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

Memorandum to Clients

January, 2005 | *News and Analysis of Recent Events in the Field of Communications* | No. 05-01

On the horizon, DTV getting the DTS?

Cell-A-Vision?

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The FCC is reportedly getting ready to commence a fast-track proceeding on Distributed Transmission Systems (DTS), technology that broadcasters and regulators alike hope will enable DTV stations to provide more complete, spectrum-efficient coverage to their markets.

The heralded DTS technology operates much like a cellular telephone network – the service area is divided into a number of different cells, each with its own transmitter. However, unlike cellular phone systems, where spectrum is split into channel groups and no adjacent cells share the same channel, each DTS cell transmits on the same frequency. Like a system of on-channel repeaters, DTS uses multiple transmitters on a single frequency to deliver a single signal throughout a service area.

Stations using multiple transmitters can provide higher signal levels throughout their service areas without causing as much interference to their neighbors as use of single main transmitter would entail.

Proponents of DTS claim that broadcasters can use it to overcome many signal delivery problems. For example, DTS can be used in service areas with hilly or mountainous terrain to reach populations that would otherwise be blocked from reception by the topography. In urban areas, DTS can be used to overcome urban canyons and enable set top reception by delivering signals from multiple directions and allowing higher signal levels. And because DTS makes use of shorter towers and lower power transmitters, it can often achieve these benefits while avoiding zoning problems or serious interference concerns. Stations using multiple transmitters can provide higher signal levels throughout their service areas without causing as much interference to their neighbors as use of single main transmitter would entail. The virtues here are obvious: more uniform signal levels over wider service areas while causing less interference (think along the lines of the classic Miller Lite ads: "more service", "less interference").

DTS does have some limitations, though. First, interference will arise among the signals from different transmitters in the same network. Adaptive equalizers in DTV receivers can manage some of this interference – indeed, it is this feature of DTV receivers that makes DTS possible. But interference beyond the capacities of most adaptive equalizers will have to be addressed through other means, such as outdoor directional antennas. Also, DTS will not work in certain adjacent and near-adjacent channel situations. Under current interference requirements, DTS operations may be precluded on channels with neighboring analog stations on adjacent channels, or within four channels above or below. DTS operations may be precluded on

(Continued on page 13)

The Scoop Inside

Another nail in the "backfill" coffin

Vacant Allotments Can't Be Used To Fill Proposed White/Gray Areas In Allotment Proceedings

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In the July, 2004 issue of the *Memo to Clients*, we reported on the *Refugio, Texas* decision in which the FCC held that, when an existing FM licensee proposes the reallotment of its station from Community A to Community B, and when the station which would be reallotted is the *only* operating radio station in Community A, the proponent will *not* be permitted to rely on a vacant channel to "backfill" the removal and thereby provide Community A with the mere possibility of some local service in the future. Rather, the Commission concluded that it would not permit the sole operating station in a community to be removed from that community unless it could be replaced by another operating station. In the Commission's view, the loss of existing service which would be suffered by Community A could not be corrected with the allotment of a mere vacant channel, since there is no guarantee as to when, if at all, actual service would be available on that channel.

In a recent FM rulemaking decision, the Commission has clarified and further expanded the *Refugio* approach. In this recent decision, the proposed reallotment would have created white and gray area (*i.e.*, areas in which no radio service at all – "white" area – or only one radio service – "gray" area – could be received). Recognizing that the creation of such service-free areas would likely be the kiss of death to the proposal, the proponent urged that the dropping in of a number of strategically-placed new channels would take care of the problem. But, following the *Refugio* logic, the Commission declined to adopt that proposal because, as the Commission saw it, the predicted loss of service would not be adequately remedied by vacant channels.

In *Refugio* (a Bureau decision which was affirmed last year by the full FCC), the Commission reasoned that the ultimate licensing of a new station through the now-obligatory auction procedure is an uncertain and time-consuming process. After all, an auction filing window must be opened, the actual auction must be conducted, a qualified winner must emerge, its application must go through technical processing and be granted, and the station must be built. Clearly, the prospect that a new station may come into being after completing this process is not the same thing as a currently operating, local transmission service.

The Commission has now applied the same reasoning in a case involving the loss of reception service rather than transmission service. The proponent had argued, and continues to argue in seeking reconsideration, that the Commission has previously stated that it should generally presume that service will be provided on previously allotted, vacant channels. The Commission responded, however, that it did not make this assumption when considering loss of service. In this case, the Commission noted that almost 3,000 people would lose their only radio service, and another 1,000 would lose their second radio service. The provision of at least one radio service is the Commission's highest priority in making FM station allotments. The Commission's staff therefore concluded that even the provision of a first local service to a new community would not outweigh the loss of service that would result. It reiterated that the promise of a possible new service in the future is a poor substitute for a currently operating station. Thus, a vacant allotment would not be sufficient to offset the creation of "white" and "gray" area that would result from the proposed move.

Any FM licensee contemplating the relocation of its station to another community should be mindful of the FCC's concern about leaving a community with no local radio service.

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Focus on FCC Fines

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Don't touch that dial-tone - The FCC recently fined four different licensees for violating the rule against broadcasting telephone conversations. Two of the violations occurred in connection with news reports, while the others involved on-air radio pranks. Readers are reminded that FCC rules prohibit recording or broadcasting a telephone conversation unless the other party has consented to the recording or broadcasting ***before*** the recording/broadcast begins. Details of the fines follow:

Louisiana: A Monroe TV station was nicked for a $10,000 fine when one of its reporters recorded (a) the answering machine message of a local politician and (b) the same politician answering the phone and hanging up. Both of these brief incidents were broadcast on the evening news. The FCC was not pleased. The TV station claimed that neither incident qualified as a "conversation" under the FCC rules and therefore the broadcast was not illegal. The FCC disagreed, noting that its rules protect the privacy of someone answering a phone and that in both instances, that privacy was violated. This ruling underscores that the fact of the unconsented-to taping (or broadcast) is the crucial element here, and ***not*** the limited nature of the material contained in that taping/broadcast.

Ohio: A Cleveland TV station was slapped with a $6,000 fine for airing a recorded telephone conversation between a reporter and a local man. During the conversation, the reporter identified herself as a reporter. While the interviewee understood that the conversation was "on the record", he was not aware that the call was being recorded for broadcast. After the conversation was played on the evening news, the interviewee called the station to complain. In response, the station aired the conversation again, which led the interviewee to complain again, this time to the FCC. In lowering the $6,000 boom on the licensee, the FCC rejected the licensee's claim that confirming that an interview is "on the record" is the same thing as obtaining consent to the future broadcast of the taped interview. Interestingly, the interviewee was a former reporter who, according to the licensee, should have known that the interview was being recorded for future broadcast. Again, however, the FCC was unpersuaded, further underscoring the fact that it is the station's affirmative obligation to obtain express consent ***before*** any the tape starts to roll.

Michigan: As part of an on-air prank, an announcer at an FM station in Detroit called a prayer line and asked the volunteer to pray for a cause that was suspicious. Although the volunteer suspected that something was not quite right with the request, he still prayed for the cause of the caller, and that prayer (along with the rest of the conversation with the announcerl) was broadcast. By the time the incident was investigated by the FCC, the announcer responsible for the prank had left the station. The FCC had before it only an affidavit from the prayer line volunteer describing the incident; for its part, the licensee submitted a statement advising that, because the announcer had since been fired, the licensee could neither confirm not deny the charges. Faced with this evidentiary record, the FCC concluded that the station had in fact violated the rule prohibiting the unconsented-to broadcast of a telephone conversation. The price tag: $8,000.

Nationwide: A multi-station radio operator took a $28,000 hit from the FCC for broadcasting an announcer's prank call to an affiliate company's account executive. During the show, the announcer called the account exec who (at least at the time) worked for the station's parent company. The announcer claimed to be someone the account exec had met at a local nightclub. When the announcer revealed himself, his interviewee was not amused – so much so that she reported the matter to the FCC. During the investigation of the incident, the station's parent company defended itself using the words of the FCC's rule itself. The rule expressly exempts from the prior consent obligation, among other things, calls in which "the other party to the call [*i.e.*, not the station's on-air staff] is associated with the station (such as an employee or part-time reporter)." Since the account exec was, at least at the time of the call, an employee of the station's licensee (or an affiliated company), the station argued that the call fell within that exemption and no consent was necessary. Faced with a heapin' plate of its own words to eat, the Commission declined. Instead, the FCC announced that the exemption in its rule does ***not*** apply to any and all employees of a licensee, but rather only to those employees "who participate in 'open mike' shows, phone in news stories, or perform similar duties". As the Commission saw it, the account exec could not reasonably have been aware that the call would be broadcast – the announcer lied about his identity, called her on her private cell phone, and discussed matters of a "highly personal nature that one would not expect to be broadcast". This result required the Commission to engage in some verbal contortions, since the language of the rule does appear to support the Commission's pinched interpretation. But that, again,

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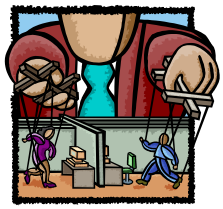
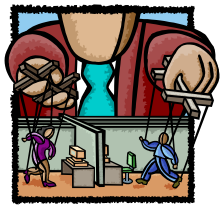


FCC OK's LMA's, TV-style

Properly Limited "Shared Services" Arrangements Between Television Licensees Held Not Attributable



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The FCC recently gave its effective seal of approval to an arrangement in which the licensee of a TV station entered into a "Shared Services Agreement" and other agreements with a second TV station in the same market. Since the licensee of the first station was precluded by the FCC's multiple ownership rules from owning the second station, it had been alleged that the arrangement was inconsistent with the rules. But the FCC concluded that the "Shared Services Agreement" and other agreements were akin to joint sales agreements (JSAs), which currently are not treated as ownership interests or otherwise restricted under the FCC's TV multiple ownership rules.

While the use of local marketing agreements (LMAs) has flourished on the radio side, no equivalent business device on the television side had received a formal FCC thumbs-up.

Historically, the Commission's rules governing common ownership or control of television stations in a given market have been considerably more restrictive than those governing the radio industry. Largely as a result, while the use of local marketing agreements (LMAs) has flourished on the radio side, no equivalent business device on the television side had received a formal FCC thumbs-up. Nevertheless, because of the obvious business advantages which can arise from LMA-like arrangements, some television operators have developed an approach which resembles an LMA in a number of respects but which still falls short of a full-tilt time brokerage agreement.

The TV approach involves a bundle of agreements which, when effectuated together, allow one television licensee to shoulder much of the burden of operating a second station in the market, and to derive significant commercial benefits from that second station, without running afoul of the local multiple ownership rules. This approach has been in use in a number of markets for some time. However, the FCC has never been called upon to review and approve the underlying agreements. Rather, in at least some instances the parties to the deal have discussed the matter generally with members of the Commission's staff and have satisfied themselves that the bundle of agreements would not raise any multiple ownership questions. But to date, the Commission has been officially silent in this area.

Until the recent decision, that is.

There a petitioner argued to the Commission that an arrangement featuring a Shared Services Agreement and other agreements pushed one party over the multiple ownership limit and into a de facto ownership position which had not been approved by the Commission. The Commission rejected those arguments. In this case, the parties' arrangement provided that the licensee of one TV station (let's call him the Operator) would (i) provide a second station 15% of the second station's programming, (ii) sell all of the advertising time on the second station, (iii) have the right to purchase the second station under an option agreement, (iv) guarantee the debt of the second station, and (v) have the right to inspect the financial books of the second station. The FCC found that this arrangement would ***not*** result in giving the Operator an "attributable interest" in the second TV station which would be treated as ownership under the TV multiple ownership rules. The FCC further found that this arrangement would not be deemed to result in an unauthorized transfer of control of the second station to the Operator.

The petitioner had argued, among other things, that the fact that the Operator would be providing 15% of the second station's programming ***and*** would be supplying 100% of its advertising meant that the Operator would be providing more than 15% of the station's programming, which would result in the Operator holding an attributable interest in the station. The FCC declined to go down that road, noting that Commission policy has consistently held that only programing agreements, such as local marketing agreements (LMAs) or time brokerage agreements (TBAs) for more than 15% of the program time on a station would be treated as ownership under the multiple ownership rules, while agreements for providing advertising, such as joint sales agreements (JSAs), would ***not*** be so treated.

The FCC additionally stated that it has previously decided that guaranteeing debt of a station and holding an

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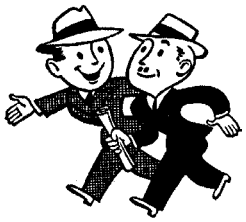
2003 rules taking effect in 2005

JSAs: Just Say "Attributable"



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Do you have an AM or FM radio station in an Arbitron Metro Market? If so, do you have an agreement with another station owner in the same Market to sell advertising time on the other station? Are you selling more than 15% (on a weekly basis) of the advertising time on the other station? If your answers to all of these questions are "yes," a new FCC rule that just came into effect requires you to file a copy of your agreement with the FCC. Take note: you have less than a month to comply**.**

As part of its 2003 revision of the rules governing media ownership concentration, the FCC decided that Joint Sales Agreements (JSAs) should count when determining how many stations an entity owns or controls in a market.

As media junkies know, the FCC was blocked for a year from implementing its new media ownership rules by legal challenges that eventually wound up in the U.S. Court of Appeals for the 3rd Circuit (in an appeal often referred to as the infamous "Prometheus Radio Project" case). Last Fall, however, the court lifted its hold on some of the FCC's new rules, although there is still a possibility of an appeal to the US Supreme Court. Seizing the opportunity, the FCC is beginning to include radio station JSAs when determining media concentration limits.

To phase in its new rules, the FCC first needs to know how many radio station JSAs are out there. Thus far JSAs were not required to be reported, so they have been flying under the FCC's radar. The Commission is now looking to correct that. If you are a party (in particular, the party doing the selling for another station you don't own) to a JSA that qualifies, you must file a copy of the JSA with the FCC by ***February 22, 2005***. Remember also to put a copy in the relevant stations' public inspection files. The FCC will allow you to white-out text of the JSA that is confidential or otherwise proprietary, so long as you allow the FCC to inspect such wording upon request.

Also, from now on if you sign a new JSA that falls within the criteria set forth above, you have 30 days from the date of signing to file a copy with the FCC. This is similar to the existing rules requiring you to file time brokerage agreements, management consulting agreements and the like.

From now on if you sign a new JSA that falls within the criteria announced by the Commission, you have 30 days from the date of signing to file a copy with the FCC.

Next, the FCC wants you to re-count how many stations you have in the market, including stations that you sell advertising for under the JSAs, to determine if you are under or over the multiple ownership limits. If you entered into a JSA *before* June 2, 2003 (*i.e.*, the date on which the "new" rules were adopted by the Commission) and the JSA now causes you to exceed the FCC's multiple ownership limits, the FCC has provided you with a "grandfather," or grace, period. Your JSA can continue until September 3, 2006, although it can***not*** be renewed if it expires before then. JSAs entered into after June 2, 2003, but before September 3, 2004, which cause you to exceed the FCC's ownership limits, must be terminated by April 4, 2005.

If you are the owner of a station not included within any Arbitron Metro Markets, these new requirements don't affect you yet. The FCC doesn't require you to file JSAs yet, at least not until the FCC implements new ownership rules for stations in your situation. But stay tuned, because once such rules become effective, you will have 60 days to comply.

(Continued from page 4)

option to purchase the station are not treated as ownership under the multiple ownership rules.

While this ruling should provide a measure of assurance to television licensees who have entered into such Shared Services arrangements, there is reason to believe that that mechanism may not be available for long. The FCC currently has pending a rulemaking proceeding in which it is considering whether to treat agreements for providing advertising (*e.g.*, JSAs) as ownership under the TV multiple ownership rules. No such rule is currently in place for television. On the radio side, the Commission has begun to treat such agreements as potentially affecting ownership interests in a radio station. This is clearly an area where the law is developing, and care should be taken to assure compliance with all rules and policies presently in effect.

Paxson petitions, Powell packs up, and

DTV Must-Carry Decision May Be In The Offing

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Mark your calendars and cross your fingers. Reliable sources indicate that the long-unresolved question of DTV must-carry may be heading for the Commission's agenda in early February.

DTV must-carry rights have been a matter of controversy for years. While it has long been established that a station's standard analog signal is entitled to mandatory carriage, the Commission has declined to decide the extent to which the same station's digital signals may be similarly entitled. Broadcasters generally feel that digital must-carry should be required. This would include both the station's analog *and* digital signals (during the transition period when both are operating), as well as all programming streams aired by a broadcaster who elects to offer multi-cast on its digital channel. Cable operators, on the other hand, urge that a multi-channel must-carry obligation would be unfair and overly burdensome.

In 2001, the Commission did find that a DTV licensee operating without any analog signal was entitled to must-carry rights, but only as to the "primary" signal of the digital licensee. And elsewhere, the Commission has granted cable operators and television licensees the authority to enter into voluntary agreements whereby the cable operator would carry both the analog and digital signal of the television licensee.

The big question left unresolved, though, has been whether broadcasters' analog ***and*** digital signals were entitled to mandatory carriage (*i.e.*, "dual carriage") and whether cable operators would be required to carry more than a single digital program stream from any single licensee. The Commission sought additional comments, and more than 600 responsive submissions have been submitted. For several years the matter has been awaiting Commission disposition.

Now, finally, it appears that a decision may be near. And that may be largely thanks to Paxson Communications Corporation. Last August, tired of the Commission's foot-dragging, Paxson asked the U.S. Court of Appeals in Washington, D.C., to order the Commission to issue a decision in the matter. Paxson noted that the Commission had requested comment on a number of specific questions, and that the record has since been supplemented with responsive pleadings covering each of the matters raised by the Commission. Paxson also argued that the delay in resolving this matter has delayed the DTV transition, and has caused economic injury to the broadcasting industry.

Paxson's request technically sought a "writ of mandamus" from the Court. Such requests are different from conventional appeals because, in conventional appeals, the appealing party asks the Court to reverse an agency decision which the appellant believes to be flawed in some respect(s). In cases such as digital must-carry, the problem is not that the FCC has issued a flawed decision, but rather that the FCC has issued no decision at all. Claiming that the Commission has unreasonably delayed the resolution of the matter, Paxson simply asked the Court to order the Commission to get the matter decided, one way or the other.

Mandamus proceedings are also different from conventional appeals because, in a conventional appeal, the Commission is required to respond to the appeal automatically. That is, the filing of an appeal generally assures the appealing party that the issues it seeks to raise will be addressed in some fashion. By contrast, in a mandamus proceeding, the FCC need not respond unless and until the Court orders it to do so. And the Court, in turn, will not do so unless the Court is convinced, at least preliminarily, that the party requesting the mandamus has a reasonably strong case.

In this instance, the Court apparently felt Paxson was on the right track, as the Court ordered the Commission to respond.

Not surprisingly, the FCC opposed Paxson's request, and instead argued that it has already complied with the statutory obligations requiring the adoption of rules to permit the carriage of digital signals by cable operators, and that no future action is necessary to determine the dual carriage rights of broadcasters. The Commission noted that it has continued to receive submissions from the public regarding the dual-carriage issue, and that its "careful" consideration of the dual-carriage matter is ongoing. Finally, the Commission argued that it has been really really busy working on the DTV transition, issuing orders on the channel election process, adopting the DTV Tuner mandate, and adopting the Broadcast Flag rules.

(Continued on page 7)

Upper AM pioneers looking to upgrade

Expanded Band Expansion Bandied

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Broadcast historians will likely recall the FCC's years-long effort to clean up the AM band by making available virgin spectrum beyond the original upper limit of the AM band (1605-1705 kHz) to licensees who were willing to "migrate" their stations up to that new spectral turf. The idea was to reduce congestion – and its natural by-product, interference – in the lower portion of the band. When the dust finally settled after years of rule makings and relocation efforts, the results were somewhat limited: only 65 stations made the move (or committed to make the move).

In setting up the expanded band opportunity, the Commission sought to avoid the "shoe-horning" approach to AM allotments which has complicated the AM allocation arrangement for the better part of a century. Rather than permit expanded band stations to utilize directional arrays and a range of powers in order to snuggle themselves into tight locations between or among other nearby (on the spectrum) stations, the Commission opted for a more FM-like approach based on distance spacings, omni-directional operation, and uniform 10 kW (day), 1 kW (night) power limits.

Now three expanded band pioneers have filed a Petition for Rulemaking asking the FCC to amend its rules and afford Class B status for stations operating in the AM expanded band (1605-1705 kHz). In particular, the petitioners have asked for the elimination of both the limitations on power ***and*** the prohibition against directional antennas. According to the petitioners, those revisions would "enable expanded band stations to respond to market forces", which presumably means that the changes would make it easier for such stations to go after listeners they can't presently reach. The changes would also help alleviate the "second class citizen" status of expanded band operators, according to the petitioners. That status, they say, arises at least in part from the fact that ground conductivity – a key factor in determining the reach of an AM signal – tends to be worse for higher AM frequencies than for lower ones. While expanded band licensees could theoretically already seek waivers of the existing power/directionalization limits, the petitioners claim that eliminating those provisions would relieve the FCC's staff of the "burdensome task of evaluating multiple waiver requests".

Of course, any such relief would presumably be offset, at least partially, by the added burden of processing modification applications which would likely require essentially the same staff analysis as would waiver requests, so that potential benefit may not be all that it's cracked up to be. Moreover, to the extent that reliance on power increases and directional arrays might result in increased potential for interference to other stations, such reliance might also trigger more petitions to deny or other objections, thus imposing a greater burden on the Commission's staff.

For the time being, the Commission has taken no action on the proposal. The Commission has, however, gone so far as to issue a public notice alerting the public to the fact that the petition was filed. The issuance of such a notice is often the first step toward a rule making proceeding, so the petitioners have apparently succeeded in at least getting the ball rolling. Anyone with more than a passing interest in AM technical standards – and particularly anyone with an expanded band license or with a station near the expanded portion of the band – should probably keep an eye out for further developments relative to this proposal.

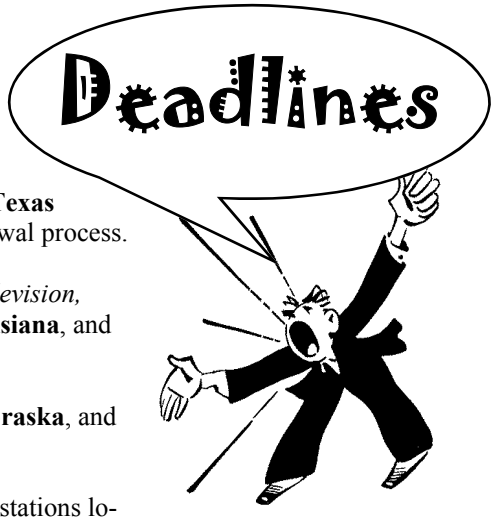
(Continued from page 6)

In its reply, Paxson expressed incredulity, pointing to past comments by the Chairman and Commissioners acknowledging that the dual-carriage issue was "unfinished business" and that it was an "open issue" still being reviewed by the Commission. Paxson also reiterated its concern that the delay in issuing an order on dual carriage has caused substantial economic harm on broadcast licensees.

If various reliable sources prove accurate, the Court will likely not have to decide whether to order the Commission to act: the DTV carriage matter is said to be headed for a decision at the Commission's open meeting in early February. Obviously, some action, any action, on the issue will moot out the mandamus proceeding (although it might tee up a conventional appeal in which various parties argue that the Commission's decision – whatever it turns out to be – is wrong). The timing of the decision was likely influenced at least in part by the Paxson mandamus effort, but it might be equally attributable to the fact that Chairman Powell plans to resign in March. The Chairman, who largely controls the Commission's agenda, may wish not to leave any loose ends in the DTV conversion process when he leaves office.

And in case you were wondering, our sources indicate that the Commission is likely to reject broadcasters' call for multi-cast and dual carriage must-carry obligations.

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 *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 *radio* stations in **Kansas**, **Nebraska**, **New Jersey**, and **New York** must also file a biennial ownership report. 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.

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.

February 10, 2005

DTV Channel Elections - First round DTV channel election forms (FCC Form 382) must be submitted by all TV stations required to participate in first round elections (*Deadline extended from original deadline of January 27).*

February 22, 2005

Radio Joint Sales Agreement Filing Required - All *radio* joint sales agreements (JSA's) that result in creating an attributable interest must be filed with the FCC. Those agreements include JSA's involving radio stations where a

(Continued on page 9)

Frank Montero Named Member

Francisco R. "Frank" Montero has been named a member of the Firm, effective January 1. He has been with FHH in an "of counsel" capacity since January, 2003. Frank is an experienced communications attorney active in the area of Hispanic language media for the United States and Latin America. He has also been involved in FCC regulatory counseling, corporate finance, asset and security acquisitions and intellectual property. Frank has held a number of positions through which he has helped to promote increased opportunities for Latinos and others. A former FCC official – he was Director of the Commission's Office of Communications Business Opportunities – he currently serves on the Executive Committee of the FCC's Federal Advisory Committee on Diversity in the Digital Age, a position to which he was appointed by Chairman Michael Powell. He was also instrumental in the establishment of the Independent Spanish Broadcasters Association, an organization formed to promote and develop ownership, business opportunities and access to capital for independent Spanish language broadcasters.

(Continued from page 8)

station licensee (including all parties under common control) is the brokering entity, the brokering and brokered stations are both in the same market, and more than 15 percent of the advertising time of the brokered station on a weekly basis is brokered by that licensee.

April 1, 2005

Television Renewal Pre-Filing Announcements - *Television*, *Class A television*, and *LPTV* stations originating programming and located in **Ohio** and **Michigan** must begin pre-filing announcements in connection with the license renewal process.

Radio Renewal Pre-Filing Announcements - *Radio* stations located in **Arizona**, **Idaho**, **Nevada**, **New Mexico**, **Utah**, and **Wyoming** 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 **Indiana**, **Kentucky**, and **Tennessee** must file their license renewal applications.

Radio Renewal Applications - All *radio* stations located in **Texas** must file their license renewal applications.

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

EEO Public File Reports - All *radio* and *television* stations with five (5) or more full-time employees located in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, **Tennessee**, and **Texas** must place EEO Public File Reports in their public inspection files. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

Radio and Television Ownership Reports - All *radio* stations located in **Delaware**, **Pennsylvania**, and **Texas** must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All *television* stations located in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, **Tennessee**, and **Texas** must also file a biennial Ownership Report. All reports filed on FCC Form 323 or 323-E must be filed electronically.

The pendulum starting back?

One Year After Super Bowl 2004, Commission Rejects Indecency Complaints

By: *Harry F. Cole*
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While the imminent departure of Chairman Powell may suggest to some that a roll-back in indecency enforcement could be in the offing, it's probably best not to bet the farm on that possibility. The remaining four commissioners have all enthusiastically embraced the anti-indecency movement – indeed, Commissioners Copps and Adelstein, and occasionally Martin, have occasionally indicated that they thought the Commission hasn't been hard enough, er, hasn't adequately reproached the industry. Nevertheless, some signs of a backward swing of the regulatory pendulum have appeared.

In two separate decisions, the full Commission rejected complaints concerning a total of 36 instances of alleged indecency on television. In so doing, the FCC seems to be backing away from the absolute prohibition against arguably indecent language which was at least hinted at in the March, 2004 *Golden Globes* decision (in which Bono's incidental and seemingly impromptu use of the term "fucking" as an adverb was held to be both indecent and profane).

*Where Golden Globes seemed to prohibit essentially **any** use of sexual or excretory terminology, even when used in a plainly non-sexual/non-excretory context, the recent decisions stop well short of an absolute prohibition.*

The complaints were all filed by the Parents Television Council (PTC), which helpfully focused the Commission's attention on occasional uses of terms which were, in PTC's view, indecent. Those terms included repeated use of the word "dick" (or variations, including "dickhead") as an apparently derogatory epithet. They also included a variety of other words (*e.g.*, penis, testicle, vaginal, ass, nutsack, orgasm, breast, nipples, can, crap, pissed) which popped up in dialogue, often in connection with sexually-tinged exchanges among the characters.

Now remember that Bono's exclamation occurred not in any sexually-tinged conversation between romantically-inclined characters, but rather in an off-the-cuff acceptance speech. Since the Commission has claimed that its indecency analysis depends to a significant degree on "context", one might think that the PTC's complaints should have had some traction. After all, they involved terms which refer to sexual or excretory organs or activities, and the context of the references made it reasonably clear that the terms were indeed being used in that sense.

But the Commission rejected the PTC's complaints. The references to "dick" were viewed as mere "epithets" which were either "intended to denigrate" or "a play on words". Moreover, their use was merely "fleeting" and "not sufficiently explicit or graphic and/or sustained" to be patently offensive. Ditto for the other terms. And ditto, too, for the "fleeting" glimpse of a cartoon character's "buttocks" depicted in the animated program "King of the Hill". The FCC also seemed swayed by the fact that a number of the supposedly offensive terms were not repeated or "dwelled upon".

The Commission did not put its FCC Seal of Approval on the language, though. It hedged by saying that use of such language "may, depending on the nature of the broadcast at issue, contribute to a finding of indecency". But the Commission declined to explain exactly how or when or under what circumstances the "nature of the broadcast" (whatever that may mean) could push the use of these or similar words over to the "indecent" side of the universe.

The Commission also held that "material containing inaudible or bleeped expletives do not render the broadcasts patently offensive" because the broadcaster in such cases "has exercised appropriate editorial control over its programming by deleting or editing out utterances" that might otherwise be deemed patently offensive. As for visual images, the FCC similarly held that the use of pixilation or other obstructions (clothing, bedsheets, etc.) to shield sexual or excretory organs from the audience's view was an effective device which prevented the "actual[ ] depict[ion]" of such organs.

It is, frankly, difficult to square these decisions with the *Golden Globes* opinion. Where *Golden Globes* seemed to prohibit essentially ***any*** use of sexual or excretory terminology, even when used in a plainly non-sexual/non-excretory context, the recent decisions stop well short of an absolute prohibition. Indeed, those decisions appear to tolerate considerable levels of sexual/excretory content, including smarmy innuendo. And while the Commission now says that the examples presented by the PTC were not "graphic" or "explicit", the Commission does not explain why Bono's

(Continued on page 11)

Cable TV Must-Carry/ Retransmission Consent Elections Are Due This Year

By: Paul J. Feldman
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It's not just ***Presidential*** elections that should be on the mind of broadcasters. Rather, full power TV and LPTV/Class A broadcasters should be mindful of the fact that they must elect must-carry or retransmission consent status *vis à vis* their local cable TV systems by ***October 1, 2005***.

The opportunity to re-visit your station's carriage status rolls around every three years. The election you make as of October 1, 2005, will go into effect on January 1, 2006, and will remain in effect until January 1, 2009 (the deadline for your next election opportunity being October 1, 2008). It is not too early to start strategizing on your approach to cable carriage of your station. While must-carry status can be chosen unilaterally by the licensee, the election of "retransmission consent" involves reaching an agreement with the cable system, and the negotiation process leading to such an agreement can be prolonged. Of course, the more different cable systems, and cable system operators, that may be involved, the more complicated and prolonged the negotiations are likely to be. Any licensee considering seeking retransmission consent would do well to get started on that process sooner rather than later. If you need assistance or have questions on these issues, contact Paul Feldman at 703-812-0403 or feldman@fhhlaw.com.

(Continued from page 10)

utterance *was* so "graphic" or "explicit" as to distinguish it.

Along the same lines, the Commission's willingness to allow licensees to rely on pixilation to avoid otherwise indecent visual images appears to run counter to the *Married by America* decision of late last year, in which the Commission's staff held that depictions were indecent despite the fact that they had been pixilated.

The only conclusion that can confidently be reached is that the Commission's indecency policies remain a muddled work still in progress.

Streamlined Historic Preservation Review Process Takes Effect

By: Michael Richards
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It's now official. The patchwork quilt of regulation that once created delays and confusion for many spectrum users seeking to construct transmission towers is being streamlined and standardized – so says the FCC in adopting a "national programmatic agreement" with state governments and recognized native tribal governments under the National Historic Preservation Act.

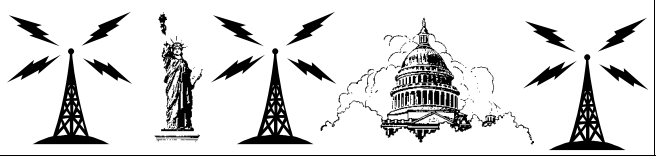
Although broadcasters will also benefit, the driving force has been the transformation of the wired nation increasingly into a wireless nation. More wireless services require more tower sites – and more tower proposals have meant more disputes over tower construction. Often, processing delays have occurred because a tower is proposed in or around an historic site.

The FCC's antidote is to standardize the historic site review process, from application to approval, so that state, federal, Indian tribal and Hawaiian native organizations charged with protecting heritage sites can get their reviews done as quickly and predictably as possible.

The same form will work regardless of whether it's being submitted to the FCC, or to a state, tribal or Native Hawaiian historic preservation office. A standard set of "Criteria of Adverse Effect" will govern whether or not a site is permissible. The new procedures will also put time deadlines in place to streamline the system.

The new system will allow certain types of tower construction without historic review. These include replacement or upgrading of certain existing towers when height is not substantially increased, construction of some temporary towers, or the placement of mobile transmission units including satellite trucks or electronic newsgathering vehicles.

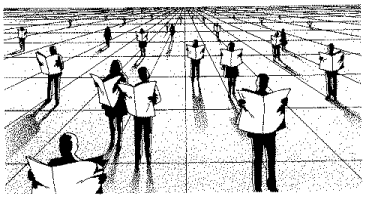
While new applications will automatically be reviewed under the new systems, applicants with pending applications must re-file on the new forms if they wish to take advantage of the new streamlined system.



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

Updates on the News

Congress eases automatic death sentence In a surprise move hidden deep in the bowels of the annual appropriations bill (the massive Congressional peristalsis which provides funding for the entire Federal government), Congress relaxed Section 312(g) of the Communications Act. That provision, in place since 1996, mandated that any broadcast station which failed to broadcast for any 12 consecutive months would automatically and irretrievably lose its license. Before 1996, the FCC had discretion to permit stations to stay off the air indefinitely, if the FCC found that to be in the public interest. But the Commission was relieved of that discretion in 1996. As a result, it became absolutely essential for broadcasters to remain on the air at least for some brief period of time before the 12-month bell rang. (How much broadcasting was enough to avoid automatic expiration? While the Commission never answered that question directly, in at least one opinion it indicated that broadcasting for a 24-hour period would do the trick.)



In December, 2004, though, Congress abandoned that hard-nosed attitude. While it left in place the 1996 language, Congress then tacked onto the end of that language a huge loophole which permits the Commission to allow stations to stay off the air as long as fairness and equity warrant.

This change in the Act relieves some pressure because it at least gives rise to the possibility that a station might be able to cease operation for more than 12 months without risking its license. But broadcasters should ***not*** assume that the FCC will automatically extend off-the-air authorizations beyond 12 months. We suspect that, having become comfortable with the no-more-12-months regimen, the Commission will be very stingy in granting extensions without a very substantial showing of, *e.g.*, good faith efforts to return to operation.

NCE tsunami aid permitted While noncommercial educational stations are generally discouraged from engaging in extensive fund-raising activities (for entities other than themselves, of course), the Commission is loosening things up a bit for those NCE folks who want to raise funds to assist the relief efforts for victims of the tsunamis in South Asia. NCE stations interested in shaking their tambourines and passing the hat for such efforts may do so, but first they have to request a waiver from the FCC staff. Waiver requests should: (a) identify the station(s) which is/are going to do the fund-raising; (b) indicate the dates and times the fund-raising will begin and end; and (c) describe how the collected funds are to be distributed. The request need not be elaborate or detailed, but it should be enough to satisfy the staff that the fund-raising will be "time-limited", *i.e.*, subject to a pre-set stopping point. It should also reflect some reasonable manner by which the station plans to get the proceeds into the hands of bona fide relief organizations. TV licensees should email their waiver requests to Barbara Kreisman, Chief of the Video Division (barbara.kreisman@fcc.gov); radio licensee should contact Michael Wagner of the Audio Division (michael.wagner@fcc.gov).

DTV channel election update Two days before the original deadline (*i.e.*, January 27) for filing first round DTV channel elections, we received an email from the AFCCE about an "important advisory" from the FCC. According to the AFCCE:

> The FCC has enlisted our help to notify all interested parties ASAP that the station database that will be used to evaluate interference for Form 382 elected channels will be Table I [12/21/04] and **NOT** the Nov 2004 DB of authorized facilities used to generate the pre-step Table of Station Assignment and Service Information that was described in the handout for the Jan 18th meeting at the FCC. This change by the FCC is intended to better protect stations with certified facilities that are larger than their authorized facilities.

Fortunately for us all, the Commission has extended the deadline by two weeks, to February 10.

FM rulemaking freeze thawed You may recall that, since last June, there has been a freeze on rulemaking proposals (petitions and counterproposals) which propose changes in any of the FM channels which were on the block in Auction No. 37. That was then, this is now. The auction is history, and so is the freeze (at least since January 21). Let the filings begin.

Comings and goings Unless you've been living in a cave for the last several weeks, you probably have heard that Chairman Michael Powell and Media Bureau Ken Ferree are both throwing in the towel sometime in March. To help remind everybody of all the cool ways he advanced his "vision", the Chair graciously issued, through the FCC's press office, a five-page single-space multi-bulleted collection of "Policy Highlights of Michael K. Powell's FCC Tenure". Also heading for the door is the FCC's General

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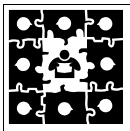

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channels with neighboring digital stations on first adjacent channels.

Further, the FCC has previously indicated concerns about DTS's service status (*i.e.*, primary or secondary) and the impact it will have on existing and future LPTV and translator stations. The FCC still faces the task of hammering out DTS rules covering location and service area, power, antenna height, and emission mask, interference protection and technical standards. These issues will presumably be the focus of any fast-track proceeding the FCC institutes.

In the meantime, the FCC appears willing to consider DTS requests on a case-by-case basis. When Paxson Communications recently applied for a waiver to use DTS to meet heightened coverage requirements for one of its stations, the FCC indicated that it would consider allowing use of the technology prior to finalization of DTS rules, so long as certain criteria are met. The Commission's apparent willingness to permit use of the technology now, in advance of any formal rule making, suggests that the FCC is not only relatively confident of the soundness of the technology but also interested in expediting its deployment. While the Commission declined to give any indication of when it might formally initiate a rule making proceeding which could result in detailed regulations governing DTS operation, the smart money appears to believe that that will be sooner rather than later. Precisely how the Commission may start that process – *i.e.*, by Notice of Inquiry or Notice of Proposed Rule Making – is, however, not clear. We will keep you posted as developments warrant.

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illustrates the Commission's determination to protect unsuspecting people from being ambushed in telephone conversations which are broadcast (either live or on tape) without prior consent.

Penniless auction bidder squeaks by without fine - A New York man participated in two FCC auctions in 2003 and ended up winning a Guam PCS license for $473. The FCC investigated complaints that during the auction, this man made improper contacts with another bidder. Rather than cooperate with the FCC investigation, the bidder refused to respond to the FCC inquiry. Feeling slighted by the cold shoulder, the FCC managed to get his attention with a $10,000 spanking. This time, he responded and provided the FCC with documents and affidavits indicating that he had no money, was unemployed and was supported by his brother. The FCC let the man off the hook for the $10,000 fine but – as an auction winner – there is no word on whether he can build his station.

FCC cuts a deal with Louisiana AM/FM combo - Armed with a list of nine violations, the FCC went after a Franklin, Louisiana, operator for violations ranging from unauthorized transfer of control of the station to inadequate main studio staffing. The operator negotiated its terms of surrender and admitted that it violated the rules. The operator also signed up for an FCC payment plan and now owes the FCC $20,000 which will be paid in monthly installments.

(Continued from page 12)
Counsel, John Rogovin. Meanwhile, in December, Commissioner Adelstein, tanned, rested and ready, got himself reappointed after a prolonged stay in political purgatory. His term now extends to 2009.

Payola – the new indecency? Looking for the next growth area in the enforcement business? Look no further than that mid-20th Century classic, payola. Hot on the heels of the disclosures that (a) commentator Armstrong Williams had been paid, *by the government* (your tax dollars at work . . .), a healthy six-figure sum to say nice things about an administration program and (b) nobody apparently bothered to mention that to any broadcast stations on which Mr. Williams appeared, Chairman Powell ordered the Enforcement Bureau to jump on it like a big dog. And while he was at it, he also instructed his enforcers to check into allegations of payola at a Niagara Falls FM station. L'Affaire Williams appears to be primarily political in nature and, while it may have legs inside the Beltway, our guess is that its repercussions will be limited. The Niagara Falls situation, on the other, may have farther reaching effects in the radio industry. While little has been stated publicly about the latter investigation, it appears to involve the role of independent promoters who work the turf between record companies and radio stations. The often, er, fuzzy nature of the relationships, expectations and obligations rippling through the universe of independent promotion may surprise and dismay Federal bureaucrats expecting to see clear bright lines setting forth specific contractual understandings. Stay tuned.

What's in a name? And finally, in December the FCC announced the availability of a revised version of Form 501, which (according to an official FCC public notice) the Commission has dubbed a "Slamming Complaint Form". We applaud the agency's effort to make its forms sound more upbeat and attractive, and we look forward to the day when we can submit "Bitchin' Ownership Reports", "Totally Awesome Assignment Applications" and "Phat Renewals".

FM ALLOTMENTS PROPOSED –12/17/04-1/19/05

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	1.420
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	170 miles SW of Fort Worth	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	156.3 miles N of Dallas	298A	04-410	Cmts -12/27/04 Reply-01/11/05	Drop-in
OH	Mason	20.2 miles N of Cincinnati	249A	04-411	Cmts -12/27/04 Reply-01/11/05	1.420
KY	Salt Lick	60.7 miles E of Lexington	249A	04-411	Cmts -12/27/04 Reply-01/11/05	1.420
IN	Cannelton	28.1 miles N of Owensboro, KY	275C3	04-436	Cmts -02/10/05 Reply-02/25/05	1.420
IN	Tell City	28 miles NE of Owensboro, KY	289A	04-436	Cmts -02/10/05 Reply-02/25/05	1.420
MD	Myersville	11.5 miles SW of Frederick	295B	05-4	Cmts -03/03/05 Reply-03/18/05	1.420

Notice Concerning Listings of FM Allotments

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

FHH - On the Job, On the Go

The County Board of Arlington, Virginia, has reappointed **Frank Jazzo** to its Cable Television and Information Technology Advisory Commission.

Ed O'Neill now has 20 (count 'em, 20) grandchildren. The 20th, Quinn, was born on January 12.

Laurie Cole (better half of **Harry**) was a winner on *Jeopardy!* in December. In a category titled "'Happy' New Year" (based on familiar expressions including the word "happy"), she correctly answered "happy hour" and "happy hooker".

FM ALLOTMENTS ADOPTED –12/17/04-1/19/05

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
TX	Crosbyton	44 miles N of Lubbock	264C3	04-340	None
WA	Union Gap	146 miles S of Seattle	285A	04-327	None
CO	Security	8.95 miles S of Colorado Springs	288C2	04-367	None
CO	Genoa	93 miles NE of Colorado Springs	291C3	04-367	TBA
MS	Benton	46.6 miles N of Jackson	226A	04-249	None
IN	Corydon	25.8 miles SW of Louisville, KY	299B1	04-380	None
IN	Lanesville	16 miles SW of Louisville, KY	243A	04-380	None
PA	Centre Hall	99.7 miles N of Frederick, MD	258A	03-231	None
PA	Huntingdon	84 miles N of Frederick, MD	278A	03-231	None
PA	Mount Union	73.5 miles N of Frederick, MD	292A	03-231	None
OK	Blanchard	16.7 miles SW of Norman	247A	03-181	None
OK	Weatherford	66.7 miles NW of Lawton	286A	03-181	None

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