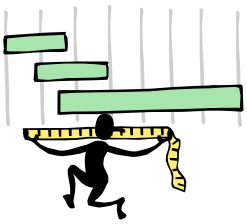
FLETCHER, HEALD & HILDRETH, P.L.C.

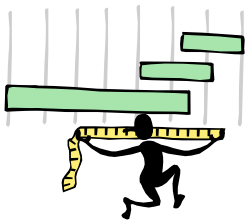
Memorandum to Clients

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



Prodded by SHVERA

FCC Looks Into Standards for Measuring Distant Digital Signals



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

The Commission recently released a Notice of Inquiry (NOI) relating to the proper measurement and testing procedures for distant digital television signals. This inquiry was initiated as a result of the passage of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA).

In particular, the Commission is seeking to determine whether the current signal strength standard and testing procedures used to determine whether a household is entitled to receive distant network programming from satellite services remain accurate, or whether revisions are necessary. To that end, the Commission is seeking comment on the following questions:

Antenna Placement: Should the Commission modify the procedures for determining if a digital signal is "available" to a particular household based on the different antenna installations and orientation? In particular, the Commission is seeking comment on whether the Commission should make different assumptions about whether a digital signal can be received in light of: (a) the various placement locations for receiving antennas; and (b) the variety of different receiving antennas available in the marketplace.

Signal Strength Measurement: Should the Commission revise the measurement procedures for DTV signal strength? The current rules rely on the measurement of the television visual carrier, but the DTV signal does not contain a visual carrier. Therefore, the FCC questions whether the measurement of the DTV signal should be based on the pilot signal or the center of the DTV channel.

Signal Strength Standard: Currently, to determine whether a household is eligible to receive a distant signal, the Commission measures the Grade B analog signal at that particular household. In the NOI, the Commission is seeking comment on whether the Commission's use of particular signal strength at a particular household should continue to be used. The FCC is interested in identifying any alternative methods that might better establish whether a household is capable of receiving a high-quality DTV signal.

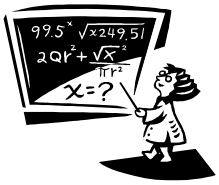
Development of Predictive Model: In developing the DTV Table of Allotments, the Commission utilized the OET 69 predictive method for measuring signal strength. In response to the passage of the Satellite Home Viewer Act of 1999 (SHVIA), the Commission developed a new predictive model for determining whether a household was eligible to receive a distant signal from a satellite service provide. The Commission is now seeking comment on whether there is a different methodology that could be developed to better determine a household's eligibility.

DTV Receiver Standards: The Commission is also seeking comment on how the quality of a consumer's DTV receiver affects its ability to receive a local signal, and whether this should be a factor in establishing a household's eligibility.

DTV Receiver Interference: Finally, the Commission is seeking comment on how a DTV receiver's ability to sift through interference and find a usable DTV signal should be factored into this analysis. In particular, the Commission is seeking comment on how to account for factors such

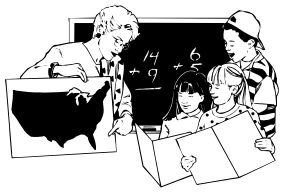
(Continued on page 9)

The Scoop Inside



And so it begins

Petitioners Test Metes and Bounds Of Radio Market Definition



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

Wouldn't you know it? The FCC finally gets a new multiple ownership rule in place for radio and the next thing you know, in roll petitions seeking to mess around with the seemingly clear bright lines of the new rule. But for the moment, at least, those clear bright lines remain clear and bright: the FCC has recently rejected a number of requests to use alternative market definitions in lieu of Arbitron's established market definition for determining compliance with the FCC's local radio multiple ownership rules.

One case involved stations in Ithaca, New York, an Arbitron radio market where BIA reported nine radio stations "home" to the market. A four-station group was proposed to be sold intact. Under the FCC's local radio multiple ownership rules, in a market with 14 or fewer stations, an entity may not own more than half the stations. Thus, if there were nine stations in the market, the proposed sale would have been permitted. Petitioners opposing the application argued that, because of unique terrain obstructions which supposedly prevented reception of some of the nine stations listed by BIA, the market should be deemed to consist of only seven stations – which would preclude the proposed sale.

The FCC was not buying what the opponents were selling.

The Commission explained that, under its new multiple ownership rules, the Arbitron market definition – in areas where there is such a market – is presumptively the definition to be used, and the burden is on a petitioner to show that an alternative market definition is appropriate. The FCC staff reviewed the market in question and concluded that seven stations provide city grade strength coverage to the entire market and two other stations provide such coverage to virtually all the market. As a result, the FCC found that the petitioner's argument regarding terrain obstructions failed to show that reliance on the Arbitron market definition was inappropriate. Using the BIA report of nine stations in the Arbitron market, the FCC found that acquisition of a four-station group complied with the multiple ownership rules.

In a second, unrelated case, a petitioner tried an alternate tack. The four stations proposed to be sold were located in Pullman and Colfax, Washington, neither of which is in an Arbitron-defined market. That minor bagatelle didn't bother the petitioner, however. Rather, according to the petitioner, the Commission should define a new "Moscow [Idaho]-Pullman-Colfax" market which would consist of stations licensed only to those three communities. Since there are only nine stations which would fit in that category, and since the proposed buyer already owned two of them, the proposed assignment would leave six of those nine stations under common control.

Nice try, but again, the Commission was not interested in this approach. Instead, the Commission observed that it has adopted an interim methodology for determining under concentration of control in non-Arbitron markets, and the proposed assignments easily conformed with the rules when analyzed pursuant to that methodology.

As more assignment applications work their way through the Commission's processes under the new rules, we can expect to see challenges along these lines for some time

(Continued on page 9)

Fletcher, Heald & Hildreth
A Professional Limited Liability Company

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

Supervisory Member
Vincent J. Curtis, Jr.

Co-Editors
Howard M. Weiss
Harry F. Cole

Contributing Writers
Harry F. Cole, Ann Bavender,
Anne Goodwin Crump,
Donald J. Evans, Jeffrey Gee,
Steve Lovelady, R.J. Quianzon,
and Michael Richards

Memorandum to Clients is published on a regular basis by Fletcher, Heald & Hildreth, P.L.C.

Focus on FCC Fines

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

For the second month in a row, the FCC issued no fines to broadcasters for violation of its rules. However, readers should not interpret this as a sign that there is greater compliance in the industry. Nor should readers assume that the Commission has adopted a kinder, gentler approach to violations that it may have uncovered.

Rather, as best as we can determine, the current hiatus in traditional enforcement activity (*i.e.*, the imposition of fines) is the result of a bureaucratic shuffle at the FCC. This month's column will provide a brief update about that shuffle.

As many readers are aware, former FCC Chairman Michael Powell stepped down from the Commission in mid-March. In his place, President Bush designated Commissioner Kevin Martin as the twenty-sixth person to fill the seat as Chairman of the FCC. Customarily, when a new FCC Chairman takes office, he enjoys the prerogative of appointing new Bureau Chiefs and Office Directors. The current changing of the guard in the office of Chairman resulted in a flock of new appointments, including the position of Chief of the Enforcement Bureau.

The FCC's Enforcement Bureau is its "long arm of the law" in a number of ways – think of a composite of Andy Sipowicz, Hamilton Burger and Judge Judy. The Bureau is charged with investigating broadcast rule violations, bringing charges based on its investigations, and assessing liability for violations which it identifies. It is the investigating detective, prosecuting attorney and initial trial judge all rolled into one. Since its creation six years ago, the Bureau has been headed up by David Solomon, who had a twelve-year history with the FCC prior to running the Bureau. Mr. Solomon stepped down when the former chairman left.

Chairman Martin has appointed Kris Monteith as the new Chief of the Enforcement Bureau. Ms. Monteith has an eight-year career with the FCC. She moves over to run the Enforcement Bureau after serving as a Deputy Chief in the FCC's Consumer and Governmental Affairs Bureau. Prior to that she had been a division chief in both the Wireless Telecommunications and Common Carrier Bureaus. Ms. Monteith, 40, has a law degree from George Washington University and an undergraduate degree from the University of Colorado. Having been appointed by Chairman Martin, Ms. Monteith will likely interpret the FCC's rules strictly and the Enforcement Bureau may become even more aggressive in enforcing FCC policies.

While her resume does not include any broadcast-related experience, never fear. The Enforcement Bureau has a solid staff of regulators who have *not* changed with the administration and who *do* have considerable experience on the broadcast side. Because of that, we do expect that there will be a resumption of fine and forfeiture activity once the new boss gets settled in.

FHH - On the Job, On the Go

During May, **Raymond Quianzon** delivered an address regarding the state of telecommunications policy and spoke on several telecommunications panels at a Department of Interior Economic Summit in North Dakota.

On May 24-25, **Mitchell Lazarus** attended the annual conference of the National Spectrum Managers Association, and on May 26, he attended a related meeting of the Fixed Wireless Communications Coalition.

Scott Johnson and **Howard Weiss**, along with the FCC's **Roy Stewart**, attended the Alabama Broadcasters Association annual convention in Orange Beach, Alabama from May 20-22. Scott made a presentation about station contests and lottery/gambling promotions.

In June, that travelin' guy **Howard** will be back on the road, this time heading for Panama City, Florida to attend the summer convention of the Georgia Association of Broadcasters.

Prodded by SHVERA II

Commission Explores The Territories

Scope of Must-carry for the Outlands at Issue

By: Michael Richards
703-812-0456
richards@fhhlaw.com

Cable systems may not have to carry all of a broadcast television station's digital multicast streams, but the FCC believes that DirecTV and EchoStar's Dish Network are required to carry them all in their local-into-local packages – at least in Alaska, Hawaii, and possibly Guam, the U.S. Virgin Islands and Puerto Rico, too. That's how the FCC reads the 2004 law commonly known as SHVERA (for all you telecom wonks, that would be the Satellite Home Video Extension and Reauthorization Act of 2004).

It not clear yet whether SHVERA will make the satellite folks *schvitz* (Editor's note: *schvitz (Yiddish)* – to sweat, perspire). But the FCC is trying to find out: it's seeking comment from broadcasters and DBS companies (and anyone else who has an opinion on the matter) on certain limited aspects of the satellite carriers' must-carry obligations.

At issue are definitions and other provisions that apply only to service into "non-contiguous states." SHVERA says that satellite operators must carry all digital multicasat streams of broadcast stations in "non-contiguous states". It's clear Alaska and Hawaii are included in the intended scope of that term, since they are both clearly "states" which are "non-contiguous".

But Congress did *not* say whether non-contiguous U.S. *territories* are included. While the Communications Act generally includes Puerto Rico, the U.S. Virgin Islands and Guam (and a handful of other, smaller territories) in its definition of the term "state", the Commission is seeking comments on whether these U.S. territories should be counted the same way under SHVERA and the FCC rules that implement SHVERA. No one ever said the law was simple or coherent.

The FCC is also seeking to determine which physical places in the non-contiguous areas of the country will qualify for SHVERA local-into-local guarantees.

The FCC is also seeking to determine which physical places in the non-contiguous areas of the country will qualify for SHVERA local-into-local guarantees. The official test is whether subscribers can receive DBS service in a particular community. But as simple as that sounds, it's not as simple as it seems. SHVERA does not specify the technical parameters for measuring the availability of DBS signals. And that means a debate rages, for instance, over the minimum angle of orientation to a satellite required for DBS reception in Alaska.

Additionally, the FCC is proposing two deadlines for local stations to elect mandatory carriage or retransmission consent for local-into-local carriage in non-contiguous states: October 1, 2005, for analog signals, and April 1, 2007, for digital signals.

Comments on the FCC's proposals are due on June 6, 2005. Replies to those comments are due on June 20, 2005.

Cable Ownership/Control Issues To Be Revisited

By: Vincent J. Curtis
703-812-0420
curtis@fhhlaw.com

Facing a stale record, an ever-changing competitive landscape and howling clamors from both supporters and opponents of regulation, the FCC has released a Second Further Notice of Proposed Rulemaking dealing with the issue of cable horizontal and vertical ownership limitations. As part of the 1992 Cable Act, Congress added Section 613(f) to the Communication Act, which essentially directed the FCC to set reasonable horizontal and vertical limits on cable operators in order to "enhance effective competition." As a result, the Commission in 1993 issued an order (which was subsequently amended in 1999) that limited cable operators to 30% horizontal and 40% vertical limits. Those limits, however, were held in abeyance pending court challenges to the statute.

Eventually, in a court decision known as *Time Warner I*, the U.S. Court of Appeals for the District of Columbia Circuit upheld the constitutionality of Section 613(f). The court found that the Congress had concerns that were

(Continued on page 5)

Just due it . . .

Buyer's Due Diligence: Trust But Verify

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

In the sale/purchase of a radio or television station, the primary document between the seller and buyer is commonly called the Asset Purchase Agreement, or APA. The APA usually contains a number of representations and warranties by the seller about the assets it is selling. For instance, a seller's typical representations about the FCC license for the station are that: the seller is the holder of such license; the station's license is in full force and effect; and the license has not been revoked, suspended, cancelled, rescinded or terminated. The seller usually goes on to state that there is not issued, pending or threatened any complaint, order to show cause, notice of violation, or notice of apparent liability against the seller in connection with the station. Most APAs contain page after page of such representations and warranties about almost every aspect of the seller and the station's assets and operations.

Question: Should a buyer just rely upon a seller's representations and warranties when it's time to close the station acquisition transaction?

Answer: OF COURSE NOT!!

Should a buyer just rely upon these representations and warranties when it is time to close the station acquisition transaction? Of course not! The prudent buyer does its own investigation of the seller and station assets – what lawyers and broadcasters call "due diligence."

There are several reasons not to rely solely upon what the seller says in the APA.

First, the survival of the seller's representations and warranties often ends soon after closing. Most APAs include a cut-off provision, so that the seller's representations and warranties survive for only a matter of months after closing. If the buyer finds out that one of the representations and warranties of the seller was not true, but the survival time period has expired, the seller may no longer be held liable under the agreement and the buyer might not have any legal recourse.

Second, even if a buyer finds out before the survival period expires after closing that one of the representations and warranties of the seller was false, most APAs also contain dollar limits on the extent of the seller's liability. It could be that the total damages of the buyer must exceed a certain floor amount, or that there is an ultimate upper limit on the seller's liability. Finally, there is always the possibility that a seller has taken all the money it received from the sale of the station and gambled it away at Bellagio's craps table during the NAB convention. So even if a buyer has a legitimate claim against its seller for breach of a representation or warranty, there are numerous reasons why such claims might not be collectable from the seller.

(Continued on page 9)

(Continued from page 4)

well-grounded in evidence as to the potential for increased concentration and vertical integration that could result in anti-competitive behavior by cable operators.

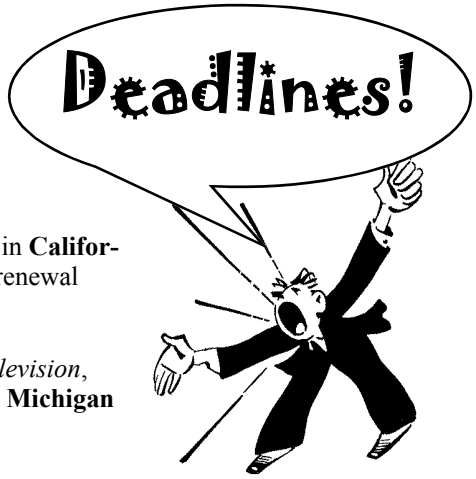
Following that action, the same court rejected the Commission's ownership and attribution rules in a decision known as *Time Warner II*,. In rejecting the Commission's conclusions, the court basically said that the Commission lacked sufficient evidence to support the horizontal limit or to demonstrate a reasonable link to allow the 40% vertical limit.

Shortly after *Time Warner II*, in 2001, the Commission began a further proceeding to review cable ownership.

While a number of parties filed comments, no action has been taken in the intervening four years. With a new Chairman in place, and faced with the continued demand for a solution, the Commission has now decided to request new and updated information relating to industry changes. Those changes include competition arising from: satellite television and other MVPD's; the telephone companies' entry into cable; and various other ubiquitous new competitors – including BPL's arrival in the broadband world. And the ultimate question is how all of those factors will play out in any determination of limits on cable ownership and control.

Comment and reply comment dates will run from the publication of the Commission's action in the *Federal Register*. We will keep you advised.

June 1, 2005



Television Renewal Pre-Filing Announcements – All *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 – All *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* stations 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.

August 1, 2005

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

Radio Renewal Pre-Filing Announcements – All *radio* stations located in **Alaska**, **American Samoa**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, and **Washington** must begin pre-filing announcements in connection with the

(Continued on page 7)

How low can they go?

Legislators Look to Lower LUC

By: Jeffrey Gee
703-812-0511
gee@fhhlaw.com

Legislation aimed at regulating "527" political groups may greatly reduce the rates broadcasters may charge federal candidates for political advertising in upcoming campaign cycles. 527 groups – Swift Boat Veterans for Truth and America Coming Together were two high-profile examples from last year's presidential campaign – raised and spent millions of dollars attempting to influence the 2004 elections. The proposed legislation, known as the "527 Reform Act of 2005", is intended to limit such spending by subjecting 527 groups to the same campaign finance limitations as other regulated political committees. While the elimination of 527 spending may not have a substantial impact on broadcasters' revenues, a last minute amendment to the bill by Sen. Dick Durbin (D-IL) has the potential to drastically reduce the amount broadcasters may charge federal candidates for advertising time.

The proposal would impose considerable practical and financial burdens on broadcasters.

The Durbin amendment would redefine the lowest unit charge rate by basing it on prices from the previous 365 days. The amendment also would make all such ads non-preemptible. Under current rules, broadcasters must sell each class of advertising time to qualified candidates at the lowest rate charged for that class of time during the 45 days prior to a primary election or 60 days prior to a general election. Under the amended formula, however, broadcasters would be required to sell politicians ***non***-preemptible spots at the lowest rate charged for ***preemptible*** spots over the entire preceding year. Obviously, such an approach would impose on broadcasters considerably greater burdens, both practical and financial, than are already imposed by the existing political broadcasting rules.

The 527 Reform Act of 2005 (with the Durbin amendment) has been approved by the Senate Rules Committee and is now up for consideration by the full Senate. NAB and some broadcast station groups are already lobbying against the amendment. Although the smart money currently says that the Durbin amendment is likely to be rejected – a similar measure was proposed and defeated in 2002 – broadcasters can expect that politicians will continue to look for ways to vote themselves into cheaper (or free) advertising time. Broadcasters who have any views on such moves may wish to bring those views to the attention of their respective Congressional delegation(s), either directly or through the NAB or state associations.

(Continued from page 6)

license renewal process.

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

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

Radio and Television Renewal Post-Filing Announcements – All *radio* stations located in **California**, and all *television* stations located in **Illinois** and **Wisconsin** must begin their post-filing announcements in connection with the license renewal process, and continue such announcements on August 1 and 16, September 1 and 16, and October 1 and 16.

EEO Public File Reports – All *radio* and *television* stations with five (5) or more full-time employees located in **California**, **Illinois**, **North Carolina**, **South Carolina**, and **Wisconsin** 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 **California**, **North Carolina**, and **South Carolina** must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All *television* stations located in **California**, **Illinois**, and **Wisconsin** must also file a biennial Ownership Report. All reports filed on FCC Form 323 or 323-E must be filed electronically.

Debt Payment Eschewal — Bad News For Renewal

Red Light Violation Leads to Dismissal of Renewal Application

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

You may have read some of our coverage of the "red light" system which the FCC instituted late last year (*see* articles in the September and December, 2004 issues of the *Memo to Clients*). And you may have thought that that system was interesting but hardly of any great import to your quotidian existence.

The following tale may change your mind on that score.

In January, 2004, a stand-alone AM licensee in Florida filed its renewal application. (The application was almost four months late and was filed on the eve of the expiration of the station's license, but that fact is not important here.) Two months later, in March, 2004, the Commission amended its rules governing its debt collection processes. In so doing, the FCC decided that it would withhold action on all applications filed by anyone who happened to be delinquent on non-tax debts owed to the Commission. And if the delinquency were not "resolved" in 30 days of notice to the deadbeat, er, delinquent party, then all such applications would be dismissed.

According to the Commission, the licensee in question here owed five separate debts as of January, 2004, when its renewal application was filed. The FCC says that the licensee was sent two letters notifying it of its outstanding debts. The FCC also says that the licensee received those letters, and that the licensee does not deny receiving them – but it is unclear whether the Commission itself has any proof that its letter notices were in fact received. It is reasonably clear, however, that the licensee did not pay the outstanding fees after the FCC's notices were sent.

In connection with the processing of the renewal application, the Commission's staff checked for delinquencies and, sure enough, up popped the five unpaid debts. That triggered the issuance of a "red light notice". That notice triggered the 30 day deadline – failure to resolve the delinquencies within 30 days of that notice would result in dismissal of then-pending applications.

You guessed it – the licensee did not respond to that notice either, and in January, 2005, the Commission dismissed the renewal application.

That got the licensee's attention. He lawyered up and paid up his debts. His newly-retained counsel then asked the Commission to reconsider the dismissal of the renewal application and to reinstate it.

And the Commission said "no".

Rather than grant the petition for reconsideration, the Commission advised the luckless licensee that it would have to file another renewal application, with an appropriate filing fee. The FCC also helpfully noted that a failure to re-file "promptly" would lead to the cancellation of the station's license and deletion of its call sign.

If there was ever any question in your mind about this, let's clear it up once and for all: the FCC is ***not*** kidding about the dire consequences facing those who have not paid their debts to the Commission. And if you happen to have a license renewal application pending when a delinquency surfaces, that renewal application – and, as a direct consequence, your license – is at stake if the delinquency is not resolved promptly.

It is always prudent to pay your bills on time and to keep receipts. But with your license possibly on the line, it is not only prudent - it's vital.

What makes this situation even more interesting is the fact that the FCC's own records may not be entirely accurate and up-to-date. For example, we are aware of a number of licensees who have received "red light notices" for debts which had already been paid. If proof of payment can be provided to the Commission, that normally takes care of the problem. But without such proof, the FCC will continue to treat the debt as outstanding, and pending applications – including renewals – will be at risk.

The moral of this story is really pretty basic: pay your debts to the FCC on time, be sure to get receipts for your payments, and keep them filed away and handy for future reference in case the FCC's records prove to be less than complete and accurate. When it comes to paying fees, you may want to consider using the Commission's on-line payment mechanism. Payments made that way are credited almost immediately, and as part of the electronic filing process you are able to print out a detailed receipt which clearly establishes the payment (and also provides tracking numbers within the FCC's system). And, since on-line

(Continued on page 9)

(Continued from page 5)

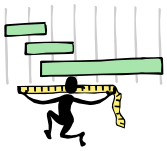
A buyer is much better off doing its own due diligence to discover any problems with the station – ***before*** closing. ***All*** aspects of the station should be inspected. In particular, a buyer should search for recorded liens against the property, and to determine if there are any judgments or lawsuits pending against the seller. Also, the buyer should obtain and review complete copies of all contracts and leases to be assumed, as well as title insurance commitments for all real property. Further, phase I environmental surveys for all real property (and possibly leased property) should be commissioned, and the station's physical facilities (*e.g.*, tower, studio, transmitter, etc.) should be inspected by a competent engineer. And of course, the buyer (or the buyer's accountant) should review the financial books and records of the seller.

The most important item to be acquired – the FCC license – should be reviewed and a due diligence investigation performed by the buyer's FCC lawyer.

In addition, the most important item to be acquired – the FCC license – should be reviewed and a due diligence investigation performed by the buyer's FCC lawyer. The FCC's Enforcement Bureau will respond to requests for information from an attorney representing the buyer in a sale transaction, and will notify him or her if there are any pending complaints against the licensee of the station. Similarly, the Policy Division of the Media Bureau will, upon request, let the buyer's attorney know if there are any complaints pending in the political office or the EEO branch. A minimum of five business days should be allowed for receipt of replies to inquiries to these offices of the FCC. Finally, the buyer's FCC attorney should examine the files of the FCC that are available through the public reference room of the FCC in Washington, D.C., for evidence of any complaints filed against the seller or any other irregularities.

And here are some tips on contract drafting for your APA to avoid a potential controversy between the seller and buyer. The APA should include a provision stating that if the buyer, during its due diligence investigation, discovers one of the seller's representations and warranties is false, the buyer will notify the seller. Additional wording should be added whereby the seller and buyer decide how to deal with that potential situation, and if the buyer decides to close anyway, whether the election to close despite the problem is to be considered a waiver by the buyer of the seller's breach. Disputes between buyers and sellers have occurred in cases when a buyer discovers a problem, either notifies or does not notify the seller, and then closes the transaction anyway. The buyer thinks it can still make a claim for breach of the warranties after closing, and the seller thinks that the buyer waived its rights by closing with knowledge aforehand of the breach.

So our recommendation to buyers is to do due diligence. It is the best insurance that you can buy to know that you will receive what the seller says it is selling.



(Continued from page 1)

as foliage and man-made sources of interference.

Clearly, this proceeding is likely to have a dramatic impact on the future battles between over-the-air broadcasters and satellite carriers over the delivery of local signals to individual households at the periphery of broadcast station service areas. Comments in this proceeding will be on June 17, 2005, with reply comments due on July 5, 2005.

(Continued from page 8)

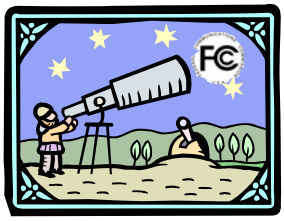
payments are made by credit card, you have the additional back-up of the credit card bill which will reflect the payment.

It is, of course, always prudent to pay your bills on time and to keep receipts. But with your license possibly on the line, it is not only prudent - it's vital.

(Continued from page 2)

to come. Any time a new set of standards is imposed by the agency, the precise metes and bounds of those standards are put to the test by parties through case-by-case adjudications. Certainly the new multiple ownership rules will be no exception.

On the one hand, the recent cases could be read as a discouraging signal to anyone trying to open up assignment applications to a broader attack than the relatively cut-and-dried language of the multiple ownership rules would seem to contemplate. But on the other, the Commission did not absolutely preclude such attacks, so we can anticipate more such challenges in the future – and possibly, some such challenge might hit paydirt. Stay tuned.



Like sands through the hourglass . . .

22-Year-Old Application Finally Makes It To The Finish Line

By: Donald J. Evans
703-812-9430
evans@fhhlaw.com

In March – that's March, ***2005*** – the FCC granted a Multipoint Distribution Service application bearing file number 8301199. The only odd thing about that file number is the "83" part – it means that the application was filed in ***1983***. It turns out that this particular application, with which we became acquainted only during the present millennium, was filed almost a full biblical generation ago during the initial filing window for the MDS lottery. And therein lies a tale.

Back when dinosaurs roamed the earth, the FCC awarded such MDS licenses by lotteries. Application 8301199 spent the first five years of its life as a lottery loser, springing back to life when the original lottery winner was disqualified and a new lottery was held. At that point, 8301199 made the mistake of not being amended within the time frame specified by the FCC and was summarily dismissed.

Planet FCC
An occasional feature in which we examine the often curious quirks and foibles of the institution at 445 12th Street, SW

Ignoring the fact that the application had at that point been pending for nearly six years through no fault of the applicant's, the FCC focused on a ***one-month*** delay by the applicant in submitting a required amendment. According to the Commission, this 30-day delay in coming up with the required information resulted in an intolerable delay in the initiation of new service to the public, a delay so serious as to warrant dismissal of the application.

The applicant filed three separate petitions for reconsideration with the FCC staff, each time pointing out that the FCC's then-most-recent order seemed to have ignored one critical fact or another in the case. Again, the applicant's sole delict had been a failure to amend within 30 days. Apparently feeling unconstrained by any such time considerations – and obviously feeling unashamed about its own extravagant consumption of time while the public still awaited the initiation of new service – the FCC took four, eight and two years, respectively, to exhaustively process each of these five-to-eight page documents. While the FCC may have been profligate with its time, the agency was able to preserve at least one natural resource, *i.e.*, its paper: each of the FCC's actions, reached after years of careful deliberation and analysis, required only a two- or three-paragraph dismissal.

8301199's righteous and dogged perseverance eventually paid off in 2003 – that would be just about 20 years after the application was filed – when the staff suddenly recognized the error of its ways and reinstated the application. Two years later – a blink of the eye in FCC time – the application was finally granted.

This hapless little application no doubt promised to deliver cutting edge technology in 1983, perhaps incorporating hi-fi 8-track audio and advanced beta video into the disco dance lessons which would be delivered to its breathlessly waiting audience. Much of that audience is now having hip replacement surgery and downloading broadband video from satellite. This application languished through eight different chairmen of the FCC (and four different U.S. presidents), passing among three different bureaus without ever reaching a level of review higher than a deputy bureau chief. Let's give the FCC some credit for finally acknowledging its error, but let's also sentence it to 22 lashes with a wet noodle – one for each year of inaction.

1983

Who can remember back that far? To help you get your bearings, here are a few highlights from that halcyon year.

Ronald Reagan was in his first term as President; George Bush (no, the *other* George Bush) was Vice President. There were still seven FCC Commissioners, including (as of January, 1983), Chairman Fowler and Commissioners Quello, Fogarty, Jones, Dawson, Rivera and Sharp. Monica Lewinsky celebrated her 10th birthday. Camcorders and the CD were introduced to the consumer market. Initial testing of the technology which eventually became the cellular phone system began. *Toto IV* was the Album of the Year. The final episode of *M*A*S*H* was broadcast (for the first time). Michael Jackson first performed his moon walk on national television.

Let's party like it's 1983!

FM ALLOTMENTS ADOPTED –4/20/05-5/20/05

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
TX	Refugio	116 miles SE of San Antonio, TX	279C1	04-299	None
OR	Clatskanie	56 miles NW of Portland, OR	225C3	04-428	TBA
WA	Long Beach	113 miles NW of Portland, OR	259A	04-428	None
WA	Ilwaco	110 miles NW of Portland, OR	253A	04-428	TBA
IN	Cannelton	72 miles SW of Louisville, KY	289A	04-436	None
IN	Tell City	73 miles SW of Louisville, KY	275C3	04-436	None
MI	Ferrysburg	33 miles NW of Grand Rapids, MI	226A	02-74	TBA
CA	Cedarville	219 miles N of Carson City, NV	260A	04-387	TBA
LA	Dulac	75 miles SW of New Orleans, LA	242A	04-329	TBA
CA	King City	153 miles S of San Francisco, CA	275A	04-332	TBA
NV	Fallon Station	69 miles E of Carson City, NV	287C	04-333	TBA
CA	Coachella	132 miles E of Los Angeles, CA	278A	04-334	TBA
CA	Cambria	213 miles S of San Francisco, CA	293A	04-335	TBA
TX	Carbon	135 miles W of Dallas, TX	238A	04-336	TBA
AL	Northport	60 miles SW of Birmingham, AL	286A	04-337	TBA
AL	Shorter	24 miles E of Montgomery, AL	300A	04-201	TBA

FM ALLOTMENTS PROPOSED –4/20/05-5/20/05

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
WY	Bairoil	185 miles NW of Cheyenne, WY	235A	05-177	Cmts-6/20/05 Reply-7/5/05	Substitute vacant channel
WY	Sinclair	145 miles NW of Cheyenne, WY	267C	05-177	Cmts-6/20/05 Reply-7/5/05	Substitute vacant channel
NJ	Bass River Township	65 miles SE of Philadelphia, PA	293A	05-188	Cmts-7/11/05 Reply-7/26/05	Section 1.420(i)