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

Memorandum to Clients

April, 2005 | *News and Analysis of Recent Events in the Field of Communications* | No. 05-04

DNR for VNRs?

FCC "Reminds" Broadcasters to Disclose Sources of News/Public Affairs Materials

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You might call them the trans fats of broadcast news. Video News Releases (VNRs) have increasingly become ingredients in many broadcast news and public affairs recipes – even though viewers may not have known that they were even there. But just as the FDA is now making sure that food packagers disclose the presence of trans fats in their packaged goods, so too must broadcasters now make sure their news and public affairs programs disclose who's paid for the sounds and images used in their programming packages.

The disclosure requirement has been on the books for years. It's an aspect of Section 317 of the Communications Act (which relates generally to sponsorship identification) as well as Section 73.1212 of the Commission's rules. But you may be forgiven if you didn't realize that those provisions reach VNRs because the FCC has not invoked those provisions much at all in that context. (A quick electronic search of FCC decisions citing either of those two sections turns up only a small handful of even marginally relevant decisions over the last 20 years or so.)

But that was then and this is now, and now happens to be a moment in political history when the public eye has been directed to a number of situations in which some governmental offices have provided content (including VNRs) to broadcasters and those broadcasters have in turn used that content without disclosing its source. This certainly isn't the first time that such shenanigans have occurred, and it won't be the last – but now that the practice has been outed with respect to the current administration (although totally ignored during the Clinton administration), the FCC, presumably looking to protect the honor of the current administration, has issued a "reminder" to broadcasters that they are obligated to disclose the nature, source and sponsorship of VNRs.

Ask any communications professor, and you'll hear that such disclosure is straight out of the curriculum for Journalism 101. For example, the ethics code of the Radio Television News Directors Association states that professional journalists should "clearly label all material provided by outsiders." But the FCC is concerned not so much with ethics as with assuring compliance with the Communications Act. And the Act requires that the public be informed of the identity of those who are trying to persuade the public through programming. Accordingly, the FCC has warned broadcasters and cable systems alike that whenever they "air VNRs, licensees and [cable] operators generally must disclose to . . . their audiences the nature, source and sponsorship of the material that they are viewing." The Commission also added ominously that it would take "appropriate enforcement action" against scofflaws who don't comply.

The Commission did not specify precisely how news and public affairs programs must make these on-air disclosures. Traditionally, such disclosures in the news business are

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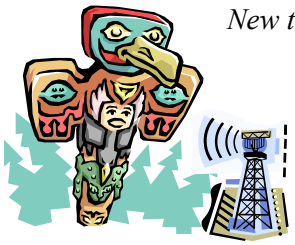
The Scoop Inside



New towers and old history, bound together with red tape . . .

On-Line Proposed Tower Construction Notification Process Unveiled

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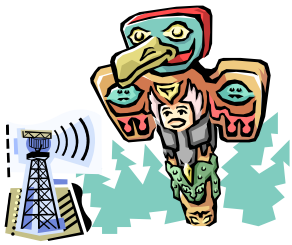

As reported in the January and February, 2005, issues of the *Memo to Clients*, a National Programmatic Agreement (NPA) has gone into effect. The NPA implements new procedures to be undertaken to assure that proposed tower construction complies with the National Historic Preservation Act of 1966, particularly with respect to the potential impact of such construction on sites to which Indian tribes and Native Hawaiian Organizations (NHOs) (not to mention State Historic Preservation Officers (SHPOs)) attach religious and cultural significance. The Commission also established an on-line "Tower Construction Notification System" (TCNS) to facilitate those procedures.

And now the FCC has provided "clarification" about how that system is supposed to work.

Using TCNS, Tribes, NHOs and SHPOs may enter and update, on a nationwide basis, the geographic areas for which they are interested in receiving notices. When you want to build a tower, you are required under the NPA to make reasonable good faith efforts to identify and make contact with any tribe or NHO that may attach religious and cultural importance to your proposed site. Such contacts are to be made through the FCC (unless the applicant has a pre-existing relationship with a tribe or NHO).

TCNS is supposed to facilitate that. You log onto TCNS and enter the geographic information about your proposal. TCNS then forwards your notification to tribes, NHOs and SHPOs that have expressed an interest in that geographic area. And if any tribe or NHO has not specified any particular geographic area, then the FCC forwards to such tribes/NHOs *all* notifications throughout the *entire* United States. (By default, Indian tribes in Alaska will receive only notifications relating to proposals in Alaska unless the tribe sets different preferences.)

Once you have entered your notification into TCNS, you might think that your obligations are at an end. You would be wrong.

Under the NPA, all tribes and NHOs are entitled to respond to a TCNS notification. But the NPA does not specify any deadline by which such responses must be made. So if you propose a site in an area in which a tribe or NHO has specified an interest, and if the tribe(s) and/or NHO(s) don't respond to your notification, you have to make a "reasonable effort at a follow-up contact". And if they *still* don't respond, you must then "seek guidance from the Commission".

The job is even tougher when it comes to tribes and NHOs which have *not* designated any geographic areas of interest through TCNS. For them, you must undertake reasonable and good faith efforts to determine whether any tribe or NHO might attach religious and cultural significance to any historic properties which might be affected by your proposal. If you conclude that a tribe or NHO may attach such significance and if the tribe/NHO has not responded to the TCNS notification you filed, you have to follow-up and, if you still get no response, you, too, must "seek guidance" from the FCC.

Of course, if you determine that no tribe or NHO is likely to attach such significance to the area of your site, you don't need to take any further action . . . ***EXCEPT*** if a tribe or NHO at some later point indicates some interest or "other evidence of potential interest comes to the applicant's attention".

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Focus on FCC Fines

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Editor's note: For the first time in several years, the FCC issued no decisions involving broadcast-related fines this past month. To fill the void, we asked our correspondent on the FCC fines beat, R.J. Quianzon, to provide a brief overview of the forfeiture process.

Many readers have been curious about how the FCC undertakes the process of punishing a station. This month's column will provide a brief glimpse into the FCC broadcast enforcement protocol.

Step 1 - The FCC is on to you. In some cases (involving, *e.g.*, charges of broadcast indecency, unconsented-to telephone calls or advertising problems), the FCC finds out about alleged violations when an audience member or disgruntled employee blows the whistle, usually in a written complaint to the agency. However, in some instances, FCC employees are listening or watching broadcasts (which is not difficult with more than 2000 FCC employees) and the FCC initiates an inquiry on its own. For many other fines (for instance, tower or EAS violations), FCC agents learn of the problem when they grace a station with a surprise inspection. Such inspections may be spurred by a disgruntled employee or local activists, or they may be completely random. During an inspection FCC agents don't toss the premises like cops on primetime TV shows, but they do inspect the subject station for compliance with all the FCC's rules.

Step 2 - Watch Your Mail. Once the FCC is onto a possible violation – either from a complaint or an inspection – it writes the licensee a letter. Generally, this arrives as a Notice of Apparent Liability (NAL) or as a Notice of Violation (NOV). The FCC's Notice is required to contain certain specific information, such as the dates of the alleged actions and the FCC rules violated. An NAL must also specify the amount of any proposed forfeiture. Licensees should immediately review these notices and contact their FCC counsel. Ignoring the Notice or claiming that it was never received are tricks which have been tried, unsuccessfully, many times before – they generally result in increased fines.

Step 3 – Respond to the FCC. You must respond to the FCC; failure to due so often results in a default decision, and may even count as a separate violation for which you can be separately fined. Your FCC counsel will have both experience in dealing with FCC enforcement actions and a wealth of knowledge regarding the history of similar FCC issues. Responses to the FCC are usually due within 30 days for NALs and within 10 days for NOVs. Responses can include exculpatory explanations for the conduct which the FCC sees as potential violations.

Step 4 - Wait for the FCC. It may take FCC staff several months (or years) to decide whether to take any further action and, if so, what action to take. The FCC staff may also issue additional inquiries regarding the matter.

Step 5 - The Order. Based upon the original complaint or inspection and the licensee's response, FCC staff may issue an Order deciding the matter. In some instances (very rare in a matter initiated by an FCC agent's inspection), the FCC may decide that there are no grounds for enforcement against a licensee and let the matter go. But when the FCC decides to go after the licensee by issuing a fine, the Commission will issue a Forfeiture Order. At that point the licensee has several options.

Step 6 - The Aftermath. Faced with a Forfeiture Order, a licensee can simply pay a fine, appeal the matter internally at the FCC, appeal the matter to a Court (but only if the fine is paid first) or wait for the FCC, with the Department of Justice as its mouthpiece, to try to collect the fine by initiating a collection suit in a Federal District Court. Let's look at those options.

Obey the FCC Order - A licensee can simply pay the fine. This puts the matter behind the licensee, but leaves the licensee with the equivalent of a rap sheet, a record of violating the FCC's rules. If the violations are very serious or repeated, such a record could present problems to the licensee at renewal time. (Note that the vast majority of routine fines do ***not*** involve license-threatening misconduct.)

Appeal the FCC Order - If a Forfeiture Order is issued by the FCC's Enforcement Bureau (which is where the vast majority of fines come from), a licensee may pursue an administrative appeal within the FCC. The time limits and requirements for such internal, administrative appeals are strict and set by rule. In such an appeal, the licensee might argue that the Forfeiture Order is based on inaccurate facts or a mistake in the law. The licensee can also admit that it has violated the rules, but seek a decrease in the fine based on a various factors, including inability to pay. Licensees claiming such an inability should be prepared to provide the Commission with detailed financial data (*e.g.*, copies of recent tax returns) to support the claim. As long as the licensee's appeal is pend-

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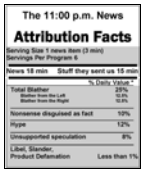

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made either orally, in the narration, or by printed disclosure superimposed over the visual image. The Commission did note that, for "political or controversial programming" of more than five minutes' duration, the disclosures must be made at both the beginning and the end of the airing of the material.

And there's more. If a corporation, committee, association or other unincorporated group or entity is paying for or furnishing the broadcast matter, the station must place in its local public records file a list of the entity's chief executive officers, members of its executive committee, or board of directors.

Of course, in a world of satellite delivery from multiple sources, news and public affairs programmers may not always know the provenance of their video. News agencies and other network providers may have neglected to adequately label material. Or harried news personnel may have edited in video segments to help tell the story – without double checking their origins. The FCC is saying, essentially: not good enough. The disclosure rules are designed to assure the identification of any programming subject to the sponsorship ID rules – those rules reach not only licensees themselves, but also employees and program suppliers, *i.e.*, just about everybody involved in the production and distribution of programming. The FCC's view, right or wrong, is that with those rules in place, each licensee can and will be expected to have an accurate handle on its program sources.

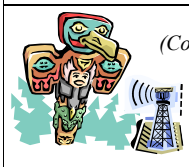
The FCC's view, right or wrong, is that, under the rules currently in place, each licensee can and will be expected to have an accurate handle on its program sources.

Simultaneously with its warning, the FCC also asked for comments "on the ways in which VNRs are used in programming, and on which practices are the most common." Significantly, the Commission's inquiry extends to whether "mechanisms are in place" to ensure that the broadcaster or cable operator actually does receive the information it needs to comply with the disclosure requirement. That suggests that the FCC may not be completely confident in the effectiveness of the system as it presently operates.

This inquiry by the Commission could be an effort to gather information so that it might fine-tune its rules. On the other hand, the inquiry might also be a device by which the Commission hopes to deflect further attention away from the VNR issue. By asking for comments, the Commission can easily tell anyone accusing it of failing to enforce the rules that, in fact, the Commission ***is*** actively engaged in a review of the effectiveness of those rules. Since the deadline for reply comments is currently set for July 22 (initial comments are due June 22) and could easily be extended well beyond that, the Commission may be figuring that, by then, the public's attention will have moved along to some other hot and happening issue and that VNRs will no longer demand the attention which has been given them in recent weeks.

If the FCC is in fact thinking along those lines, though, it's not clear that that approach will work. Advocacy groups are standing ready to help – and, presumably, attempt to jump-start – FCC enforcement efforts. The FCC public notice only speaks about "Video News Releases." But some activists are also targeting radio, since the rules underlying the FCC enforcement warning apply to audio services as well as video services. As the Center for Media and Democracy web site exhorts: "sounds like a great opportunity for local activism." So even if the FCC were inclined to let this issue die down quietly, that may not be in the tickets.

For the time being, broadcasters should assume that the FCC is indeed serious about ramping up its enforcement efforts on this front. According to the Commission, penalties could include forfeitures to the Commission, license revocation, or even criminal liability (fines up to $10,000 and/or imprisonment of not more than a year). While criminal prosecution is a theoretical possibility, so too is the notion that the Earth will be hit by a comet tomorrow. But an administrative fine ***is*** a very real possibility well within the FCC's routine activities (and revocation, while unlikely, is at least more likely than criminal prosecution), so licensees should take appropriate steps to identify and disclose the sources of their programming.



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So the TCNS provides, at most, the illusion of streamlining. It's true that, by entering your proposal into TCNS, you theoretically can notify all potentially interested tribes and NHOs. But the burden is still on the applicant to check into whether the proposed site may be of particular interest to any tribes/NHOs which have not indicated any specific interest in the area of that site. And once notices have been given to all potentially interested tribes/NHOs, the applicant must still follow-up if no response is received. And if no response to the follow-up is received, the applicant is ***still*** not out of the woods – the next step is to "seek guidance" from the FCC.

Plainly, the process of building new towers has become considerably more complicated and subject to greater uncertainty. Anyone contemplating construction of a new tower should be careful to factor compliance with these additional procedures into the anticipated construction timetable.

FCC: Takin' care of bid-ness, again

More FM Channels On The Auction Block

Next auction scheduled for November

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The FCC has announced that it intends to conduct an auction of 173 FM broadcast construction permits beginning on November 1, 2005. This grouping includes 30 permits that were not sold during the auction held last November and 143 newly available FM allotments. A list of the channels which are up for grabs is posed on the FHH website (fhhlaw.com). Click on the "FM Auction 62" link on the "Articles and Resources" button, or just go straight to http://www.fhhlaw.com/articles_fm_auctions_62.asp.

The Commission has not yet established a filing deadline for applications to participate in the auction. If it holds true to previous patterns, however, the likely time for the filing window will be during late July or early August. The FCC's staff is also likely to impose a freeze on minor modification applications in connection with the auction - so if you have a minor mod in mind, you should act promptly or risk being frozen out until after the auction.

The Commission's recent notice seeks comments on the proposed methodology for conducting the auction. The comment deadline is April 29, and the reply comment deadline is May 6, 2005. As a practical matter, however, aside from some possible tinkering with minor technical details, the Commission generally moves forward with the auction procedures outlined in the notice and used in previous auctions. It is especially likely to continue in that pattern since those procedures appeared to work reasonably smoothly during last Fall's FM auction.

The proposed procedures do involve some changes in the system since the last FM auction was conducted. In the interim, the Commission has adopted its Integrated Spectrum Auction System ("ISAS"), which is a redesign of the previous auction application and bidding systems. The changes are designed to enhance FCC Form 175 by providing for the input of discrete data elements in place of free-form exhibits and by improving the accuracy of submitted Forms 175 through automated data checking.

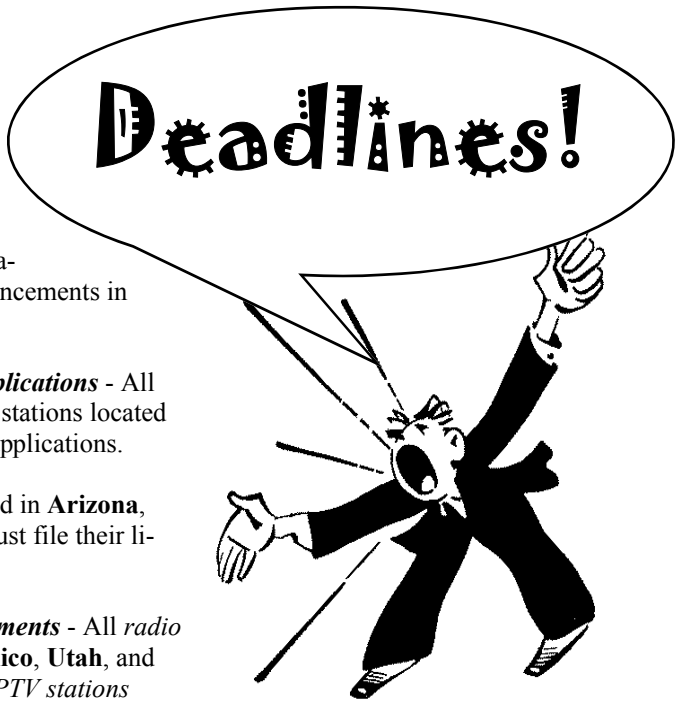
As previously, the Commission plans to conduct a simultaneous, multiple round auction. This means that bidding will remain open on all construction permits until there is no further bidding on any construction permit. In addition, as has been the practice in the past, prior to the auction the Commission will require upfront payments which will govern the maximum amount of bidding units which a particular applicant may use during any round. Each FM allotment is assigned a certain number of bidding units, which are the same as the dollar amount of the required opening bid for that construction permit. The amount of bidding units required to bid on a particular construction permit remains constant throughout the auction, regardless of the dollar value to be paid for the permit, but a bidder cannot place a bid for any construction permit for which it does not have sufficient eligibility in terms of bidding units. Bidding eligibility cannot be increased during the actual auction, but it can be decreased if an applicant does not remain sufficiently active.

Fletcher Heald also has put new safeguards in place with regard to internal matters and potential client conflicts. In particular, for anyone interested in participating in the auction, we will require that a letter be signed confirming that interest and specifying the markets to be sought.

One change from previous auctions is that the Commission proposes to divide the auction into two stages based upon activity level. Stage One is the first part of the auction during which more bidders are actively participating in the auction. During Stage One, a bidder wishing to maintain its level of bidding eligibility will be required to be active on construction permits representing at least 75 percent of its current bidding eligibility. During Stage Two, when there are fewer permits for which active bids are being submitted, a bidder will be required to be active on 95 percent of its current bidding eligibility in order to maintain that eligibility level.

Based upon past experience and the stringency of the Commission's anti-collusion rules, Fletcher Heald also has put new safeguards in place with regard to internal matters and potential client conflicts. In particular, for anyone interested in participating in the auction, we will require that a letter be signed confirming that interest and specifying the markets to be sought. We will not consider ourselves to be representing a client in any particular market until we receive the signed letter. In addition, if another client later specifies a market which conflicts with a market previously reserved for a client, we will not be able to represent that later client in any market.

June 1, 2005



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

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

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

Radio Renewal Applications - All *radio* stations located in **Arizona**, **Idaho**, **Nevada**, **New Mexico**, **Utah**, and **Wyoming** must file their license renewal applications.

Radio and Television Renewal Post-Filing Announcements - All *radio* stations located in **Arizona**, **Idaho**, **Nevada**, **New Mexico**, **Utah**, and **Wyoming**, and all *television, Class A television*, and *LPTV stations originating programming* located in **Ohio** and **Michigan** must begin their post-filing announcements in connection with the license renewal process, and continue such announcements on June 1 and 16, July 1 and 16, and August 1 and 16.

EEO Public File Reports - All *radio* and *television* stations with five (5) or more full-time employees located in **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **Michigan**, **Ohio**, **Nevada**, **New Mexico**, **Utah**, **Virginia**, **West Virginia**, and **Wyoming** 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 **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **Nevada**, **New Mexico**, **Utah**, **Virginia**, **West Virginia**, and **Wyoming** must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All *television* stations located in **Arizona**, **Idaho**, **Nevada**, **New Mexico**, **Utah**, and **Wyoming** must also file a biennial Ownership Report. All reports filed on FCC Form 323 or 323-E must be filed electronically.

July 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.

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.

Lien on me?

Avoiding Collateral Damage

Providing comfort to lenders when the FCC prohibits security interests in licenses

By: Steve Lovelady
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Interest rates are low. For many small- to medium-size businesses attempting to raise capital, bank financing is now more attractive than trying to find equity investors. But do radio station owners have a harder time borrowing money from banks than other business owners? Usually the answer is yes, and it could be due to the unfortunate reality that many banks misunderstand the laws governing FCC licenses.

One reason banks are reluctant to make such loans is that a radio station's most valuable asset, its FCC license, cannot legally be pledged to the bank as collateral. Without the FCC license, all of the station's other assets (including that 1992 Chevy van with flame decals, "Hot 105.5" painted in four-foot high red letters on its flanks and 150,000 miles on the odometer) are not worth much. In most station acquisition transactions we work on, the tangible assets are worth only a tiny fraction of the total purchase price. Most of the value is allocated to the station's FCC license and goodwill. That is why banks usually require personal guaranties by the owners or some other collateral, even if a station is worth millions of dollars on the open market.

Banks can get their hooks into collateral that is the next best thing to the station's license – the money that results from a sale of such license.

There is, however, a way to get around this issue—by pledging the *proceeds* from a sale of the FCC license, instead of the license itself.

Under the Communications Act, any direct pledge of an FCC license – or, to put it in other words, a grant of a security interest in the license – without the FCC's consent could be considered to be an unauthorized transfer of control. As the United States Court of Appeals for the Ninth Circuit said in a 1998 bankruptcy case decision: " . . . the FCC may prohibit security interests in licenses themselves because the creation of such an interest could result in foreclosure and transfer of the license without FCC approval. Such approval is necessary to regulate the airwaves in the public interest."

This prohibition may be sidestepped by permitting the lender to legally obtain and enforce a security interest in the proceeds of the sale of a station's FCC license. In the words of the Ninth Circuit court: "No such public interest is implicated, however, by a security interest in the proceeds of licenses, which does not grant the creditor any power or control over the license or the segment of the broadcast spectrum it represents." So banks can get their hooks into collateral that is the next best thing to the station's license – the money that results from a sale of such license. And, since that's really what the bank wants, anyway – after all, do you really think that your loan officer wants to pull an afternoon drive shift? – that approach should satisfy everyone's interests.

When we review loan documents for a station owner who is borrowing money, we insert special wording to cover this situation into the Security Agreement, Pledge Agreement, Mortgage, or any other document that purports to create security interests in a station's assets. While the language can vary somewhat from deal to deal, in essence it says that the parties would really like to create a security interest of some sort to protect the lender, but as long as the FCC doesn't permit such interests in the license, the parties will settle for a security interest in the proceeds of any sale of the license, BUT, if the FCC ever changes its mind and decides the security interests in licenses are permissible, then the license of the station in question will automatically be deemed to be subject to such a security interest.

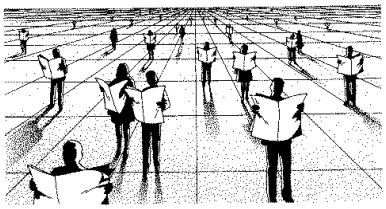
In addition, since any good lawyer believes that if something is worth saying once it should be said (at least) twice, we usually add more wording emphasizing that the parties to the deal wish to comply in all respects with the FCC's rules and policies. This added verbiage expressly states that the secured party will not take any action pursuant to the security interest that requires prior FCC approval (like, f'rinstance, unilaterally seizing control of the station and its day-to-day operations) without first getting such approval.

With provisions like these added to the loan documents, a bank should feel confident enough to loan money to a radio station, with such loan being secured by the station's assets. If the borrower later defaults in its loan payments and the station's assets must be sold off to satisfy the debt (pursuant to authorization obtained from the FCC), the lender can legally make a secured claim against the money realized from such sale.

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

Updates on the News

FCC rules available II In this column last month we advised that the latest hard-copy version of the FCC's rules had recently been put on sale by the Government Printing Office. But we also pointed out that those printed copies are current only through September 30. If that six-month gap makes you just a wee bit nervous, never fear. The GPO is beta-testing a website with *current* versions of the rules. Check it out at http://www.gpoaccess.gov/ecfr/. A quick spot-check (of the oft-amended FM table of allotments) showed links to revisions which were adopted in the last month but which won't be effective until early May – certainly an improvement over the half-year delay on the print side. Plus, unlike the pricey hard copies of the rules, the on-line version is free.



Microsoft eyeing vacant TV turf In the May, 2004 *Memo to Clients*, we called readers' attention to a Notice of Proposed Rule Making in which the FCC sought comments on the possible use of otherwise unused portions of the TV band for unlicensed wireless broadband services. That proceeding is still moving along, although it is unclear when we can expect to see any action. But don't let the bureaucratic silence lull you into thinking that there is nothing to worry about here. It was recently reported that Microsoft's mouthpieces have been meeting with folks on the Eighth Floor to promote the unlicensed use of TV channels.

LPTV, Class A, TV translators heading for the auction block The Commission has announced an auction of LPTV, Class A and TV translator permits to begin on September 14. The auction involves some 300 applications filed in August, 2000. Get all the details at the Auction 81 homepage at the FCC's website: http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=81. Note that any noncommercial applicants on the auction list must submit an amendment claiming NCE status ***no later than May 13, 2005***.

Never send a baby to buy the beer The FCC has (again) reminded folks who file petitions, counterproposals and comments in rulemaking proceedings that such items must be addressed "To: The Office of the Secretary" and sent to the Secretary's address. If such pleadings are addressed instead to the Media Bureau or the Audio Division – apparently a mistake made by many who have not been paying attention – they could be treated as late-filed if, because of the incorrect address, they don't get an official "received" stamp from the Secretary's office by the applicable deadline.

Wilkommen, bienvenu, welcome

Jeff Gee Joins FHH As Associate

Fletcher, Heald & Hildreth is pleased to announce that, on May 2, 2005, Jeffrey Gee will be joining our ranks as an associate. Jeff is a 1995 graduate of Syracuse University, where he majored in Policy Studies, Political Science and Writing for Television, Radio & Film. He received his law degree from Georgetown University in 1998, and has been practicing communications law since. While a student he interned for an Illinois State Senator, Dean Witter, the U.S. Department of Justice, the British Broadcasting Corporation and (truly establishing his credentials as a Renaissance man) the Renaissance Entertainment Corporation, where he worked as an actor, musician and stunt performer. As of May 2, Jeff can be reached at gee@fhhlaw.com.

FHH - On the Job, On the Go

In April **Paul Feldman** spoke on "Cable Must-Carry Nuts and Bolts" at a seminar on cable and satellite carriage held in Washington, D.C. by the Federal Communications Bar Association.

Kudos and congrats to **Ali Miller** and husband Jeff on the arrival of daughter Sydney Lauren. Young Sydney was born in March, weighing in at a healthy five pounds nine ounces. Mother and daughter are doing well.

Fine points for the fine print

Cable TV Carriage Elections: Some Tips and Hints

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With must-carry/retransmission consent elections for cable TV due by October 1st, here are some things to keep in mind during the process of making elections.

- Broadcasters should be mindful of procedural rules, in order to protect themselves if there is a subsequent dispute regarding carriage. Thus, election letters should be sent to the cable operator by certified mail, return receipt requested, and a copy should be placed in the station's public file.

- Stations that have been denied carriage on a system during the current three-year cycle due to inadequate signal should remember to make an election (presumably must-carry) for this upcoming ***new*** three year cycle if the station has upgraded its facilities (or even if it simply plans to do so in the immediate future).

- If you are electing must-carry rather than retransmission consent, the election letter should clearly state that the station is ***electing*** such carriage, ***not requesting or demanding it***, in order to minimize the risk that a cable operator rejection or non-response will automatically trigger a filing window for a complaint.

- While stations currently broadcasting in ***both*** analog and digital formats do not have must-carry rights for their digital signal, voluntary carriage of the digital signal must be secured pursuant to a written retransmission consent agreement. Thus, operators of analog/digital combo stations may end up with their analog signal carried pursuant to must-carry and their digital signal carried pursuant to retransmission consent. If you are contemplating such an approach, it is critical that your election letter be ***very specific*** that the must-carry election is for analog, and that the retransmission consent election is for the digital signal.

- Stand-alone DTV stations electing must-carry should designate the *specific* programming stream for which they seek carriage: Channel 25.***1***, 25.***2,*** etc.

Next month, we will discuss retransmission consent negotiations.

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ing, it is not required to pay the fine. The appeals process ordinarily takes at least months, and often years, to complete.

Go to Court – If a licensee takes advantage of the full range of administrative appeals available to it within the FCC, the final stop within the agency is the Commission itself. Once the FCC has issued an order upholding a fine, the target licensee may appeal the fine to a Federal Circuit Court, ***but only if it first pays the fine***. The idea is that, if the judicial appeal is successful, the licensee can seek a refund of any fine improperly assessed against it. Of course, the licensee can also simply pay the fine and let the matter drop – in which case it's left with the rap sheet problem mentioned above.

But a licensee may also choose ***neither*** to pay the fine ***nor*** to appeal. If a licensee does not pay the fine, the law provides that the alleged violation cannot be used by the FCC against the licensee unless the FCC, with the aid of the Department of Justice, has obtained a final decision from a Federal court ordering the payment. In other words, the Feds have got to come after you to try to collect. Importantly, the collection action in Federal District Court is a trial "*de novo*", which means that the government has to prove to the judge that you really did violate the rules. It should also be noted that a notice of apparent liability may not be used by the FCC to prejudice a licensee in any other proceeding if the fine has not been paid or a court has not ordered payment. While the law is clear on this latter point, several recent FCC decisions suggest that the Commission may point to conduct underlying previous, as-yet-unpaid fines as aggravating the penalty for later, similar conduct.

How a licensee should respond to a Forfeiture Order will depend on the peculiar facts and circumstances of each licensee and each alleged violation. And one important factor underlying the question of how to respond is the fact that, in most cases, the assessed fine is likely to be appreciably less than the potential legal fees that would be necessary to prosecute an appeal. Still, it is important to recognize that the issuance of a Forfeiture Order does ***not*** necessarily mean that the licensee will ultimately have to pay the fine.

As always, though, the best way to avoid encountering the FCC's enforcement system is to ensure that stations are being operated in accordance with all of the FCC's rules.

FM ALLOTMENTS PROPOSED –3/23/05-4/20/05

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
OK	Tipton	129.3 miles S of Oklahoma City	233C3	05-128	Cmts -05/10/05 Reply-05/25/05	Drop-in
OK	Thomas	85.3 miles NW of Oklahoma City	247A	05-130	Cmts -05/10/05 Reply-05/25/05	Drop-in
CA	Redding	152.9 miles N of Sacramento	221A	05-131	Cmts -05/10/05 Reply-05/25/05	Drop-in
FL	Lake Park	6.3 miles N of West Palm Beach	262A	05-147	Cmts -05/10/05 Reply-05/25/05	Drop-in
FL	Jacksonville	71.2 miles NE of Gainesville	236A	05-129	Cmts -05/10/05 Reply-05/25/05	Drop-in
FL	Sanibel	42 miles N of Naples FL	229C2	05-134	Cmts -05/10/05 Reply-05/25/05	1.420(i)
MS	Madison	11.5 miles N of Jackson	242C0	05-135	Cmts -05/10/05 Reply-05/25/05	1.420(i)
KS	Burlingame	22.3 miles SW of Topeka	253C1	05-133	Cmts -05/10/05 Reply-05/25/05	1.420(i)
AR	Strong	106.7 miles NE of Shreveport, LA	296C3	05-141	Cmts -05/10/05 Reply-05/25/05	Drop-in
TX	Roma	143 miles S of Corpus Christi	278A	05-142	Cmts -05/10/05 Reply-05/25/05	Drop-in
OK	Arapaho	98.3 miles W of Oklahoma City	251C3	05-136	Cmts -05/10/05 Reply-05/25/05	Drop-in
TX	Big Spring	45.9 miles NE of Midland, TX	265C3	05-137	Cmts -05/10/05 Reply-05/25/05	Drop-in
LA	Cameron	142 miles E of Houston, TX	296C3	05-138	Cmts -05/10/05 Reply-05/25/05	Drop-in
TX	Melvin	115 miles S of Abilene	242A	05-132	Cmts -05/10/05 Reply-05/25/05	Drop-in
TX	Menard	134 miles N of San Antonio	292A	05-133	Cmts -05/10/05 Reply-05/25/05	Accommodation Substitution
TX	Junction	112.4 miles N of San Antonio	224A	05-134	Cmts -05/10/05 Reply-05/25/05	Accommodation Substitution
WV	Romney	92 miles SW of Frederick, MD	239A	05-143	Cmts -05/10/05 Reply-05/25/05	Drop-in
TN	Arlington	23.3 miles N of Memphis	274C1	05-140	Cmts -05/10/05 Reply-05/25/05	1.420(i)
KS	Americus	53.8 miles SW of Topeka	240A	05-139	Cmts -05/10/05 Reply-05/25/05	Drop-in
KS	Emporia	55.4 miles SW of Topeka	244A	05-139	Cmts -05/10/05 Reply-05/25/05	Accommodation Substitution/Show Cause
PA	Hermitage	16 miles N of Youngstown, OH	280A	05-145	Cmts -05/10/05 Reply-05/25/05	1.420(i)

FM ALLOTMENTS PROPOSED –3/23/05-4/20/05 *(continued)*

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
NV	Moapa	52.11 miles NE of Las Vegas	233C	05-146	Cmts -05/10/05 Reply-05/25/05	1.420(i)
CA	Mojave	96 miles N of Pasadena	255A	05-109	Cmts - 05/09/05 Reply-05/24/05	Drop-in
CA	Trona	170 miles N of Pasadena	247A	05-109	Cmts - 05/09/05 Reply - 05/24/05	Accommodation Substitution
OK	Stringtown	126 miles N of Dallas, TX	290A	05-110	Cmts -05/10/05 Reply-05/25/05	1.420(i)
OK	Haileyville	144 miles SE of Oklahoma City	252A	05-110	Cmts - 05/10/05 Reply - 05/25/05	Accommodation Substitution
NY	Cumberland Head	28 miles W of Burlington, VT	264A	05-111	Cmts - 05/09/05 Reply - 05/24/05	Drop-in
TX	Dalhart	75.4 miles N of Amarillo	241C1	05-144	Cmts -05/10/05 Reply-05/25/05	1.420(i)
TX	Perryton	109 miles NE of Amarillo	248C3	05-144	Cmts -05/10/05 Reply-05/25/05	1.420(i)
TX	Llano	71.3 miles NW of Austin	297A	05-151	Cmts -05/12/05 Reply-05/27/05	1.420(i)
VA	Norfolk		299A	05-150	Cmts -05/12/05 Reply-05/27/05	1.420(i)
VA	Windsor	33.6 miles W of Virginia Beach	287B	05-150	Cmts -05/12/05 Reply-05/27/05	1.420(i)
KY	Clinton	126.5 miles N of Memphis, TN	234C2	05-152	Cmts -05/12/05 Reply-05/27/05	1.420(i)
KY	Mayfield	135 miles NE of Nashville, TN	271C2	05-152	Cmts -05/12/05 Reply-05/27/05	1.420(i)
CO	Steamboat Springs	138 miles N of Denver	289A	05-153	Cmts -05/12/05 Reply-05/27/05	Drop-in
TX	Victoria	113.2 miles S of San Antonio	290A	05-154	Cmts -05/12/05 Reply-05/27/05	Drop-in
OK	Okemah	71.2 miles SW of Tulsa	279C1	05-166	Cmts -05/31/05 Reply-06/14/05	1.420(i)
OK	Wilburton	122 miles S of Tulsa	267C1	05-166	Cmts -05/31/05 Reply-06/14/05	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.