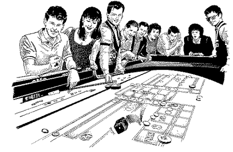
FLETCHER, HEALD & HILDRETH, P.L.C.

Memorandum to Clients

June, 2005 | *News and Analysis of Recent Events in the Field of Communications* | No. 05-06

Changing the way we set the Table?

FCC Proposes Make-over for Radio Channel Allotment Processes



By: *Lee G. Petro*
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Raising the prospect for the first major overhaul of the FCC's allotment procedures since 1982, the FCC issued a Notice of Proposed Rulemaking (*NPRM*) in June seeking comments on several proposals which, if adopted, would have a significant impact on the future of FM allotment proceedings.

Acting in response to a Petition for Rulemaking filed by First Broadcasting Investment Partners LLC (First Broadcasting), a company that has been involved in many recent major allotment rulemaking proceedings, the Commission is seeking comment on four major issues.

Permitting Community of License Changes By Filing Minor Change Applications – Perhaps most importantly, the *NPRM* seeks comment on whether the Commission should permit the change of an AM or FM licensee's community of license through the submission of a minor modification application.

> *The proposed change would substantially reduce (if not eliminate altogether) the possibility that a community-of-license change proposal would be subject to some form of comparative evaluation as against one or more other, later-filed, proposals.*

Under current procedures, in order to effect a change in community of license, a licensee must file a petition for rule making to amend the FM Table of Allotments (which technically constitutes a section of the FCC's rules). On the AM side, while a change in community of license is sought by application (there is no AM Table of Allotments), such applications are treated as seeking "major changes", which triggers considerably more elaborate processing limitations. The proposed change, by effectively cutting off alternate conflicting proposals as of the date the application is filed, would substantially reduce (if not eliminate altogether) the possibility that a community-of-license change proposal would be subject to some form of comparative evaluation as against one or more other, later-filed, proposals.

First Broadcasting claimed that the current approach is unnecessarily time-consuming and creates "regulatory uncertainty". It also suggested that the abandonment of the rule making approach in favor of the minor mod approach would relieve the FCC's over-burdened staff and prevent the filing of hundreds of competing applications in response to window filing announcements.

The Commission appears to be favorably disposed to this approach, although with some reservations. In particular, the FCC is mindful of the obligation, imposed by Section 307(b) of the Communications Act, to assure the fair and equitable distribution of broadcast frequencies among the various states and communities. Community-of-license changes have already led to a migration of broadcast channels from rural communities into metropolitan areas, which

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SHVERA Me Timbers!

Satellite Carriage: NOT Just a Cable Clone

Attention must be paid to differences between cable and satellite must-carry rules

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While TV stations may be focusing on cable carriage issues at the moment, many of them should also be mindful of current issues involving carriage of their stations, and their competitors' stations, on the DirecTV and Dish Network satellite systems. A number of recent FCC actions, and on-going deadlines, are coming into play at the same time.

Election Between Retransmission Consent and Must-Carry

In a manner similar to the election that a station must make with respect to carriage on ***cable TV*** systems in the station's local market, stations must also make an election between retransmission consent and must-carry status on the ***satellite*** systems of DirecTV and Dish Network every three years. The satellite election deadline for this three-year cycle is the same as the deadline for cable TV elections - ***October 1, 2005***.

There is a ***critical difference*** between the two processes, however: for cable TV, if a station fails to make an affirmative election, it is deemed as a matter of law to have elected must-carry; but in the arena of satellite carriage, if a station fails to make an affirmative election, it ***loses*** its rights to must-carry. Thus, in markets where one or both of the satellite carriers are providing carriage of local stations ("local-into-local" carriage), it is critical that stations make an affirmative election.

Election letters must contain specific information required by the FCC's rules in order to be effective, so you should consult with your communications attorney about these requirements. Remember, there may be markets where the satellite carriers are not currently providing carriage of any local stations – in such markets, the carriers are ***not*** obligated to provide must-carry.

Notices of Importation of Distant "Significantly Viewed" Stations

As discussed in the February, 2005 *Memo To Clients*, the new "Satellite Home Viewer Extension and Rural Consumer Access to Digital Television Act" (SHVERA) has provisions which ***allow but do not require*** satellite operators to import distant stations into markets where those distant stations are deemed "significantly viewed" by the FCC. The FCC has initiated a number of proceedings to enact rules required under SHVERA, including one on the importation of significantly viewed (SV) stations. The FCC issued a notice of proposed rulemaking on these SV rules, including an extensive list of all of the communities where certain stations are currently deemed to have SV status.

While the FCC proceeding is pending, the FCC has concluded that the satellite carriers have rights to import such stations under the SHVERA statute even before the FCC's rules are enacted, and accordingly, the satellite carriers are preparing for such importation. In doing so, the carriers are required to notify local stations at least 60 days before importing an out-of-market SV station into the local market. Some stations have recently begun receiving notices on importation of signals.

If your station receives a notice that a satellite carrier intends to import an out-of-market SV signal of a station affiliated with the same network as your station, or carry-

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Focus on FCC Fines

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Attention Newsrooms – Use Visuals! Readers of this column may recall that three months ago in the March 2005 issue, we reminded video programming distributors of the requirement that they ensure that the hard of hearing and deaf are aware of emergency information. The March article described fines imposed on several San Diego television stations which failed to provide visual aids for emergency information. In the San Diego instance, the stations were fined for not warning viewers about wildfire evacuations and emergency procedures.

Shifting its forfeiture aim eastward, the FCC has recently fined three Washington, D.C. television stations for similar violations. As thunderstorms and tornados rolled into the Washington area on a May evening last year, local television stations announced weather warnings. The storm coverage included information on how to take shelter during such emergencies. However, hearing-impaired viewers had no idea that such information was being provided because the information was given aurally, with no corresponding textual or graphic information displayed on the screen. So while newscasters and meteorologists were telling viewers in the storm's path to get away from windows and go to interior rooms or to the lowest levels of their homes, there was no way for deaf and hearing-impaired viewers to get that information.

Although the newsrooms were obviously trying to relay emergency information to their audiences, they had overlooked the federal requirement to provide that information to the deaf or hearing-impaired.

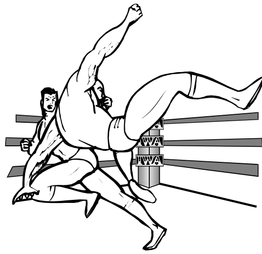
As the varied circumstances between the Washington, D.C. rainstorms and the San Diego fires indicate, ***any*** television station may end up reporting on an emergency. (There is, after all, weather everywhere, and that can obviously lead to emergency conditions.) The FCC provides 15 examples of such emergencies, including gas leaks, power failures and plant explosions – and the FCC's list is by no means all-inclusive.

While the FCC seemed to indicate, when it first adopted these rules, that broadcasters would have some good faith discretion in determining what information would be subject to the requirement, this year's decisions strongly suggest that broadcaster discretion in this area is extremely limited. The solution for the news room is to ensure that ***any*** critical emergency information is provided both aurally ***and*** visually. The FCC notes that this may be as simple as hand-writing notes and holding them up to the camera. For the price of a magic marker and a white board, the Washington stations could have avoided the $8,000 and $16,000 fines they were assessed.

Fine Dished Out For Unlicensed Dish A broadcaster with a satellite earth station failed to renew its registration and now faces a $4,000 fine. The broadcaster is the licensee of more than two dozen radio stations. The broadcaster also has a satellite earth station for picking up satellite signals. The FCC noticed that the station had failed to renew its authorization for the satellite dish and hit the company with the fine. The station claimed that it simply overlooked the satellite dish but that it had made no errors with its more than two dozen radio station and a dozen auxiliary links. The FCC did not accept this excuse and levied a fine of $4,000.

FCC Stalks, Bags Hunter Deer hunting season in Arkansas opened with FCC agents bagging their prey – radio-equipped hunters who were violating the Commission's rules. At the end of the previous deer hunting season, the FCC's New Orleans Field Office received a complaint about interference to ship radio frequencies. When the next deer season rolled around, the Feds geared up with radio location devices to track their elusive quarry. The high tech hunt worked, as the FCC scoped out a hunter using a radio and nailed him with a $10,000 fine (which was later reduced). The hunter's equipment, as it turned out, consisted of a marine radio required to be used in a boat. The hunter was using the equipment in his car (which, it appears, was not seaworthy) to contact other hunters. Readers are reminded that marine radios must be operated in accordance with the limited marine purposes of their licenses. (So while Bambi may now be in the clear, this could be bad news for Flipper.)

Mall Security Needs License While walking around his local mall one day, an FCC agent spotted mall security officials using a walkie talkie. The FCC agent asked the mall staff to show him a license for the walkie talkies. Although the equipment had been licensed at one time, that license had expired. The FCC issued a $10,000 fine to the mall for using unlicensed equipment.



INCREDIBLE HULKS IN TAG TEAM DEATH MATCH!!! NO HOLDS BARRED!!!

The Mighty Telcos v. The Cable Guys: Pay TV Contenders Go For The Eyes

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It's a battle of the titans as the descendants of the old telephone monopoly system duke it out with the entrenched cable monopoly system for a share of America's eyeballs. Verizon, SBC, Bell South and others are bulking up what used to be called "video dialtone service" to compete directly with cable. You have to look hard to catch sight of the contest, though: for the moment, it is being slugged out in legislatures and agencies, rather than more conventional spectator venues.

Late last month, the cable guys won a round in the Texas legislature. Verizon and SBC wanted to avoid local franchising rules and, instead, obtain statewide franchises to construct video delivery services anywhere in the Lone Star State. But the cable guys, with local governments in their corner, won the day. As a result, Verizon and SBC will have to obtain local franchises if they want to offer video lines in Texas. A similar tag-team effort by cable lobbyists and municipalities squashed statewide franchising in Virginia.

The possible shift from local regulation to national franchising presents an interesting conundrum for politicians who have railed against Big Federal Government and who would supposedly prefer to let the states and localities regulate local matters.

The Bells complain that the piecemeal nature of local franchising takes too long and devours resources. Team Cable, with their local government supporters, says the Bells want statewide franchises so they can avoid such requirements as universal buildout, public access and even franchise fees.

But the action is moving now from state capitals to the nation's capital, where FCC chairman Kevin Martin has said that he is "sympathetic" to the need for fewer video rules to encourage more market competition. Similarly sympathetic is the Chairman of the Senate committee that supervises the FCC, Alaska Republican Ted Stevens. Stevens told the Federal Communications Bar Association earlier this month that "we need to think about some sort of national franchise."

Exactly what sort of national franchise could be worked out in Washington among the currently warring titans of telecom? The National Cable Television Association's president, Kyle McSlarrow, said that his industry is interested in regulatory parity with such new video challengers as the old phone companies. That appears to signal that, given the right mix of deregulatory sweeteners, big-time cable would not be averse to a truce with big-time telco that might create national franchises.

That would leave local governments out in the cold, with their current chokehold on local cable franchise likely broken with the arrival of a national franchising approach. Without NCTA helping them, local governments would be left fighting the battle without industry help. The National League of Cities, among other groups, is lobbying to stop national franchising by raising the specter of video redlining and gutted localism requirements on cable.

The sweetener for consumers may be that a national franchise may bring competition more quickly to those markets in which competitive cable service from "overbuilders" has not yet arrived. On the other hand, that sweetener may prove artificial at best. A landscape dominated by a couple of national Goliaths wielding massive financial resources (not to mention political clout) is not likely to be attractive to small overbuilders. And any valiant would-be competitors would in any event likely be very hard-pressed to find any level playing field on which to try to compete. The only "competition" likely to occur would be between the two big players. While that might be some improvement over existing monopoly conditions, any notion of a blossoming universe of small operators successfully competing against a couple of dominant national franchisees is akin to a second marriage – the triumph of hope over experience.

The possible shift from local regulation to national franchising does present an interesting conundrum for politicians who have railed against Big Federal Government, and who would supposedly prefer to let the states and localities, rather than Washington, regulate local matters. Since cable franchising has for decades been handled at

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RFA–The RF stands for regulatory flexibility

Small Chance of Small Changes for Small Businesses

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Are you a small business owner? Would you like to tell the FCC what to do with its rules? Here's your chance: you have from now until September 1, 2005, to do just that.

A federal law (known familiarly as the "Regulatory Flexibility Act") requires that all federal agencies periodically review their rules to consider whether the rules should be retained, amended, or eliminated, based on the rules' effect on "small entities". In general, a "small entity" is a business that is independently owned and operated, is not dominant in its field, and falls below certain annual revenue thresholds ($6 million for radio/$12 million for television). Independently owned and operated non-profits and small governmental entities also are considered "small entities".

At the end of May, the FCC announced that it would start such a review of several of its rules, including a number pertaining to broadcasters.

Under consideration are rules relating to cable carriage, forfeitures for tower violations, application and regulatory fees, auction rules, EAS, earth stations, unattended station operation, cable must-carry requirements, and programming for foreign stations.

The FCC is inviting comments on whether it should retain, amend, or eliminate these rules based on the rules' impact on a substantial number of small entities. Although the FCC is highly unlikely to make major changes to any of these rules – it won't repeal reg fees for small broadcasters, for instance, or dismantle the EAS – this proceeding gives small businesses an opportunity to recommend changes based on their own particular circumstances and perspectives. If you wish to participate in this proceeding, comments are due by September 1, 2005. There is no provision for reply comments.

Meet the new boss . . .

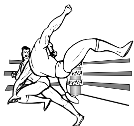
FCC Fills Top Bureau Honchoships

At long last, Chairman Martin has announced his selection for Chief of the Media Bureau – Donna Gregg. Gregg has most recently served as Vice President of Legal and Regulatory Affairs and General Counsel of the Corporation for Public Broadcasting. Prior to that she was in the private practice of communications law, and before that, she began her career as a staff attorney in the FCC's Cable Television Bureau. She has been a Senior Lecturing Fellow in Telecommunications Law and Policy at Duke Law (where she got her law degree), and a member of the Board of Directors of the North American Broadcasters Association.

Clearly, Gregg has strong credentials. And to assist her in navigating the sometimes turbulent substantive and bureaucratic waters of the Media Bureau, Chairman Martin has tapped long-time veteran Roy Stewart as the Bureau's Senior Deputy Chief. With 40 years of service at the Commission, Stewart has unparalleled depth of knowledge and experience. Additionally, he has worked constantly getting to know broadcasters, their industry and their problems. As a result, he is a familiar, and welcome, face to many broadcasters.

Also on the new faces front, let's say hello to Samuel Feder, who steps in as the Commission's Acting General Counsel. Feder has been serving as Chairman Martin's Legal Advisor for spectrum and international issues.

Meanwhile, over in the FCC's Office of Engineering and Technology, Ed Thomas, the Office's Chief, has left the Commission. Bruce Franca has been named Acting Chief.



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the local level, it's hard to see how Washington politicians could justify grabbing that authority away from the locals. We can look forward to some fancy rhetorical footwork if Congress does take up the telcos' cause.

No specific legislation or FCC rulemaking is in the hopper yet. But with key Republicans in both Congress and the FCC demonstrating interest in a review and possible revamping of the nation's cable franchise rules, the fight is revving up. And much like the jockeying of yachts before the starting gun of an America's Cup race, the pre-race strategy and positioning may well determine the ultimate outcome of the contest. But yacht racing is probably not the aptest analogy: the looming fight over the right to deliver pay-per-view programming promises the kind of smashmouth contact sport that sells on pay-per-view. Stay tuned.

Thumbs down for CEA/CERA Proposal

FCC Moves Up DTV Receiver Deadlines

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Sometimes, it just doesn't pay to ask.

As reported previously, the Consumer Electronics Industry and the Consumer Electronics Retailers Association filed a request to delay the deadlines contained in the Commission's DTV Tuner order adopted in 2004. Those deadlines mandated that (a) as of July 1, 2005, 50% of the television sets manufactured and imported into the United States with screen sizes of 25"-26" include a digital television tuner, and (b) 100% of these television sets have a DTV tuner by July 1, 2006.

According to CEA and CERA, the Commission's requirement has resulted in the "hoarding" of non-DTV sets by retailers and has served to impede the roll-out of digital service. To resolve this problem, CEA and CERA suggested that the Commission eliminate the 50% requirement, and establish March 1, 2006, as the deadline for 100% of these television sets to have a DTV tuner.

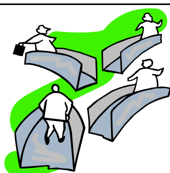
Several parties filed comments opposing this request. They argued that since CEA and CERC did not believe that the 50% requirement was in the public interest, the Commission should eliminate the mid-term deadline, and accelerate the 100% requirement from March 1, 2006 to late 2005. This would prevent retailers from dramatically reducing the cost of non-DTV sets during the 2005 holiday season in order to unload the soon-to-be-obsolete equipment. It was also suggested that the Commission move up the deadline by which ***all*** television sets must have DTV tuners.

Things didn't go as CEA and CERC presumably hoped. *Au contraire*.

The Commission refused to eliminate the 50% deadline of July 1, 2005, and advanced the 100% deadline for 25"-36" television sets from July 1, 2006, to March 1, 2006. In addition, it issued a further request for comment on whether the deadline for all television sets with screen sizes 13" or larger should be moved forward from July 1, 2007, to no later than December 31, 2006. At the same time, there is movement in both houses of Congress to advance the July 1, 2007 deadline as well.

The Commission advanced the 100% deadline for 25"-36" television sets from July 1, 2006, to March 1, 2006.

It is likely that this matter will be resolved not by the Commission, but rather in one of the bills currently being considered in Congress dealing with the DTV Transition. At this point, though, there are multiple indications that the white flag has come down and we are now in the last lap of the DTV Transition 500. As the long-running process gathers momentum toward its conclusion, the transition could easily start to resemble a snowball rolling downhill, gathering size and speed as it moves, ultimately crushing obstacles that get in its way. The manner in which the Commission chose to roll over the hopeful expectations of CEA and CERC may be a harbinger of things to come. Of course, we will let you know when there is further information.



FHH - On the Job, On the Go

Harry Martin has stepped down from the Presidency of the Federal Communications Bar Association after holding that office for a year. Meanwhile, **Lee Petro** has been elected to the Board of Trustees of the FCBA Foundation.

In June, **Vince Curtis** and **Frank Jazzo**, along with FCC's **Roy Stewart**, attended the annual convention of the Mississippi Association of Broadcasters in Biloxi.

And in August, **Frank** will toddle on down to Little Rock for the annual convention of the Arkansas Broadcasters Association being held from August 4-6.

Supremes let Third Circuit decision ride

Radio Market Approach Continues To Withstand Challenges

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The FCC is continuing to reject requests to use alternative market definitions in lieu of Arbitron markets (where they exist) and its new, revised contour-overlap methodology (where no Arbitron markets exist). In one recent case involving an FM auction, an entity was the highest bidder on two separate channels at Zapata, Texas. A petitioner argued that, as there was only one radio station currently licensed to Zapata, granting one entity construction permits for two new stations to be licensed at Zapata would result in that entity owning two-thirds of the stations there.

The FCC rejected that argument, pointing out that, since Zapata is not in an Arbitron market, the contour-overlap methodology would apply. Using that methodology, the FCC found that there would be four stations in the "market". Under those circumstances, one entity could own up to two of those stations, so the winning bidder was in compliance with the rules.

These cases indicate that the Commission remains determined to apply the radio multiple ownership standards which it adopted two years ago.

Another recent test of the multiple ownership rules arose in connection with an assignment application filed prior to the effective date of the new radio market definitions. An entity which already owned two AM and three FM stations in Arbitron's Grand Junction, Colorado market wished to acquire an additional FM station in that market. The FCC had "flagged" the application (under its since-abandoned policy of screening assignment applications for potential multiple ownership concerns) and invited the public to comment on the level of concentration in the market.

A petitioner claimed that the acquisition would further consolidate an already highly concentrated market. In response, the FCC observed that the Arbitron-based market definition had since taken effect and quoted its 2003 order adopting the Arbitron market definition: "We believe that, *in virtually all cases*, the rule will protect against excessive concentration levels...." The FCC found that, as there are 21 stations in the Grand Junction Arbitron market, an entity may own up to six stations, with four of those in the same AM or FM service.

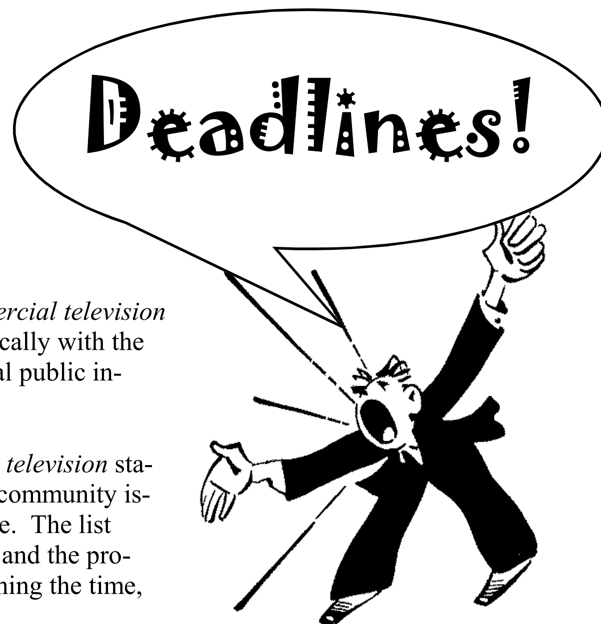
These and other cases (some of which we discussed in last month's *MTC*) indicate that the Commission remains determined to apply the radio multiple ownership standards which it adopted two years ago – and which the U.S. Court of Appeals for the Third Circuit allowed to take effect last September, despite continuing appellate litigation over those standards.

For those of you keeping track, the appellate litigation has pretty much reached the end of the line. In June, the Supreme Court declined to review the Third Circuit's 2004 decision, meaning that that earlier decision stands as is. The FCC did seek rehearing of the Third Circuit's decision in August, 2004, and it appears from the Court's docket that the Commission's petition may still be pending. But the statements of Chairman Martin and Commissioners Adelstein and Copps all indicate that, as far as they are concerned, the whole multiple ownership magilla is back before the Commission for further tweaking to address the shortcomings perceived by the Third Circuit.

While the Commission has yet to take any formal action, a number of observers suspect that Chairman Martin will break the multiple ownership proceeding into separate components (*e.g.*, newspaper-broadcast cross-ownership, radio ownership limits, television ownership limits). Conventional wisdom suggests that the 2003 FCC decision, which wrapped up essentially ***all*** aspects of multiple ownership in one gigantic package, presented too easy a target for opponents to attack. By slicing and dicing the various issues down to a series of more limited, discrete items, the Commission may be able to avoid the degree of opposition encountered in 2003. No matter what approach the FCC takes, however, the final disposition of these issues is still likely years away.

July 1, 2005

Digital Station ID Requirement – All DTV stations must broadcast hourly station identifications consisting of the DTV station's call sign and community of license.



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.

July 27, 2005

Auction No. 62 Seminar – An informational seminar for parties interested in participating in the upcoming auction of FM channel (Auction No. 62) will be held at the FCC's offices at 445 12th St., S.W., Washington, D.C. The seminar is free of charge, and registration is first-come, first-served. Registration forms must be submitted by July 25.

Auction No. 62 Application Window Opens - Short-form applications (FCC Form 175) for FM channels to be auctioned in Auction No. 62 may be submitted beginning at Noon Eastern Time on July 27. All applications must be submitted electronically; the filing window closes at 6:00 p.m. Eastern Time on August 12.

August 1, 2005

Television Renewal Pre-Filing Announcements - *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 - *Radio* stations located in **Alaska**, **American Samoa**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, and **Washington** 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 **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

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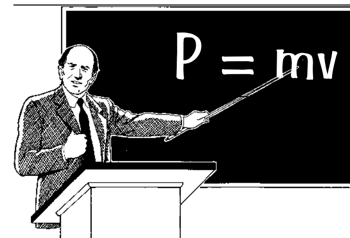
DTV momentum builds

First Round Channel Elections Wrapping Up, DTV ID Taking Effect, Rep/Max Kicking In



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The Commission continues to advance the DTV ball down the field.

In June, it moved toward completion of Round One of the DTV channel election process by approving 25 Negotiated Channel Agreements, rejecting 12, and sending more than 150 letters to stations whose channel elections would, according to FCC analysis, result in impermissible interference. The recipients of those letters have 60 days in which to notify the Commission how the interference conflict will be resolved. It also issued tentative DTV channel designations for 1,554 stations participating in the first round of channel elections. The Commission currently expects to wrap up Round One of the election process this summer, clearing the way for the commencement of Round Two elections in the fall, possibly as early as September. The agency's ultimate goal is to issue a new DTV Table of Allotments by August, 2006.

The FCC expects to wrap up Round One this summer, clearing the way for the commencement of Round Two elections possibly as early as September.

And on July 1, 2005, the DTV station identification requirements take effect. As of that date, DTV stations must comply with the longstanding station ID rules. DTV station IDs must include the station's call letters following by the community or communities specified in the station's license. Stations may insert the frequency, channel number, name of the licensee and/or name of the network between the call letters and community of license. Also, stations which are multicasting may include additional information identifying each program stream.

Meanwhile, use-it-or-lose-it deadlines for replication/maximization of DTV service areas are already upon some and fast approaching others. By July 1, 2005, affiliates of the top-four commercial networks (*i.e.*, ABC, CBS, Fox and NBC) in Markets 1-100 must be up to full facilities – meaning that, where the station is currently operating on its tentative DTV channel designation, the station must construct full authorized facilities; where the tentative DTV channel designation is ***not*** the station's current DTV channel, the station must serve at least 100% of the number of viewers served by the 1997 facility on which their replication coverage was based.

The same use-it-or-lose-it obligations will apply to all other commercial and noncommercial television stations as of July 1, 2006.

The penalty for falling short of the use-it-or-lost-it requirement is loss of interference protection to the portion of the relevant service area which is unused as of the applicable deadline. Moreover, stations falling short of the full buildout requirement will not be able to "carry over" interference protection to its unserved DTV service area on its post-transition channel. While these deadlines may be waived, the Commission has cautioned that waivers will be granted only in "unusual and limited circumstances".

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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.

August 12, 2005

Auction No. 62 Application Window Closes **-** Short-form applications (FCC Form 175) for FM channels to be auctioned in Auction No. 62 must be submitted electronically by 6:00 p.m. Eastern Time on August 12.

(Continued from page 1)

might could accelerate and might be inconsistent with the 307(b) mandate. As a possible means of reducing that possibility, the FCC proposes that community-of-license-change applications be required to include a "detailed exhibit" demonstrating that the proposal would be consistent with Section 307(b).

The Commission also seeks comment on various practical issues which would arise from the shift away from rule makings, and toward applications, for changes in communities of license. These include: how other possible facilities changes should be treated when included with a community-of-license change application; whether such applications must be mutually exclusive with the proponent's already authorized facilities; and whether such an application can include involuntary changes to the facilities of other licensed stations. Also, commenters are asked to address what standards may be necessary or appropriate to assure compliance with Section 307 (b) in the distribution of radio service: for example, should community changes be limited based on the relative number of transmission or reception services in the former and proposed communities, or those communities' respective sizes, or the like?

Perhaps most surprisingly, the Commission also suggests that, if the proposed change were adopted, the Commission might also delete the FM Table of Allotments from its rules altogether. Under this approach, the FCC would continue to maintain the Table, but ***not*** as a formal rule. Rather, it would simply be a list, probably maintained and accessible on the FCC's CDBS internet site.

The reason for this suggested change is a matter of legal niceties. The FCC, as a federal agency, is subject to the Administrative Procedure Act (APA), which sets out the procedures necessary to change an agency's rules. As noted, the FM Table of Allotments is a rule. So when an FM channel's community of license is changed, that rule is changed. And in order to change a rule, the APA requires the agency to jump through certain hoops – which hoops comprise what we know as the rule making process.

If the FCC now contemplates that the FM Table may be changed without resort to that process, it's got to figure out how to do that consistently with the APA. And the staff suggests that the way to do that is simply to define the problem away by taking the Table out of the rules.

Requiring Construction Permit Application and Filing Fee When Filing Petition for New Channels – In addition, the Commission is seeking comment on whether to require petitioners for new allotments to file, along with their allotment proposals, a construction permit application and filing fee (currently $2,980 for FM stations). According to the Commission, over the past eight years, 27.9 percent of all petitions for new allotments to the FM Table were filed by eight petitioners. The Commission also noted that 62 of the allotments that were auctioned in November, 2004, were filed by these eight parties and, despite their expressions of interest (in their various petitions for rulemaking), none of these parties participated in the auction.

One obvious conclusion that could be drawn from these statistics is that a number of parties who propose new allotments – and who, in so doing, claim that they intend to file applications for those allotments – may not really have a good faith intention of doing so. By requiring that allotment change proponents pony up a filing fee of several thousand dollars when they file their proposed changes, the FCC believes that it may be able to discourage the tire kickers and looky-loos while still leaving the door open for legitimate, good faith proponents.

By requiring that allotment change proponents pony up a filing fee of several thousand dollars when they file their proposed changes, the FCC believes that it may be able to discourage the tire kickers and looky-loos .

Therefore, the Commission is seeking comment on the imposition of a requirement that a filing fee and construction permit application be submitted with the petition for rulemaking. Because such a requirement would impose greater burdens on proponents, the FCC specifically asks whether such a requirement would have a preclusive effect on minorities and women. It is also seeking comment on whether there are other ways of addressing the perceived problems.

Limiting The Number of Allotments In A Petition – The Commission is seeking comment on a proposal to limit the number of allotments that could be set forth in a petition to amend the table of allotments to five channels. Currently, the Commission's only restriction is that a proposal to change the FM Table cannot include more than two involuntary changes to existing licensees' channels. But there is no limit on *voluntary* changes which may be proposed, and it is not unusual for some ingenious (and motivated) proponents to offer up elaborate proposals involving ten or more channels. The current proposal would prevent such filings, which often prove controversial and time-consuming to process.

Relocation of Sole Local Transmission Service – Mindful of its Section 307(b) obligations, the Commission is also seeking comment on how best to prevent wholesale migration of rural stations to more urban communities through city-of-license change proposals. Of particular concern are applications proposing to relocate channels to urban communities which have no other local transmission service, especially if

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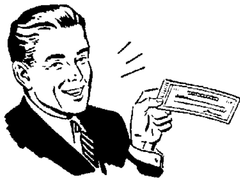

Nextel gets its wallet out

2 Gig Auxiliaries' Exit Ramps Up

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A number of broadcasters have been receiving calls from Nextel with offers to move some of their auxiliary services. Specifically, remote pick-ups, transmitter links and relays operating in certain portions of the 2 GHz band are being moved as part of a spectrum shuffle by Nextel. Through an arrangement struck with the FCC, Nextel is responsible for taking care of the relocation. Accordingly, Nextel is calling affected broadcasters, proposing terms and conditions for moving their frequencies and adjusting equipment. Many of the negotiations are subject to non-disclosure agreements in an effort to keep broadcasters from ganging up on Nextel.

The 2 GHz band is near current mobile phone operations of other nationwide providers. A small portion of the 2 GHz band (1990-2025 MHz) has been a large problem interference-wise over the past several years. Under a previous FCC reshuffling, broadcasters had to move their auxiliary operations to make room for satellite services in the same frequency. The FCC had previously adopted a relocation plan in order to try to clear broadcasters from this spectrum, but that earlier relocation effort proved to be sporadic and slow.

Sensing an opportunity, Nextel swooped into the 2 GHz fray and offered to pay for all of the clearing, a cost the FCC admits could run as high as half a billion dollars. But there being no such thing as a free lunch, there was, of course, a catch: Nextel demanded that, in exchange for removing all of the current licensees, Nextel be licensed on part of the frequency that it is clearing. After some deliberations, a bargain was struck: the FCC will license 5 MHz of spectrum at 1990-1995 MHz to Nextel in exchange for Nextel clearing all broadcasters out of the 1990-2025 MHz spectrum.

So now the FCC has given Nextel two and a half years to move all of the broadcasters out of this 2 GHz spectrum. Even though Nextel seeks to use only a sliver of frequency, it must complete the relocation of ***all*** broadcasters from 1990 MHz to 2025 MHz. The relocation will occur

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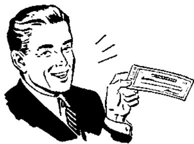
the channels would be taken from communities with no other local service. Historically, the FCC has tended to accept "first local service" as a substantial justification for such moves, even when the target community is very close to (if not a part of) an urban area. But relaxation of the allotment procedures might exacerbate the shift of channels to such urban areas – a phenomenon the Commission wishes to keep its finger on.

First Broadcasting proposed that Commission adopt processing guidelines that would permit the removal of a community's sole local transmission service if: (1) two or more other stations provide 70 dBu service to that community; (2) the station-to-be-moved would serve its new community with its first local transmission service; (3) the station-to-be-moved would provide service to greater population; and (4) the proposed service would not cause any short spacing.

The Commission is seeking comment on these proposed guidelines, and whether there are other factors that should be considered when considering such reallotments. For example, First Broadcasting did not address whether the availability, to the proposed community of license, of reception service from other stations not licensed to that community should also be considered. Such a policy would likely act as a brake on the migration from rural-to-urban areas since a target urban community would likely receive more aural services than the to-be-abandoned rural community.

Freeze on New Petitions and Settlement Window – To permit the full consideration of the proposals in the rulemaking proceeding, the Commission has imposed a freeze on the filing of new petitions for rulemakings. In addition, to clear the backlog of 285 pending rulemaking proceedings, the Commission has opened up a limited window for the settlement of rulemaking proceedings that have already commenced. In these proceedings, the Commission has waived the cap on settlements – that is, parties can seek the dismissal of their petitions or counterproposals in exchange for more than their reasonable expenses. This waiver is limited to universal settlements, *i.e.*, settlements which resolve an entire proceeding. The settlement window will close on September 19, 2005.

Comments and replies in the rule making proceeding will be due 60 and 90 days, respectively, after the rulemaking petition is published in the Federal Register. We will let you know when that occurs.



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in two phases over the two and a half year period. Nextel will be allowed to choose which broadcasters are to be moved in each phase. The first stage, which Nextel has begun in earnest, requires Nextel to relocate broadcasters in markets where Nextel knows that it will be operating. The next stage will involve the remaining markets, in which Nextel may or may not plan to operate. Regardless of its own plans, though, Nextel must relocate ***all*** other broadcasters currently using this spectrum in the 2 GHz band.

The entire relocation project is to be completed before the end of 2007, although Nextel now indicates it may be able to complete the effort sooner.

Clients who are approached by Nextel can seek the assistance of counsel in dealing with the transition. The cost of such assistance may be reimbursed by Nextel as part of the relocation negotiation. Many negotiations are already occurring and Nextel has the efficiency of scale. However, so long as a broadcaster is negotiating in good faith, Nextel must address all proposals which the broadcaster might make.

(Continued from page 2)

ing some of the same syndicated programming, you may want to review the facts regarding the viewership levels of the proposed imported station. If you can document that the imported station's viewership levels in your market were below the SV levels for two consecutive years, you may want to consider filing a petition with the FCC seeking a waiver of the rule allowing importation of the distant station.

If you discover that a satellite carrier wishes to import ***your*** station's signal into a distant market, it is important to remember that the carrier cannot do so without your consent. In that case, the carrier will still need to negotiate and sign a retransmission consent agreement with your station.

A satellite carrier cannot import your signal into a distant market without your consent.

Reciprocal "Good Faith" Bargaining Obligations

Until recently, Section 325 of the Communications Act and the FCC's rules imposed on broadcasters, but ***not*** on cable and satellite operators, the obligation to negotiate in "good faith" during retransmission consent negotiations. In SHVERA Congress mandated that that "good faith" bargaining obligation be reciprocal, *i.e.,* that it must apply equally to stations ***and*** to satellite/cable operators. Following that direction, the FCC has recently issued an Order incorporating that reciprocal obligation into its rules.

While both stations and operators must negotiate in good faith, it is ***not*** a violation of that obligation if one party chooses ***not*** to enter into a contract, as long as that party has complied with the FCC's "good faith" rules and principles. The FCC has created a two-part test for "good faith" negotiations.

The first part consists of a list of ***prohibited*** actions:

- Refusal by a Negotiating Entity to negotiate retransmission consent;
- Refusal by a Negotiating Entity to designate a representative with authority to make binding representations on retransmission consent;
- Refusal by a Negotiating Entity to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations;
- Refusal by a Negotiating Entity to put forth more than a single, unilateral proposal;
- Failure of a Negotiating Entity to respond to a retransmission consent proposal of the other party, including the reasons for the rejection of any such proposal;
- Execution by a Negotiating Entity of an agreement with any party, a term or condition of which requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcast station or multichannel video programming distributor; or
- Refusal by a Negotiating Entity to execute a written retransmission consent agreement that sets forth the full understanding of the television broadcast station and the multichannel video programming distributor.

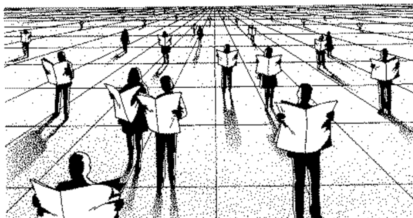
The second part of the test allows the FCC to review the totality of the facts surrounding a situation to evaluate whether a violation of the good faith requirement has occurred.

If you have any questions about these "good faith" requirements, or other satellite carriage issues, please contact us.

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

Updates on the News

Auction Action Last month it was LPTV and AM auctions. This month it's **FM**s. The FCC has scheduled Auction No. 62 to sell off 172 mint condition FM channels. For a list of the channels up for bids, as well as a recap of the procedures, deadlines, minimum upfront payments, etc. which will apply, go to http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-05-1598A1.pdf. Heads up, though – the window for filing short-form Form 175 applications opens on July 27 (at noon) and closes at 6:00 p.m. Eastern Time on August 12, 2005. Upfront payments are due by 6:00 p.m. Eastern Time September 30. The auction itself starts on November 1.



IBOC is back If you have any thoughts about the digital audio broadcasting standard known as "In-band/On-channel Digital Radio Broadcasting Standard NRSC-5" (NRSC-5), now is your chance to pass those thoughts along to the FCC. NRSC-5 was approved by an NRSC subcommittee in April, and the following month the NAB and Consumer Electronics Association shipped it over to the FCC for consideration in the IBOC docket (MM Docket No. 99-325). The Commission has in turned invited comments on the standard. The deadline for comments is July 18; for reply comments, August 17. For your own copy of NRSC-5 (to help you tell it apart from, say, NRSC-1 through NRSC-4), go to: http://www.nrscstandards.org/Standards/NRSC-5/NRSC-5.pdf.

You are now a member of the Ad Police Commissioner Adelstein apparently views payola in its various forms – classic pay-for-play, uncredited video news releases, product placements, etc. – as a hangin', or at least a hard-time-jailin', offense. In the last month or so he has applauded the issuance of an FCC Fact Sheet that provides "critical information about '*What the Payola Rules Say*' and '*What You Can Do if You Think the Rules Have Been Violated*'". He has reminded one and all that there are "major penalties involved that can include up to a year in jail." And he has "enlist[ed] everyone who watches or listens to the media in the effort to catch violations of our payola rules." It is unclear whether badges and decoder rings will be provided. No bounties have yet been announced.

CATV multiple ownership invited Comments on the Commission's 30% cable subscriber (horizontal) ownership limit and 40% channel occupancy (vertical) limit are due by August 8. Reply comments can be filed until September 9. Read all about it at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-96A1.pdf.

EEO audits redux In June the Commission issued the second set of EEO audit letters to randomly selected broadcast stations and MVPD operators. The Commission promises that more letters will be mailed out throughout the year.

Look who's back Who says that there are no second acts in American lives, or that you can't go home again? (Actually, that would be F. Scott Fitzgerald and Thomas Wolfe, respectively.) Don't try to tell that to Michael "Mike" Rice, who lost a number of broadcast licenses several years ago after he was convicted of 12 (count 'em, 12) felony counts involving sexual assault on kids 16 and under, including four counts of forcible sodomy of kids under 14. These delicts were duly reported to the FCC, but in a way which the Commission found to be misrepresentative. Because of the "egregious" nature of Rice's misconduct and his company's misrepresentations to the Commission, all his licenses got yanked in 1998.

You might think that Mr. R. would find another line of work. But lo and behold, who should appear at the FCC's doorstep in June, proposing to buy an Alabama AM station? That's right, a supposedly converted Rice. According to his application, Mr. Rice – who is described there, without apparent irony, as "a broadcaster's broadcaster" – "used to suffer from mental illnesses [but] [n]ow he is well". That, of course, is a relief. But what of the language which the FCC thought had been misrepresentative? Well, that was the fault of his communications lawyers, he says. Rice is arguing that he has been rehabilitated, and that he should be let back into the broadcast licensee fold. It will be interesting to see how the FCC reacts to this application.

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.