horns and return to the staid and predictable world of the digital television (DTV) transition. While 2004 brought us the Commission's view of the completion of the DTV Transition, 2005 will be the year when the rubber hits the road.

In 2005, it is expected that at least two of the rounds of channel elections will be completed. In addition, those network affiliates in the Top 100 markets will be required to build out their full DTV facility by July 1, 2005, and ***all*** operating DTV stations – whether they have already been licensed or are operating pursuant to special temporary authority – will be required to implement PSIP technology by February 1, 2005. However, several other factors could be acting against these efforts.

The constant drumbeat from the Commission's staff has been and continues to be that unlicensed devices in the TV band ***are*** *possible with technology currently on hand, and that the Commission could act as early as the second quarter of 2005 in adopting new rules.*

First, ten petitions for reconsideration and/or clarification were filed in response to the new rules. These petitions present a wide spectrum of complaints and criticism, including the treatment of singleton analog TV licensees, the question of actual beam tilt elevations, the abrupt dismissal of all pending analog petitions for rulemaking, management of our relationship with our neighbors in the Great White North, and the like. Also, the Commission is considering rules to permit the introduction of unlicensed devices into the television band. In addition, there could be a new digital operator in your neighborhood very soon now that the new Digital Low Power TV rules have been published in the Federal Register. Finally, all commercial DTV stations must ensure that their stations are providing the appropriate level of service to their community as of December 31, 2004.

The following is a breakdown of the most immediate concerns as we move boldly into 2005.

Round One Channel Elections On December 21 the Commission released the revised DTV Table and establish January 27, 2005, as the deadline for those licensees with at least one in-core DTV channel (2-51) to decide which channel they will select for permanent DTV operation. The revised DTV Table takes into consideration the changes to the CDBS database and integrates the actual facility (service area and population) that will be served by each television licensee at the end of the DTV transition.

By January 27, 2005, all licensees with at least one in-core channel must select which channel they intend to operate on at the end of the DTV transition. That election must be submitted to the Commission on FCC Form 382. Licensees with two "low" VHF channels (2-6), and licensees with only one in-core channel, may elect insetad to take a pass on Round One, relinquishing their in-core DTV Channels and rolling the dice in Round Two channel elections. Alternatively, licensees can enter into negotiated channel election agreements with other parties.

The Commission will then review the elections made in the first round. Where it determines that a Round One channel election will result in an interference conflict, the Commission will notify the licensees in question and will require them to file an FCC Form 383 to inform the Commission whether: (i) they have resolved the interference conflict by agreement or a technical amendment; (ii) they have decided to switch from using their respective NTSC in-core channel to their in-core DTV channel, if they have one (by the terms of the DTV Table of Allotments, such channels have been protected since 1997); or (iii) they elect to abandon their first round channel election and participate instead in the second round of elections.

We will let you know when these future dates are established.

Petitions for Reconsideration of DTV Order As noted above, several parties filed petitions for reconsideration and/or clarification relating to the new DTV rules. While the filing of the petitions does not automatically postpone or stay the DTV Transition schedule, such petitions could affect the rules and/or timetable governing the transition.

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Wringing out 2004

End-of-Year Indecency Rulings Provide No Clarification

By: Harry F. Cole
703-812-0483
cole@fhhlaw.com

The year 2004 lurched to a close much as it had begun, with the Commission issuing a flurry of decisions relating to "indecency" in late November and December. And as has been the case throughout this Year of the Indecent, the FCC's decisions did little to clarify this murky area.

On the one hand, the Commission issued a notice of apparent liability to the tune of $55,000 to a radio licensee whose announcer engaged in sexual discussions and references during a couple of call-in programs. During one program the announcer allegedly used a number of vulgar expressions in what was apparently a brief colloquy with a caller; the following day the same announcer allegedly made another graphic reference to a form of sexual activity. (We include the standard qualifier "allegedly" here because neither the complainant nor the licensee had a recording of the program, so we can't really be sure precisely ***what*** was said. But the complainant offered its version of the language, and the licensee acknowledged that the licensee could not demonstrate that the alleged language was not broadcast.)

While the language supposedly broadcast was without question harsh, it did not include any of the particular words about which the FCC has thus far expressed concern. The licensee argued that the language consisted of colloquialisms and innuendo which did not include any direct references to sexual or excretory organs or functions.

But the Commission wasn't buying what the licensee was selling. The FCC concluded that the sexual import of the broadcast was "unmistakable" and that there was no non-sexual meaning that could have been attributed to the language in question. And to make matters worse, the announcer also used language which, while not "indecent", was still "indicative of a strong tone of depravity and brutality". The result was a $55,000 fine.

But on the same day the FCC declined to issue any fines for three television programs which included plot-lines – *i.e.*, not merely passing references, but *plot-lines* constituting the focus of the entire program – relating to, among other things: (a) hiring a prostitute to obtain sperm from a horse; (b) characters' excretory systems and the fact that their excretory product caused toilets to back-up (note that this was supposed to be a comedy); and (c) the sexual interactions of a cast of six characters. In each case, the Commission concluded that the content was not graphic enough to be "indecent". The Commission offered no "graphic-o-meter" by which broadcasters might measure the graphic-ness of their programming to determine whether it might be indecent.

And on the same day, the Commission resolved most, but not all, of the then-pending indecency complaints against Viacom (and its subsidiaries, including CBS, UPN and Infinity) by entering into a Consent Decree pursuant to which Viacom agreed to pay $3.5 million dollars to the U.S. government. For its part, Viacom admitted only that certain broadcast material at issue in a single complaint (involving a 2002 radio broadcast in Detroit) was "indecent". Viacom's admission of guilt "shall be of no force and effect" if the consent decree is breached by the FCC or invalidated or modified by the FCC, any court or any legislative body.

The fine that had been assessed for the admitted indecency in Detroit had amounted to only $27,500, which may cause you to wonder why Viacom was happy to pay Uncle Sam more than 100 times that much. That's easy. Viacom was clearing the slate of ***all*** complaints, notices of apparent liability, forfeiture orders and the like relating to possible "indecency" which were pending as of November 23, the date the Consent Decree was released – the only exception being the notice of apparent liability arising from the Janet Jackson/Super Bowl incident last February.

So we end the year without having gained much insight into exactly how the FCC will determine whether material is "indecent". But we have gained the knowledge that the FCC will happily agree to look the other way and not bother to reach any decision on indecency complaints as long as the price is right. (For an analysis of the price extracted from Viacom, see the sidebar story on page 7.)

A couple of other interesting quirks in indecency enforcement surfaced at year's end: the Commission may take action against a particular station even if no complaint has been filed against that station. Historically, the Commission has acted on the basis of complaints directed against

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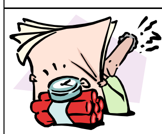
The Consent Decree which Viacom signed cleared the decks of all indecency complaints which were pending against Viacom at any level of the Commission as of November 23. That should afford Viacom considerable piece of mind, but at what cost? Under the terms of the Consent Decree, Viacom committed to the following:

- Payment of $3.5 million to the U.S. Treasury.
- Purchase, installation and good faith use of video and audio delay systems to delete indecent material from live programming.
- Distribution to all on-air talent at all Viacom radio and TV stations of a "comprehensive Policy Statement describing the FCC's rules, regulations and policies regarding the Indecency Laws". All talent must certify that they have reviewed (easy enough) and that they understand (probably a bit trickier) the Policy Statement. The Policy Statement must also be "supplemented periodically", with such supplements to be distributed to all station management.
- Conducting "training with respect to the Indecency Laws" for all on-air talent ***and*** all employees who "materially participate in programming decisions". New employees must be given such training promptly after they sign on with Viacom, and "refresher training" must be provided to all affected employees at least annually.
- If a Notice of Apparent Liability (NAL) relating to violation of the indecency rules is issued to a Viacom station, ***all*** employees materially participating in the decision to air the material in question ***will be*** suspended, and an investigation will be immediately undertaken by Viacom. The suspended employees will be required to undergo "remedial training" concerning the indecency laws and must satisfy station management that they understand such laws before they can resume their dutites. And if and when they do resume those duties, their broadcasts ***will be*** "subjected to delay and will be monitored by editors for content purposes". And if (heaven forbid) the NAL leads to a Forfeiture Order that is ultimately upheld by the courts (or paid by Viacom), all employees materially participating in the decision to air the material "will be subject to further disciplinary action up to and including termination".

These terms raise a number of questions. For example, how is any licensee supposed to prepare a "Policy Statement" describing the FCC's indecency rules when the precise metes and bounds of those rules seem to be (how can we say this politely?) somewhat elastic? And how can a licensee expect its employees to credibly certify that they "understand" the rules when many knowledgeable folks can argue that the rules are inherently incomprehensible? And since an NAL can now be triggered by a single complaint, unsupported by any tape or transcript, why should a licensee commit itself to the immediate suspension (much less mandatory "remedial training") of anyone solely because of the issuance of an NAL based on unproven allegations?



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individual stations. In the *Married By America* proceeding we mentioned in our October issue (involving a 2003 Fox Network program), the Commission received complaints about the program itself. The Commission sent a letter inquiry to a Fox O&O which had broadcast the program, asking (among other things) for a list of all other stations which had aired it. Although the station initially balked at coughing up that information, it ultimately provided a list, and the FCC proceeded to include all 169 of those stations in a notice of apparent liability. So just because you and your station have not received any complaints does ***not*** mean that you are immune from an indecency-based enforcement action. Fox and its affiliates have asked the FCC to reconsider its decision.

The *Married By America* flap also triggered a secondary spat over just how many complaints of any sort the Commission received concerning that program. Reviewing the FCC's response to a Freedom of Information Act request, one internet site charged that, while the FCC claimed that 159 complaints were received, it appeared that only three or four separate complaints were filed, with some of those being filed multiple times. When that allegation arose, the Parents Television Council (PTC) counter-charged that the FCC was ***under***-counting complaints. According to the PTC, its members filed at least 4,073 complaints about the show. PTC even called for a Congressional investigation into the FCC's complaint-counting practices.

Lest you think that all these fun and games with indecency may peter out, er, dry up as 2004 winds down, think again. Press reports indicate that the ever-vigilant Enforcement Bureau is investigating NBC's broadcast of the Summer Olympics from Athens. Apparently the Commission received about nine (count 'em, nine) complaints about one or another aspect of that coverage. Word is that some complainants were concerned about some of the costumes of performers during the opening ceremonies, while others may have been concerned about some expressive language

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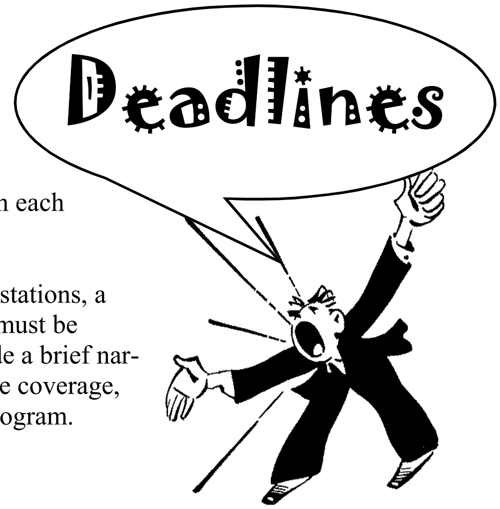
January 10, 2005



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.

Issues/Programs Lists - For ***all*** *radio*, *television*, and *Class A television* stations, a listing of each station's most significant treatment of community issues must be placed in the station's local public inspection file. The list should include a brief narrative describing the issues covered and the programs which provided the coverage, with information concerning the time, date, duration, and title of each program.

January 27, 2005

First Round DTV Channel Elections - Television licensees eligible to make a DTV channel election in the first round must submit their elections on FCC Form 382.

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.

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.

PSIP Implementation – All operating full-service *DTV* stations must implement program system and information protocol (PSIP). This requirement applies to ***both*** (a) DTV stations which are operating with the full licensed facilities and (b) DTV stations which are operating, pursuant to special temporary authorization, with less-than-full-licensed facilities.

(Continued on page 9)

Royalty Rate-Making Regimen Re-vamped

By: Alison J. Miller
703-812-0478
miller@fhhlaw.com

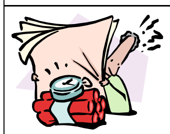
On November 30, the President signed into law legislation that eliminates the Copyright Arbitration Royalty Panels (CARPs), replacing them with three full-time Copyright Royalty Judges (CRJs) serving staggered six-year terms.

As you know, under the Copyright Act's various compulsory licenses, certain industries may use copyrighted works without the copyright owners' permission, as long as the users pay prescribed royalties to the Copyright Office. Such "compulsory licenses" are in place for the cable, satellite, and webcasting industries, among others.

Under the much-attacked and now defunct CARP system, royalty rates and related terms governing webcasting were established through CARPs. But the CARP process tended to be expensive, inefficient and of questionable utility. For example, the rates and terms for internet webcasting set by a CARP in 2002 were so intensely criticized by both webcasters and the recording industry that they were ultimately rejected by the Librarian of Congress altogether.

The new CRJ system will put royalty rate determinations in the hands of three specialized judges. The new law requires that each judge be an attorney with at least seven years of legal experience. The Chief Copyright Royalty Judge must have at least five years experience in administrative hearings or court trials. Because participation in the CRJ system is expected to be much cheaper than was the case with CARPs, small webcasters, who in the past were effectively voiceless, should now be able to participate more fully in the process.

While the new law does not take effect until May 30, 2005, the Register of Copyrights can, and likely will, appoint an interim CRJ to consider the rates and terms for the next term that will become effective on January 1, 2006, and end on December 31, 2010. The current royalty rates are in effect until December 31, 2005.



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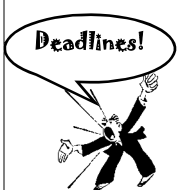
(think in terms of Cheneyisms) by beach volleyball contestants which may have been picked up by the network's mikes.

And finally, as most everyone in the industry has heard, back in October Howard Stern announced that he was taking his program to Sirius, a satellite-delivered radio service. He apparently believes that such subscription radio service is immune from indecency enforcement, unlike free over-the-air terrestrial broadcasting. And it turns out he may be right. In late October, a broadcaster file a petition for rulemaking aimed at including an indecency prohibition in the Satellite Digital Audio Radio Service (SDARS) rules. Acting with stunning (and stunningly uncharacteristic) alacrity, the Media Bureau denied that request in December, less than two months after it was filed. According to the Bureau, the Commission has already determined that "subscription-based services do not call into play the issue of indecency."

In so ruling, the Bureau was merely parroting the hoary, er, time-worn notion that free over-the-air broadcasters are entitled to less First Amendment protection than are other media providers, such as cable or SDARS operators. On that point, though, we offer the following quote we recently came across in a speech given in 1998:

> Technology has evaporated any meaningful distinctions among distribution media, making it unsustainable for the courts to segregate broadcasting for First Amendment purposes. . . . We must admit to these new realities and quit subverting the Constitution in order for the government to be free to impose its speech preferences on the public.

The speaker? None other than then-Commissioner, now-Chairman Michael Powell.



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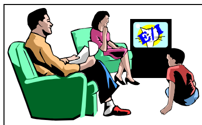
February 5, 2005

DTV/TV Commercial Limitations Effective - All *DTV* facilities must comply with the commercial limitations now applicable to analog stations, and all DTV and TV stations must eliminate displays of commercial website addresses during children's programming.



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include not only normal commercial matter but also promotions of any television or other video programming that is not children's educational and informational programming.

The Commission also asked for further comments on additional proposals concerning the children's television commercial limits.

The rules governing the display of internet addresses and the application of commercial limits to DTV programming will be effective February 1, 2005. The required display of the E/I symbol throughout a program will be effective after Office of Management and Budget (OMB) approval; the effective date will be announced in a future Public Notice. The revised definition of commercial matter to include programming promotions will be effective January 1, 2006. In addition, the revised safe harbor processing guidelines for DTV broadcasters, limits on repeats of core programming by DTV broadcasters, and the limits on the numbers of preemptions of core programming will become effective on January 1, 2006.

In its recent decision, the Commission started by confirming that DTV broadcasters are required to air an average of at least three hours per week of core children's programming on their main program streams. To satisfy the definition of core programming, a show must: (i) have as a significant purpose serving the educational and informational needs of children ages 16 and under; (ii) be aired between the hours of 7:00 a.m. and 10:00 p.m.; (iii) be a regularly scheduled weekly (or daily) program; (iv) be at least 30 minutes in length; (iv) have the educational and informational objective and the target child audience specified in the station's Children's Television Programming Report; and (v) be subject to instructions from the licensee to publishers of program guides directing that the program be identified as educational/informational, including an indication of the target age group.

DTV broadcasters who choose to provide additional channels or hours of free video programming will be subject to an increased core programming benchmark which broadcasters will have to meet to satisfy the license renewal application processing guideline. Failure to meet that benchmark will preclude routine action on the renewal application by the Media Bureau staff; instead, an application which falls short of the benchmark will have to be referred to the full Commission. Such referral will normally result in delay in action on the application and, possibly, the imposition of penalties. Under the new guidelines, for every increment of one to 28 hours of free video programming provided in addition to the main program stream, the broadcaster must provide an additional half-hour per week of core programming.

Further, in order to ensure that the same program is not simply re-broadcast many times, the new rules specify that not more than 50 percent of core programming may be re-broadcast within the same week and still qualify as core. The Commission will, however, exempt from this provision any program stream that merely time-shifts the entire programming line-up of another program stream. In addition, the Commission will not count as repeated programming core programs that air on both the analog station and a digital program stream.

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The Commission also clarified that it will analyze compliance with the core programming benchmarks separately for analog and DTV facilities. Thus, core programs aired on digital streams will not be counted in determining whether a station has met its obligations for its analog channel and *vice versa*. Further, any children's programming aired on a subscription channel will not be counted as core programming.

With regard to preemption, the Commission has clarified that it will generally require that preempted core programs be rescheduled in order to count as core programming. In addition, it has limited the number of preemptions under the processing guideline to no more than ten percent of core programs in each calendar quarter. Each preemption beyond the ten percent limit will cause that program not to count as core, even if the program is rescheduled. The Commission provided an exemption, however, for situations where programming is preempted because of breaking news.

The FCC has determined that broadcasters ***must*** display the E/I icon during the ***entire duration of core programs***. According to the Commission, this change was prompted by complaints about lack of information concerning educational and informational programming. Those complaints, in turn, arose from the facts that (a) print program guides often do not publish such information, and (b) many parents are apparently unaware of the meaning of the E/I icon. In the Commission's view, display of the E/I icon is a cost-effective way of increasing parents'

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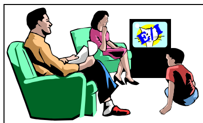

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ability to identify core programming and to steer their children toward watching these educational and informational shows. This new requirement applies to both analog and digital facilities, and also to both commercial and noncommercial stations. The imposition of this rule on ***non***commercial stations is at odds with the fact that normally children's television requirements don't apply to NCE stations. The FCC has apparently overlooked the fact that the programming aired by NCE stations generally can't meet the definition of "core" programming, since these stations are not required to file Children's Television Programming Reports. Presumably this will be clarified in time.

In response to perceived concerns about overcommercialization, the Commission has applied its commercial matter limits to ***all*** digital video programming, whether on a free or pay channel, and the definition of commercial matter has been expanded. In particular, the Commission held that the display of commercial website information during children's programming will be deemed not to count against advertising limits ***only if the website in question***: (1) offers a substantial amount of *bona fide* program-related or other noncommercial content; (2) is not primarily intended for commercial purposes, including either e-commerce or advertising; (3) has the home page and other menu pages clearly labeled to distinguish the non-commercial from the commercial sections; and (4) does not direct viewers to a page which is used for e-commerce, advertising, or other commercial purposes. Pursuant to the last requirement, the page may not contain links labeled "store" or links to another page with commercial material. The Commission also specifically prohibited the display of website addresses in children's programming when the site uses characters from the program to sell products or services.

These regulations do not yet apply to direct, interactive links to Internet sites, links which digital television may develop as an interactive service. The Commission has issued a Further Notice of Proposed Rule Making, however, to address issues raised by the few current and many potential interactive services.

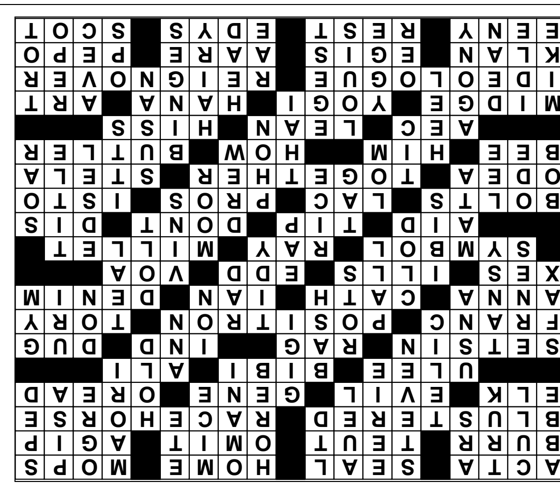
The Commission significantly expanded the definition of "commercial matter" even further to include promotions of television programs or video programming services *other than* children's educational and informational programming. (To fit within that latter exclusion, the program promoted need *not* meet *all* of the requirements for core programming, so long as the program promoted is "educational".) Previously, all promotions had been excluded from the definition of commercial matter. As the FCC sees it, the station airing the promotions reaps a substantial commercial benefit by increasing the audiences for its other shows, which in turn enables it (at least theoretically) to increase advertising rates. The change, it was stated, will protect children from overcommercialization and cut down on the number of interruptions in children's programming. The Commission also saw a benefit in encouraging the promotion of core programming in order to increase parents' awareness and potentially increase the audiences for the shows. The FCC declined to take further action at this time to ensure that program promotions aired during children's or family programming are also suitable for children to view, but it did not foreclose the possibility of taking such action in the future.

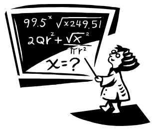
The Commission also indicated that, in the near term, it will issue a public notice to seek comment on broadcasters' compliance with the letter and intent of the Children's Television Act and FCC rules. In particular, the Commission will look at the amount and quality of core children's programming provided and the level of pre-emption of such programming.

Obviously, it is important to be alert to the changes which the Commission has already effected, and to stay alert for future changes which may be in the works. We will cover further developments in these pages as warranted. Stay tuned.

The Puzzle Corner

We received a request for the answers to the crossword puzzle ("The Usual Gang") that appeared in last month's issue. We are more than happy to oblige.





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60% of commercial radio stations and 30% of counties in the U.S., including Puerto Rico. The FCC has pending a rulemaking to adopt rules for defining radio markets and counting radio stations in areas not covered by Arbitron Metros. Meanwhile, the FCC has adopted a revised interim contour-overlap method for use in those areas. The revised interim contour-overlap method is similar to the prior contour-overlap method described above, except that the FCC now excludes from the total number of existing stations in the market: (i) stations owned by the entity being analyzed but which do not have contours overlapping the "common overlap area" of the stations being analyzed and, thus, are not counted as owned by the entity; and (ii) stations whose transmitter sites are more than 58 miles from the edge of the "common overlap area" of the stations being analyzed.

__All__ radio-related applications __must__ include a showing that the application complies with the FCC's multiple ownership rules using the new Arbitron and interim methods.

When any station which is shown by BIA as home to an Arbitron Metro has a community of license located outside the boundaries of the Arbitron Metro, it must be demonstrated that the stations owned by the entity being analyzed comply with the FCC's multiple ownership rules in ***both*** that Arbitron Metro (using the Arbitron Method) ***and*** the Arbitron Metro (or interim contour-overlap non-Arbitron radio market, identified by using the interim contour-overlap method) in which the station's community of license is located. In the five areas where Arbitron Metros are embedded within or overlap other Arbitron Metros, each Arbitron Metro must be analyzed separately. The FCC recently again refused to accept the use of alternative signal contour prediction methodology and supplemental engineering showings for demonstrating compliance with radio multiple ownership rules.

All radio-related applications – including those seeking new construction permits, modifications of existing facilities, or consent to the assignment or transfer of control of station authorizations – ***must*** include a showing that the application is in compliance with the FCC's multiple ownership rules using the new Arbitron and interim methods. In addition, all pending such applications which were filed on the June, 2002 version of the respective form were required to be amended by October 8, 2004 to demonstrate compliance with the multiple ownership rules using the new methods. Any pending applications filed on versions of the application forms dated prior to June 2002 were required to be amended by November 20, 2004. The FCC has dismissed many applications which were not amended by October 8, 2004 and will likely dismiss more which were not amended by November 20, 2004.

Before planning to purchase, sell, or modify a radio station, it is important that you consider the effect of the new Arbitron and interim contour-overlap methods of determining compliance with the FCC's multiple ownership rules. Failure to do so could lead to significant delays and frustration should it turn out that your proposal does not comply.

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when the FCC's grant of the license assignment application shall be considered nonappealable and not reversible on the FCC's own motion, we think it would be a good idea to add a provision that the FCC's consent shall not be considered to be a Final Order until all FCC Debt has been resolved (*e.g.*, paid in full, payment plan agreed upon, successfully challenged, etc.).

Excluded Obligations: Add to the list of excluded obligations any FCC Debt of the seller existing on or before the Closing Date.

Representations and Warranties: The representations and warranties of the seller should be augmented by adding references to FCC Debt. In the representation and warranty that the seller is not delinquent or in default under any debts, mortgages, contracts, etc., add FCC Debt to the list. In the representation and warranty section regarding financial performance statements delivered by the seller, include FCC Debts in the list of items that the seller certifies not to have excluded from such statements. In the representation and warranty of the seller regarding the lack of any fines or forfeiture orders, or notices of apparent liability in connection with the station licenses to be acquired, add wording that there is no FCC Debt. Finally, in the representation and warranty regarding the seller's compliance with laws and regulations and payment of all taxes, add that the seller has paid all FCC Debt. If you are the seller of a station, you will want to add similar provisions to the representations and warranties of the buyer in the transaction. If there is a provision limiting the survival, after the closing, of the representations and warranties made in the Asset Purchase Agreement, and there are exceptions to that limitation for such issues as tax payments, environmental matters, etc., that extend the representations and warranties for such issues for a greater length of time, representations and warranties with respect

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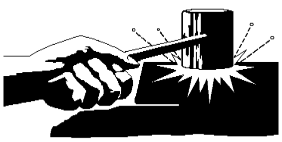
FM Channels going . . . going . . . gone



FM Auction Gaveled To A Close

Chairman suggests annual auctions in the offing

By: R.J. Quianzon
703-812-0424
quianzon@fhhlaw.com

A scant three weeks after the opening round, the FCC officially ended the first FM frequency auction opened to the public. While the total amount of potential bids was close to $200 million at one point in the late stages of the auction, the final total was only $148 million. Several applicants with large bids withdrew those bids near the auction's close, thus shrinking the government's take by some 25%.

In announcing the conclusion of the auction, the FCC publicly stated that it is planning to conduct ***annual*** auctions of FM spectrum "over the next several years". This, along with congratulatory words from Chairman Powell, appeared to signal that the Commission was happy with the operation of the auction processes. While a number of bidders sought during the bidding to challenge the activities of other bidders, the Commission declined to consider those challenges until the end of the bidding. It remains to be seen whether any of those challenges will be carried forward and, if so, what effect they might have either on individual channel sales or on the overall auction procedure.

With the close of the auction, the FCC provided high bidders ten days (*i.e.*, until December 15) to come up with 20% of their winning bids as an initial payment. Once they satisfy that deadline, those winning bidders have until January 3, 2005, to submit a full application for the construction permits which they won. Always on the look-out for the taxpayer's checkbook, the FCC requires applicants to submit full application processing fees in addition to the $150 million take at the auction.

Interestingly, FCC Chairman Powell declared that this auction brought "increased diversity through new FM radio stations", despite the fact that some very familiar names walked away as winners. Indeed, a $7.1 million Nevada permit was acquired by an applicant with ties to Marathon Media/3 Point. That group bid an aggregate of $35.5 million for all licenses it won. The $35 million total was more than twice the $16 million that the second highest aggregate bidders (some former radio executives) popped for all of their licenses. And in the end, the usual suspects will likely not be limited to acquiring only those channels for which they bid successfully: there are very few limitations which absolutely prevent a small winning bidder from being bought out by a larger company after constructing.

After the winning bidders' long-form applications have been reviewed by the FCC, they will be run through the typical steps employed by the FCC for application processing. Members of the public are entitled to oppose the applications and the FCC staff will process auction applications as they would any other application. The likelihood of success of any challenge is probably slight absent any blockbuster allegations.

(Continued from page 12)

to FCC Debt should be added to the list so as to survive for as long as possible after the closing.

Covenants: To the seller's and buyer's covenants add a provision requiring an offending party to expeditiously resolve, at its sole cost and expense, any FCC Debt that it has as of the date of the Asset Purchase Agreement or that arises between such date and the Final Order.

Closing Date: If the Closing Date under the Asset Purchase Agreement is not tied to the FCC's consent to the license assignment being a Final Order, wording should be added that the lack of any FCC Debt is a condition to the buyer's obligations to close.

Closing Deliveries: In the items to be delivered at the closing, add a requirement that the seller and buyer deliver printouts from the FCC's Red Light Display System showing that their FRN (and all FRNs associated with the seller and buyer) have a green light status.

The FCC has stated that a timely, good faith, written challenge to any delinquent debt will result in the release of a red light hold. Therefore, the parties to a potential purchase/sale transaction should perform due diligence as early in the process as possible to determine the existence of any potential debts and resolve or challenge them before an application is filed requesting the FCC's consent to the assignment of the station's license.

Although we have been discussing the FCC's new red light rule in the context of asset purchase agreements, don't forget that this rule affects all actions requiring FCC consent.

With a few additions to your Asset Purchase Agreement along the lines suggested above, together with due diligence investigations even before signing the Asset Purchase Agreement, you should be protected as much as possible from delays under the FCC's new red light rule.

FM ALLOTMENTS ADOPTED –11/18/04-12/16/04

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
GA	Calhoun	63.2 miles NW of Atlanta	233A	04-204	TBA
WA	Waitsburg	27 miles NE of Walla Walla	272A	04-168	TBA
FL	Islamorada	64.7 miles S of Miami	283C2	04-205	TBA
MA	Easthampton	14.4 miles NW of Springfield	288A	04-67	None
NY	Malta	26 miles N of Albany	289B1	04-67	None
NM	Clayton	126 miles NW of Amarillo, TX	248C1	04-220	TBA

FM ALLOTMENTS PROPOSED –11/18/04-12/16/04

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
KY	Corydon	19.5 miles S of Evansville, IN	237C3	04-420	Cmts -01/18/05 Reply-12/31/04	1.420(i)
ID	Ammon	4.6 miles S of Idaho Falls	283A	04-427	Cmts -01/24/05 Reply-02/08/05	Drop-in
OR	Clatskanie	55 miles NW of Portland	225C3	04-428	Cmts -01/24/05 Reply-02/08/05	1.420(i)
WA	Ilwaco	110 miles NW of Portland, OR	253A	04-428	Cmts -01/24/05 Reply-02/08/05	Substitution
WA	Long Beach	112 miles NW of Portland, OR	259A	04-428	Cmts -01/24/05 Reply-02/08/05	Show Cause
AR	Hermitage	129 miles N of Shreveport	300A	04-431	Cmts -01/31/05 Reply-02/15/05	Drop-in
MN	Grand Portage	145 miles N of Duluth	274C	04-432	Cmts -01/31/05 Reply-02/15/05	Drop-in
MN	Grand Portage	145 miles N of Duluth	224C	04-433	Cmts -01/31/05 Reply-02/15/05	Drop-in
NC	Cary	11 miles W of Raleigh	230C	04-429	Cmts -01/31/05 Reply-02/15/05	1.420(i)
TX	Mont Belvieu	35 miles E of Houston	248C	04-426	Cmts -01/31/05 Reply-02/15/05	1.420(i)

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 5)

Three parties filed petitions seeking redress from the Commission's decision to dismiss all pending petitions for rulemaking for new or different analog television channels. Those rulemaking petitions had been filed by parties that did not have a paired DTV channel; each sought an in-core channel on which to commence analog operation, which would then permit flash-cutting to digital service on that same channel at some point in the future. The Commission dismissed those reallotment petitions so that the analog Table of Allotments would be fixed permanently prior to the commencement of the channel election process. The Commission reasoned that the channel election process is likely to proceed more smoothly if the Table of Allotments is not subject to changes not arising from the election process. That rationale was not persuasive to the few folks whose analog reallotment proposals got tossed out, and those folks are seeking reconsideration.

Two prominent engineering consulting firms also weighed in with several concerns. They sought correction of data in the Commission's records. In addition, they questioned the interference protection requirements adopted by the Commission, and suggested certain modifications that should be made to the interference prediction software. Other points advanced in petitions for reconsideration included the following: the Commission should provide a paired DTV channel to analog-only television stations; the Commission should permit singleton licensees on Channels 60-69 to receive replacement channels in the DTV core; and the Commission should have adopted a more graduated build-out process for stations in small and medium sized markets.

It is unclear how soon, and to what extent (if at all), the FCC will consider these petitions. Obviously, there is substantial pressure on the Commission to complete the transition as soon as possible, with all loose ends tied up neatly. Thus, there is at least some basis from which to assume that action on these petitions might be accelerated beyond the usual less-than-speedy treatment accorded such petitions.

Oppositions to the petitions for reconsideration can and likely will be filed; comments in support of these petitions can also be filed. Please let us know if you would like us to assist you in preparing a submission.

Unlicensed Devices in TV Band As we reported in the June, 2004 *Memorandum to Clients*, the Commission is considering a proposal which could open the door for the operation of unlicensed devices on vacant TV channels across the country. In November, over 100 sets of comments were filed by a diverse, and divergent, group of interested parties. Depending on whom you talk to, such unlicensed operations in the television band will lead either to Armageddon, or to a happy and idyllic universe in which the spectrum is used in peace and harmony with maximum efficiency.

As you might imagine, the divide between the parties' views in large measure (but not invariably) rests on whether the commenting party happens to be a broadcaster or a wireless service provider.

Broadcasters were, of course, primarily concerned about the possibility of introducing new unlicensed devices into the television band, particularly during the DTV Transition. Also, broadcasters expressed concern about the impact of these devices in highly congested areas, and whether available technology really can accurately "sense" whether a particular frequency was unused.

Despite a wide range of views on the likely reliability of the technology, the constant drumbeat from the Commission's staff has been and continues to be that unlicensed devices in the TV band ***is*** possible with technology currently on hand, and that the Commission could act as early as the second quarter of 2005 in adopting new rules.

Reply Comments in the unlicensed operation proceeding are due at the end of December. After the close of the comment window, additional views can be presented to the FCC and its staff as an *ex parte* presentation. If you would like help in preparing a submission, please let us know.

Digital LPTV Rules As we reported in September and October, the Commission adopted new rules to permit low power television stations to convert to digital use. When we first reported on this development, the new rules had not been published in the Federal Register and, thus, had not yet become effective. Well, now they have. Most of the new substantive LPTV rules will become effective on January 28, 2005. However, the information collection aspects of the new rules (*i.e.*, the forms which LPTV operators will be required to file) will not be effective until the Office of Management and Budget approves the new information collection requirements.

They Want You To Pump It Up When it adopted the DTV service rules, the Commission provided that, while DTV stations could initially provide lower power service, they would eventually be required to increase their power to insure city grade coverage to their community of license. That time is now upon us. As of December 31, 2004, DTV city grade service requirements increase. This means that, for Channels 2-6, the field strength of the principal community signal must be 35 dBu; for Channels 7-13, the field strength must be 43 dBu; and for Channels 14-69, the field strength must be 48 dBu.

So as a new year dawns, the DTV landscape is still inchoate, a work in progress. Where we will be at the end of 2005 is anyone's guess.