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

Memorandum to Clients

July, 2005 | *News and Analysis of Recent Events in the Field of Communications* | No. 05-07

FCC moves toward setting the TV table

Counting Down to DTV Transition: Where Things Stand

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Over the past few months, there have been several notable developments in the DTV Transition. Not only is the FCC working hard to resolve conflicts created by the first round of channel elections, but it has modified the tuner requirements for DTV television sets (as reported last month), and is standing by to move forward on the future channel election rounds. At the same time, Congress is holding hearings which could lead to legislation that will establish the deadline for return of the analog spectrum (*i.e.*, the End Of NTSC Television As We Know It), and the possible creation of a subsidy program for those who cannot afford to purchase a DTV television set prior to the analog cut-off date. Heady times indeed. Below is a breakdown of recent events.

After August 8, 2005, the Commission will release an updated table of the first round elections and establish a deadline for filing elections in the second round.

The Scoop Inside

DTV AT THE FCC

Channel Elections - In June 2005, the Commission sent out 155 letters (Conflict Letters) to licensees who had, in filing their first round election forms, selected future DTV operation on their in-core (Channels 2-51) analog channel, rather than on their previously-assigned digital television channel. A number of reasons underlay opting for an NTSC channel, rather than the assigned digital channel: for example, the DTV channel assignment might have been outside of the core, or use of the NTSC channel might entail reduced operating costs.

The Conflict Letters identify impermissible interference which use of the elected NTSC channel would cause to another previously-allotted channel. Licensees receiving a Conflict Letter have until August 8, 2005, to file an FCC Form 383 – Conflict Resolution Form, advising the Commission how the conflict will be resolved. There are three options.

First, the electing licensee could decide to stick with its first round election. In that case, the electing licensee would be required either to resolve the conflict through an interference agreement or to make technical modifications to its own facilities to eliminate the conflict.

Second, the electing licensee could choose to abandon its first round election, and utilize instead its in-core DTV channel, if possible.

Third, the electing licensee could simply throw in its cards and ask to be dealt a new hand. That is, it would abandon its first round election and opt to participate in the second round of elections (currently expected to commence in September 2005). As one can imagine, the third option is extremely risky, since the universe of channels available in

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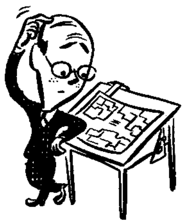

Staff won't stray from Arbitron/BIA

Waiver of Radio Market Definition Denied, Again

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The FCC has rejected yet another radio station buyer's request to use a market definition different from the one used by Arbitron and designated by BIA. In this case, an assignment application to acquire an FM station in Elizabethtown, North Carolina, had been filed, but not granted, before the new rules based on Arbitron markets went into effect on September 3, 2004. Once the new rules were effective, the FCC required the application to be amended either: (a) to demonstrate compliance with the new rules, or (b) to include a request that the new rules be waived.

In the Elizabethtown application, the proposed buyer was already maxed out ownership-wise under the new rules, so a demonstration of compliance was not in the tickets. Instead, the buyer sought a waiver. In its waiver request, the buyer relied on the fact that one of the stations which would be attributed to the buyer had been deleted from the market by Arbitron – a fact which would have brought the buyer's total in-market holdings in under the limit . . . EXCEPT for the fact that the deletion of the station from the market occurred a scant two months after the new ownership rules took effect. Unfortunately for the buyer, the new rules provide that changes in an Arbitron market can't be relied upon until those changes have been in place for at least two years.

Still, the buyer struggled on, arguing that the station in question was geographically separated from the Arbitron market, did not place a 70 dBu signal over any of the market and placed a 60 dBu signal over only a small part of the market. The buyer also claimed that the station did not have any reportable audience share in the market.

The FCC dismissed these arguments, stating that geographic location and signal strength don't establish that a station can't compete in a market and observing that: listeners often receive a satisfactory 54 dBu signal in reality (regardless of the station's predicted signal strength); many stations with limited coverage over a market are listed "in the market" by Arbitron; and many stations with zero audience shares are listed by Arbitron as being in a market.

The buyer also attempted to argue that 75% of the station's advertising revenues come from outside the market, but the FCC merely noted that that meant 25% of the revenues come from within the market. The FCC, choosing to see the glass as one-quarter full rather than three-quarters empty, took this to mean that businesses in the market view the station as an alternative to other stations in the market.

The buyer next argued that the station's advertising rates were significantly lower than comparable stations in the market. The FCC also rejected this argument, noting that ad rates are based primarily on audience share, which can reflect programming quality, format choice, or station management. The FCC pointed out that the new rules assume that not all stations compete on the same level and don't distinguish among technically stronger and weaker stations.

In denying the waiver request, the FCC again affirmed that, in adopting the new rules, the Commission "was unequivocal ... that reliance on Arbitron market boundaries and BIA home station designations - a 'more rational market definition' - is the mainstay of a rule that 'in virtually all cases...will protect against excessive concentration levels in local radio markets....'" It further affirmed that it adopted the two-year waiting period

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Focus on FCC Fines

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This month's column covers cases from Connecticut to California where dissatisfied contest winners complained or sued the stations which were running the contests. FCC rules require licensees who conduct contests to "fully and accurately disclose the material terms of the contest". In addition, state laws may also impose restrictions on contests. Readers should be certain to review fully their contest terms and rules with their audience.

I Do Island - A Capstar affiliate in Connecticut invited five female contestants to live in a shopping mall for a week. All five women were brides-to-be and the station promised the winner a wedding package valued at $30,000. Each of the women had only the clothes they wore to the mall, a sleeping bag and one personal item. The women had to live in the center court of the mall (designated the "I Do Island" for the purposes of the contest) and were permitted only to eat wedding cake and to use the restroom at scheduled times. Listeners called the station daily to vote one of the women off the "I Do Island". Eventually there was one hearty winner who was both strong enough to survive seven days on the "island" and disappointed enough to complain to the FCC about her prize.

The station had advertised that the winning bride would be given a package consisting of a bridal gown, bridesmaids' dresses, wedding rings, a reception, other traditional wedding items and a honeymoon trip, with the total package valued at $30,000. The station provided these items to the bride; however, after the bride raised a fuss, the station determined that the prizes were worth only $20,330. The bride objected and the station offered a rehearsal dinner and wedding photographer to increase the value of the package. The FCC decided that the remedial measure of offering to increase the value was too late. Because the original wedding package was advertised at a $30,000 value but was actually only worth $20,330, a violation of FCC contest rules had been committed and the station was fined $4,000.

Readers should not think that the way to avoid this fine is simply not to advertise the value of the package. The station made an attempt to claim that it never disclosed the value of the package. The FCC had evidence otherwise and, more importantly, reminded the station that if it had not disclosed the value, that, too, would be a violation of FCC rules. FCC rules require stations to fully disclose, while the contest is being conducted, the value of prizes and the method used to determine that value.

As a practical matter, when a station plans to provide a distinctive prize and to promote its contest on the basis of that prize, it is prudent for the station to make all necessary arrangements to have that prize in hand *before* the contest starts. In that way the station will know with certainty the nature and value of the prize to be awarded. Note that, once the to-be-awarded prize has been announced by the station and described in contest promotional announcements, the station is obligated to award *that* prize, and not some substitute. If the station does not have the prize actually in hand, but is depending on a third-party supplier to make the prize available, it remains the station's obligation to award the prize even if the third-party supplier fails to come across with the goods through no fault of the station.

100 Grand to the Tenth Caller - Readers may recall that the FCC previously has fined stations for conducting contests such as "Win a Million" when the million turned out to be Italian lira or other less valuable currency than the greenback. In the same vein, the FCC likely would frown on a Kentucky FM station where a night DJ made an impromptu offer to his listeners that the tenth caller will receive 100 Grand. It turned out that the DJ – who is no longer with the station – was referring to a "Nestle's 100 Grand" candy bar. This matter is not yet before the FCC, but the winner of the contest has sued the station in state court. The winner's complaint in court is that she participated in the contest as it was promoted by the station, she won fair and square, so she is entitled to the announced prize for which she thought she was competing, *i.e.*, $100,000. (In a demonstration of self-interested generosity, the station offered her $5,000 to settle the matter; not surprisingly, the winner thinks that that offer was $95,000 short.)

It is worth noting that regardless of the outcome of this case in state court, the FCC could still conduct an investigation of its own and choose to fine the station, if a complaint were to be filed. Indeed, even if the state court rules that the station must pay the winner $100,000, the FCC can fine the station for misleading its listeners in the first place. And even if the station were to prevail in the state court litigation, the FCC could *still* conclude that the licensee violated the contest rules. Of course, any such determination by the FCC would not work to the contestant's benefit, as the FCC would merely fine the station, not require it to pay the contestant. Presumably, that's why the contestant sued the station in

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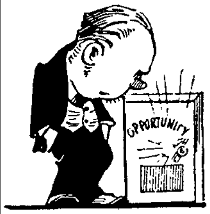
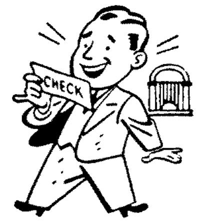


FCC tries to clear the dead wood

Settlement Cap Temporarily Waived In MX Allotment Cases



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As reported in last month's *Memo to Clients*, the Commission has proposed an overhaul of certain aspects of the FM channel allotment process. While change for the future is all well and good, what about the hordes who find their allotment proposals, filed long ago and still pending, mired in the processes of the present?

As the saying goes, money talks and, at least for a while, nobody should walk away empty-handed. Nobody, that is, that falls into a certain class of FM allotment proponents.

> *Money talks and, at least for a while, nobody should walk away empty-handed. So long, chump change – the sky's the limit.*

According to the Commission, there is an appreciable backlog of unresolved and contested FM allocation cases – at last count, 285 and growing. Resolution of that many cases by normal administrative means would take years, and that's without taking into account the delays likely to occur as a result of the possible changes in the allotment processes, changes which themselves are not likely to be in place for a year or more. So to induce folks stuck in the processing line to cut their own deals to move things along, the FCC is allowing a short-term gold rush. As long as all competitors in a contested allocation proceeding agree, any one of them can pay as much as the market will bear to bring everyone else on board through a "universal" settlement. This contrasts with the normal procedures that allow the payment of only such "legitimate and prudent" expenses as legal and engineering fees.

So long, chump change – the sky's the limit.

There are, of course, some modest limits to this governance-by-greed approach. Only those who were already in the allotment pipeline when the FCC announced this gold rush may participate in settlements under the temporarily relaxed rules. The temporary waiver of FCC settlement payment limits extends only to those who have already submitted a formal "expression of interest" in allocation proceedings with comment deadlines on or before June 14, 2005 – the date on which the FCC announced this scheme. And, as noted, any settlement must be "universal". That is, all parties to the contested proceeding must be on board with the settlement.

The Commission is ***not*** allowing "White Knight" settlements, in which an outside party pays off everyone else so it can move into the allocation.

There is, of course, a deadline. To take advantage of the temporary relaxation, a proposed settlement must be on file by Monday, September 19, 2005.

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after a change in Arbitron market listings as a "'safeguard' to help ensure the new rule's integrity."

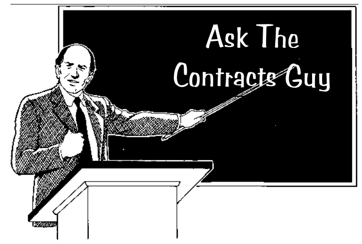
We would all probably be well-advised to get used to the "new" ownership rules. The Audio Division is clearly comfortable with them, as it has already rejected, over the last several months, multiple efforts to inject at least a little wiggle room into them. And don't look for the full Commission to be changing the rules in the near term. As we reported last month, the Supreme Court has declined to weigh in on the rules, which sends the issue back to the Commission so that the FCC can try to bring the rules into compliance with the June, 2004 mandate of the U.S. Court of Appeals for the Third Circuit.

But the Commission is not in any big hurry to address that issue just yet. As you may recall, the run up to the FCC's June, 2003 adoption of the ownership rules was marked by conflict and controversy, with Commissioners Copps and Adelstein, in particular, staking out positions strongly in opposition to the rules which were adopted. The vote then was 3-2, and the 2 (*i.e.*, Copps and Adelstein) are still there, but one of the 3 (*i.e.*, former Chairman Powell) is not. That means that, if the Commission were to vote on the matter again today, the agency would probably be stuck in a 2-2 stalemate. (A recent attempt even just to start the Commission's post-remand consideration of the rules apparently fell apart at the last minute, resulting in the withdrawal of the item from the Commission's agenda.) Because of that, Chairman Martin is presumably not inclined to charge ahead, and would instead prefer to await the arrival of a new fifth Commissioner. But no one knows when that will occur.

In the meantime, the Bureau will be left to apply the new rules as they stand. And, as we have been seeing, that's exactly what the Bureau is doing.

Gone with the Unwind

If the FCC rescinds, tomorrow may not be just another day



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So you just closed the purchase of a broadcast station and you have gone through the upheaval of transition to new management and control of the station. It was a long and expensive effort, from negotiations through to the closing, but now you are looking forward to reaping the harvest of all your efforts.

Then your attorney calls with bad news: The FCC has reconsidered its grant of consent to the transfer of the station's license to you. The result is that the station's license must be given back to the seller. What happens next?

> *It is worth the time and effort to agree beforehand how to handle such situations, rather than to wait until the pressure of the moment to cobble together an ad hoc solution if the FCC rescinds its grant.*

Although uncommon, this unfortunate turn of events can and does occur – in fact, it's happened twice this year. And it's likely to crop up again because of various institutional incentives which make pre-finality closing attractive. Once upon a time, petitioners to deny and (even worse) petitioners for reconsideration roamed the earth, wreaking uncertainty at every turn by filing challenges to applications far and wide. While the Commission never seemed all the enthusiastic about taking points off the board by rescinding grants, applicants could never be too sure. As a result, awaiting finality tended to be the norm.

But in recent years, and certainly since the surge of consolidation began in the mid-1990s, buyers have tended to be willing to charge ahead to closing irrespective of the fact that the ink was still wet on the grant. And that approach can be very attractive if the closing can be scheduled for the day before the subject station's renewal application is to be filed, because then the proud new owner can file the renewal application based only on its tenure as owner – *i.e.*, a day or two at most – and thus does not have to worry about any renewal problems arising from the previous licensee's much longer tenure.

But if you close, and then the FCC rescinds the grant authorizing the closing, logic indicates that the parties will have to unwind the deal.

How do buyers and sellers protect themselves from this problem? The best way to deal with that problem is by avoiding altogether by simply waiting until the FCC's grant has become final and no longer subject to appeal. Under the FCC's rules, for thirty days after public notice of the initial grant of approval for the license transfers, the public can object to the grant. Additionally, the FCC, on its own motion, can decide to reverse its staff for forty days after the public notice of the initial grant. The time when the FCC's ability to reverse the grant has expired is what pointy-headed lawyers refer to as "finality."

There may be, however, economic or other reasons why buyers and sellers can't (or want to) wait for finality. In the former situations, we recommend that the parties enter to an "Unwind Agreement" to cover the possibility of FCC reversal between closing and finality. It is worth the time and effort to agree beforehand how to handle such situations, while the parties are still negotiating other agreements, rather than to wait until the pressure (and disappointment) of the moment to cobble together an ad hoc solution if the FCC rescinds its grant of authority.

Unwind agreements protect both sellers and buyers in transactions that close before finality. On one hand, to protect the seller, a typical unwind agreement contains restrictions on how the buyer may change the station's business during the days between closing and finality. This helps to keep the station in a condition that the seller could reasonably resume operating. Otherwise the seller might find itself trying to take back a station that has been switched from a "death metal" format under the seller, to the buyer's "classic polka" format.

On the other hand, to protect the buyer, an unwind agreement typically contains provisions regarding refund of the purchase price. This could involve escrowing most (if not all) of the monies that changed hands at closing, to ensure that sufficient funds are available for the refund. The escrow needs to be in place for only a short time during the period (usually 30 days or less) between closing and occurrence of finality.

Both seller and buyer are protected by provisions in a typical unwind agreement that allocate responsibility for debts incurred while operating the station. The buyer is usually responsible for costs during the time between closing and its transfer of the station back to the original

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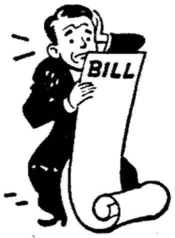

CP fees down, everything else up

2005 Regulatory Fees Adopted

The Commission has released its Report and Order establishing the annual regulatory fees which will be imposed for Fiscal Year 2005. And here's a surprise: the fees which the FCC has adopted are precisely the same as the fees which the Commission proposed earlier this year. We provided an analysis of the proposed fees in the February, 2005 *Memo to Clients.* As we noted then, the majority of broadcast licensee regulatory fees were slated to go up for 2005. And sure enough, they have gone up. The new fees are set out on the next page.

When a licensee which fails to pay the required reg fee is "red lighted", the licensee will not be granted any new authorizations, and any grants issued in the meantime may be rescinded, unless and until the "red light" is cleared either by payment of the outstanding fee or the making of appropriate arrangements with the FCC.

The payment window will run from August 23 to September 7. Additionally, we understand that the Commission sent out postcards to each licensee on July 22 specifying the reg fee(s) due. You should be on the lookout for that card; if you don't receive one, feel free to contact us so that we can track down your reg fee obligation. But remember - reg fees will be due whether or not you receive the postcard, and it is the licensee's responsibility to assure that timely payment is made

As usual, fee payments must be accompanied by a completed FCC Form 159 (Fee Remittance Advice). To fill out that form you will need to know the FCC Registration Number (FRN) of the entity owing the fee, as well as the FRN of the person or entity making the payment (if that person or entity is different from the one which owes the fee). You will also need to know the payment type code for the particular fee you are paying. Fees can be paid on-line again this year. Again, payments not paid on-line or received by Mellon Bank (*i.e.*, the Commission's fee collection representative) by their due date will be assessed a ***25% late payment fee***. We understand from the Commission's staff that on-line payment of reg fees is recommended, as that tends to reduce possible delays, confusion and disappointment from lost or misdirected paperwork. We will, of course, be happy to assist you in the filing of your fee(s).

Payment of reg fees has always been important, but it has become even more so since the implementation of the "red light" system late last year. Under that system, a licensee which fails to pay the required reg fee is "red lighted". When that occurs, the licensee will not be granted any new authorization unless and until the "red light" is cleared either by payment of the outstanding fee or the making of appropriate arrangements with the Commission for such payment. If a delinquent licensee files an application of any kind, that application will be dismissed if the delinquency is not cleared up within 30 days. Even more troubling, applications which are granted when a fee is due but not paid may be ungranted — that is, the grants may be rescinded. And when an application has been dismissed or a grant rescinded under these circumstances, we understand that the FCC's policy is ***not*** to allow those applications to be reinstated with the filing of a petition for reconsideration once the fees have been paid. Rather, the applicant has to submit a whole new application.

In view of the clearly undesirable - and potentially dire - consequences which could befall an applicant late in paying its reg fees, we urge everyone subject to regulatory fees to be sure to pay up in a timely manner.

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seller, and the seller assumes responsibility for costs subsequent to return of the station to it.

Some clients object to paying for another "unnecessary" agreement among an already long list of other documents involved in a radio or television station sale/acquisition -- particularly when the chances are slim to none that an unwind agreement will needed. However, recent experience shows that the circumstances requiring the unwind of a sale may not be as remote as previously thought, and a little extra effort putting an unwind agreement into place before closing can save a whole lot of trouble later if the FCC changes its mind about its grant of a license assignment transaction.

FEE CATEGORY	FY 2005 Annual Regulatory Fee (USD)
TV VHF Commercial	
Markets 1-10	61,975
Markets 11-25	44,675
Markets 26-50	32,025
Markets 51-100	18,800
Remaining Markets	4,625
Construction Permits	3,175
TV UHF Commercial	
Markets 1-10	20,025
Markets 11-25	17,525
Markets 26-50	10,050
Markets 51-100	6,125
Remaining Markets	1,725
Construction Permits	1,725
Low Power TV, TV/FM Translators/ Boosters	395
Other	
Broadcast Auxiliary	10
Earth Stations	205

The deadline for Reg Fees is September 7!!!

Satellite Television Stations	
All Markets	1,075
Construction Permits	535

FY 2005 Schedule of Regulatory Fees for Commercial Radio Stations

Population Served	AM Class A	AM Class B	AM Class C	AM Class D	FM Classes A, B1 & C3	FM Classes B, C, C1 & C2
<=25,000	625	475	375	450	550	725
25,001 -75,000	1,225	925	550	675	1,125	1,250
75,001 -150,000	1,825	1,150	750	1,125	1,550	2,300
150,001- 500,000	2,750	1,950	1,125	1,350	2,375	3,000
500,001 -1,200,000	3,950	2,975	1,875	2,250	3,750	4,400
1,200,001- 3,000,000	6,075	4,575	2,825	3,600	6,100	7,025
>3,000,000	7,275	5,475	3,575	4,500	7,750	9,125
AM Radio Construction Permits	310					
FM Radio Construction Permits	550					

More burdens on the way?

FCC Starts to Draft A New Chapter in the Closed-Captioning Book

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Nearly ten years ago, Congress amended the Communications Act to require that all video programming (with certain limited exceptions) be closed-captioned. While closed captioning had up to then been undertaken on a voluntary basis, without the need for prodding by the legislature, Congress was concerned that the explosion of new channels of video programming might result in new programming sources which might not feel that voluntary spirit. Congress believed it important to require that new programming sources be accessible to persons with hearing disabilities.

The resulting statutory requirements have been phased in gradually in the intervening decade. One of the last benchmarks adopted by the Commission in the implementation of the new requirements arrives on January 1, 2006. That is the deadline by which all new English-language programming must be captioned. In light of this impending deadline, and in response to a Petition for Rulemaking filed by several public interest organizations that focus on accessibility issues, the Commission has recently released a Notice of Proposed Rulemaking to ascertain the status of the implementation of the closed-captioning rules and to determine whether modifications are necessary.

One proposal likely to attract broadcaster opposition would impose a reporting requirement concerning the amount of closed-captioned programming each television station is providing.

Quality Standards – The Commission is seeking comment on whether it should adopt technical and non-technical quality standards. Specifically, the Commission questions whether complaints by parties relating to such issues as accuracy of transcriptions, typos and other errors associated with closed-captioning justify the establishment of minimum standards in those areas. In addition, while broadcasters and cable systems are already required to pass-through closed captioning already in the programs they transmit, the Commission asks whether it should adopt any supplemental rules to ensure that folks who rely on closed-captioning services do not suffer from technical glitches and other disruptions in the service. One partial remedy suggested by the Commission: possibly requiring television stations and cable system operators to actively monitor and maintain the closed-captioning service.

Complaint Procedures – The Commission is also considering shortening the time provided to television stations and cable system operators to respond to complaints regarding to non-emergency closed-captioning. While the Commission itself directly responds to complaints relating to problems associated with the closed-captioning of emergency programming, it requires non-emergency complaints to be directed in the first instance to the television station or cable system seemingly responsible for the problem. And under the current rules, the station/system has more than 45 days in which to contact the program supplier and formulate a response. According to the Commission, since all new English-language programming will have to be captioned as of January 1, 2006, it might no longer be necessary or appropriate to afford that much time to the respondent or, conversely, to deprive the complainant of a "quicker means of recourse". The Commission is also considering adoption of a standardized form for closed-captioning complaints as well as specific forfeiture penalties for violations of the captioning rules.

Compliance Reports – One proposal likely to attract broadcaster opposition would impose a reporting requirement concerning the amount of closed-captioned programming each television station is providing. Of course, one immediate problem would be the method for verifying that the certifications contained in the reports are accurate. Another issue would be whether the filer of the report could rely upon the certifications of the program distributor from which the broadcaster receives its programming. And, as with the imposition of any such reporting requirement, the Commission will have to be satisfied that the public interest in having such information readily available to the FCC outweighs the burden that will be placed on those responsible for amassing and submitting that information.

Electronic Newsroom Techniques – Under the current rules, stations located in the top 25 television stations cannot count towards the closed-captioning requirements the closed-captioning that is fed from a station's teleprompter. The rules require, instead, live closed-

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the second round elections will be limited by the channels doled out in the first round.

After August 8, 2005, the Commission will release an updated table showing all of the first round elections. At that time the FCC will also establish a deadline for filing elections in the second round. The Video Division has established an aggressive timeline, with second round conflicts to be resolved by December 2005, and the third round to commence in February 2006.

The final step will be the release of a proposed DTV Table of Allotments in August 2006, reflecting the elections made in the three rounds. Comments will be requested, and the Commission expects to complete the proceeding by the end of 2006.

Use-It-Or-Lose-It Deadlines – The July 1, 2005, deadline for the four network affiliates in the top 100 markets to complete the construction of their digital facilities came and went with several parties seeking waiver of the deadline. The Commission had established a very tight set of waiver criteria, and it will be interesting to see whether the FCC's staff determines that any of the waiver seekers have satisfied those criteria.

The next construction deadline is July 1, 2006, for all remaining stations. Those licensees that selected their in-core NTSC channel, or a different in-core channel, will be required only to construct a facility that replicates service to 80% of the viewers that were to receive service as predicted in the initial DTV Table released in 1997.

Life on the Hill

While the FCC is concerning itself with the finer points of the DTV Table of Allotments, Congress is knee-deep in negotiations of overarching legislation that will direct the final stages of the DTV transition. One critical obstacle was removed when, in recent hearings, the National Association of Broadcasters agreed to a hard deadline of December 31, 2008 for the return of analog channels. Recent news reports indicate that the legislation will be "marked up" (or finalized) in September, 2006, and will likely be attached to a larger budget reconciliation bill that will help ease its passage through Congress and signature by the President.

While the FCC is concerning itself with the finer points of the DTV Table of Allotments, Congress is knee-deep in negotiations of overarching legislation that will direct the final stages of the DTV transition

Two proposals that might be included with the legislation relate to a DTV set-top box subsidy and carriage of DTV signals on cable and satellite systems. First, several members of Congress have supported a plan by which the federal government will provide vouchers or reduced cost set-top digital converter boxes that will make the accessible to those who can't afford to purchase new DTV television sets. The NAB and the Consumers Electronics Association have gone toe-to-toe over the number of persons that will likely not own a DTV set at the end of 2008, but one can assume that it will be between 13 and 20 million persons. Under the proposed legislation, persons with analog sets that meet certain criteria will be able to obtain a set-top box for approximately $50, and will be able to continue watching "American Idol", the further adventures of Paris Hilton, and the like.

It is also possible that Congress will include language that provides television licensees must-carry rights with respect to cable and satellite carriage of both their digital ***and*** analog signals. This issue will eventually become moot after the final conversion (as noted, current projected date for final conversion: December 31, 2008), at which point there will be no more analog signals, so dual analog-and-digital carriage will no longer be an issue. Still, the next round of cable and satellite must-carry/retransmission consent elections is due on October 1, 2005. Those elections will cover the ensuing three-year period, *i.e.*, to the end of the dual-mode operation period. Legislation mandating dual-carriage must-carry rights during that final interim period could be interpreted as payback to broadcasters for the their acceptance of a mutually agreeable hard deadline for the return of the analog spectrum.

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captioning of news and other live programming. The Commission is seeking comment as to whether this standard should be extended to include ***all*** television markets so that live programming on ***all*** television stations would have to be closed-captioned on a real-time basis. Not surprisingly, parties have objected to this proposal, citing the substantial costs in maintaining additional staff to provide these services, and the very real possibility that that additional burden would discourage television stations and cable systems from providing local programming.

Comments in this proceeding are due 45 days after publication in the Federal Register. Since the text of the NPRM was not released until July 21, 2005, it is likely that comments will not be due until October at the earliest.

Minimum activity/eligibility limits tweaked

FM Auction Fast Approaching

Short-form window closes August 12; Bidding starts November 1

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

The next auction of FM channels is nearly upon us. The window for short-form applications (FCC Form 175) opens at noon on July 27; it closes at 6:00 p. m. eastern time on August 12, 2005. Upfront payments – the FCC's version of an ante – will be due (via wire transfer) by September 30, 2005 at 6:00 p.m. eastern time. And the auction itself is scheduled to start on November 1.

Veterans of last year's FM auction should be familiar with the format, in which the auction is conducted in "rounds". In each round a bidder may bid on any of the channels for which the bidder applied on a Form 175 up to the limit of the total upfront payment submitted by the bidder. (If you are not a veteran of past auctions or would like a quick refresher course on FCC auctions, check out the April and June, 2004 issues of the *Memo to Clients*.)

This time, however, there will be a new twist relative to the bidder activity rule.

In previous broadcast auctions, if a bidder purchased 100 units of eligibility, it was required to use ***all*** 100 units during ***each*** round or else use a waiver. Auction No. 62 is being adapted to resemble more closely a wireless auction in that 100% activity will ***not*** be required in each round.

This change will not affect bidders who intend to compete for only one market and who, therefore, will be submitting only the minimum upfront payment specified for that market. But it ***is*** likely to affect the strategizing for folks who plan to be bidding in multiple markets.
The new activity rule will require 75% activity during Stage One and 95% activity during Stage Two. The change between Stage One and Stage two will take place based upon a mathematical formula that attempts to track when the pace of the auction is slowing down. In other words, the precise point at which the mandatory activity level will shift can't be predicted in advance of the start of the auction, but will be announced by the Commission as the auction is being conducted.

> *For those players intending to take full advantage of the FCC's complex auction system, the latest development will permit them greater flexibility.*

How will this change work, as a practical matter? Let's say that you have submitted an upfront payment entitling you to 100 units of eligibility. During Stage One, only 75% of eligibility will need to be used in each round. Thus, if the West Elbow channel's specified minimum is 50 units and the South Dumptruck's is 25 units, your upfront payment will allow you to bid on both channels in a given round (since 50 + 25 = 75, which is less than the 100 you ponied up), and ***still*** keep the full 100 units. (In previous auctions, you risked losing the 25 points you didn't use.) As a result, if you lose interest in both West Elbow and South Dumptruck, you will still be able to use the full 100 units during the next round for some other channel entirely.

For those players intending to take full advantage of the FCC's complex auction system, this development will permit them greater flexibility.

In another auction-related note, we understand from the Commission's staff that bidders who already hold attributable interests which would preclude them from holding

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Wilkommen, Bienvenue, Welcome

Sima Neela Chowdhury Joins Fletcher Heald as Associate

FHH is pleased to announce the August 1 arrival of **Sima Neela Chowdhury** as our newest associate. Sima is a 1998 graduate of Bryn Mawr College (*cum laude*, thank you very much); she received her J.D. from the New York University School of Law in 2003. She has spent the last two years representing broadcasters in a variety of contexts, including FCC rule makings, buy-sell transactions, and a range of regulatory filings. She is also a romance language polyglot, fluent in Spanish and Italian and proficient in French. We are confident that you will find Sima to be an excellent addition to our team. Sima can be reached at 703-812-0484, or by email at chowdhury@fhhlaw.com.

Late-breaking news!!!!

Payola Moves to the Front Burner

NY Attorney General wrings $10,000,000 out of Sony

In what may be just the first engagement of a long war, the government – in the somewhat unlikely person of Eliot Spitzer, the Attorney General of New York – has attacked the problem of "payola" in its various modern forms. And at the end of Round One, the government is winning: Sony BMG Music Entertainment, the second largest record company in the world, has agreed to pay more than $10 million and, perhaps more importantly, to adopt extensive limitations on its radio-based promotional activities. And there is reason to believe that this is only the beginning.

The case arose from an investigation which Spitzer's office has been conducting into record promotions. Subpoenas had been issued months ago to a number of group radio owners, and there has been speculation that the ax would fall eventually. And fall it did.

In a document titled "Assurance of Discontinuance", Spitzer spent over 25 pages describing a wide range of promotional activities, some seemingly innocuous, some much less so. His bottomline is that virtually all of Sony's activities constituted violations of New York State laws relating to deceptive acts or business practices. Sony did ***not*** admit or deny the charges; but, as noted, Sony did agree to fork over more than $10 million and to adopt significant changes in its promotional practices.

The conduct addressed by Spitzer includes apparently straightforward pay-for-play arrangements, the provision of cash and/or goods (including, for example, plasma televisions) to station personnel, the use of "independent promoters", and other arrangements by which Sony supposedly sought to manipulate and otherwise influence its recordings' apparent popularity.

Among the limitations to which Sony has agreed are restrictions on the nature and amount of "items of value" (including CD's, concert tickets, meals, travel, goods, etc.) which Sony can give to a station or station employees. While those restrictions may be waived in some instances, such waivers must be approved, in advance, in writing, by the "Compliance Officer", a position which is created as part of the settlement with Spitzer.

Presumably the Sony settlement will serve as a template for other settlements which Spitzer's shop may negotiate with other music companies. But that leaves open the question of where broadcasters fit into this tableau. Spitzer's description of Sony's alleged shenanigans certainly suggests that, at least in Spitzer's view, broadcasters are conspirators

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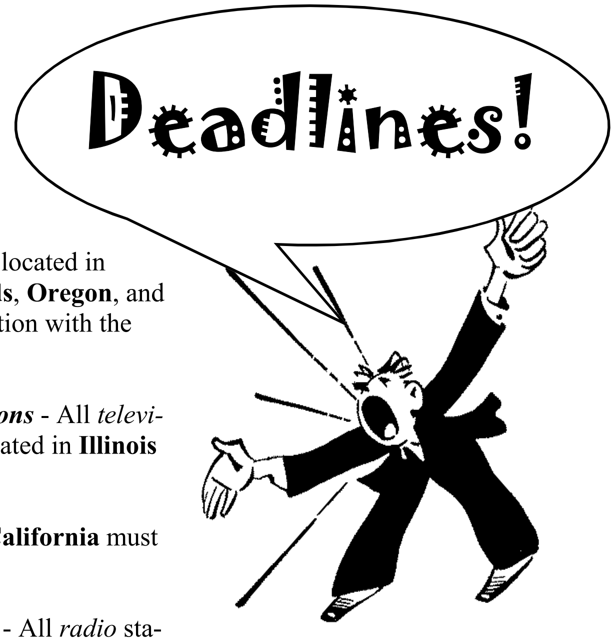
court rather than file a complaint with the Commission.

Win a Trip to the Super Bowl - The CBS TV affiliate in Los Angeles conducted a contest and offered viewers a chance to win a trip for two to the Super Bowl. The trip included airfare, hotel, tickets to the game and transport to and from the game. CBS delivered the winning contestants everything promised in the package, valued at $8,500. After going to the Super Bowl, the winners felt that the value of the package was only $4,000 rather than the $8,500 claimed by CBS. The winners were particularly upset that they had to pay taxes on an $8,500 prize which they thought was worth significantly less. Leaving the tax issues for another federal agency in Washington, the FCC addressed the valuation only for purposes of its contest rules. CBS provided evidence that a marketing agency sold it the Super Bowl package for $8,500. The FCC went to lengths to explain the mark-up value for high profile athletic events, but relied only upon the fact that CBS was out $8,500 for the package, which made the disclosed value accurate. Thus, the FCC rejected the complaint.

FCC Bureau Requires Station to Pay Twice its Fine - Finally, as an illustrative tableau of bureaucracy at work, we share the tale of an FCC paperwork shuffle endured by a tower owner. In January of this year, the FCC inspected a tower in Florida and found problems. In April, the FCC sent the tower owner a notice of apparent liability for $10,000 and advised the owner that if payment was made, it had to be done within 30 days. 70 days later, the FCC sent a forfeiture order to the tower owner demanding full payment and noting that if the payment was not made, the matter could be turned over to the Department of Justice. The only problem with the FCC's latest letter was that the payment had been made on time, 40 days earlier. In order to correct its latest order – likely in response to a frustrated call from the tower owner – the FCC had to generate even more paperwork by issuing a separate order to reverse its mistake. Nevertheless, readers are reminded that the FCC will issue fines to stations that do not keep their paperwork (EAS tests, engineering logs, and public files) completely in line with FCC rules. Note also that this case demonstrates the wisdom of keeping your own files in good order, so that when the FCC's files aren't in such good order, you can correct promptly and convincingly.



August 1, 2005

Television Renewal Pre-Filing Announcements - *Television*, *Class A television*, and *LPTV* stations originating programing 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 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 non-commercial 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.

Television Cable Copyright Claims - Cable Copyright Claim Forms are due to be filed with the U.S. Copyright Office for television stations seeking to claim cable copyright royalties for their programming carried outside of their local service areas.

August 12, 2005

FM Auction No. 62 - Short form applications on FCC Form 175 must be filed by 6:00 p.m. EDT for all those interested in participating in the auction for vacant FM allotments as listed. Applicants may begin filing applications on July 27, 2005, at 12:00 noon EDT.

September 7, 2005

Regulatory fees must be paid.

September 16, 2005

AM Auction No. 84 - Applicants reaching settlements with mutually exclusive applicants must submit the settlement agreements by this date. The Commission's rules provide that applicants in mutually exclusive AM application groups which include either (1) at least one AM major modification application, or (2) at least one noncommercial educational (NCE) application may enter into settlement agreements and/or submit technical amendments to remove mutual exclusivities. In addition, applicants must submit any required supplemental showings with regard

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to proposed communities of license.

September 19, 2005

Settlements of Pending Rule Making Proposals - Universal settlements of pending rule making proceedings which would otherwise require waiver of the caps on payments to reimbursement amounts must be submitted.

September 30, 2005

FM Auction No. 62 - Applicants to participate in the auction must submit a sufficient upfront payment by 6:00 p.m. EDT.

October 1, 2005

Television Renewal Pre-Filing Announcements - *Television*, *Class A television*, and *LPTV* stations originating programing and located in **Colorado**, **Minnesota**, **Montana**, **North Dakota**, and **South Dakota** must begin pre-filing announcements in connection with the license renewal process.

Radio Renewal Pre-Filing Announcements - *Radio* stations located in **Connecticut**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island**, and **Vermont** must begin pre-filing announcements in connection with the license renewal process.

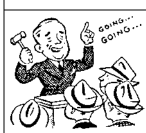
Television/Class A/LPTV/TV Translator Renewal Applications - All *television*, *Class A television*, *LPTV*, and *TV translator* stations located in **Iowa** and **Missouri** must file their license renewal applications.

Radio Renewal Applications - All *radio* stations located in **Alaska**, **American Samoa**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, and **Washington** must file their license renewal applications.

Radio and Television Renewal Post-Filing Announcements - All *radio* stations located in **Alaska**, **American Samoa**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, and **Washington**, and all *television* stations located in **Iowa** and **Missouri** must begin their post-filing announcements in connection with the license renewal process, and continue such announcements on October 1 and 16, November 1 and 16, and December 1 and 16.

EEO Public File Reports - All *radio* and *television* stations with five (5) or more full-time employees located in **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Iowa**, **Mariana Islands**, **Missouri**, **Oregon**, **Puerto Rico**, the **Virgin Islands**, and **Washington** 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 **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, **Puerto Rico**, the **Virgin Islands** and **Washington** must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All *television* stations located in **Alaska**, **American Samoa**, **Guam**, **Hawaii**, **Iowa**, **Mariana Islands**, **Missouri**, **Oregon**, and **Washington** must also file a biennial Ownership Report. All reports filed on FCC Form 323 or 323-E must be filed electronically.



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one of the to-be-auctioned channels may nonetheless still bid for that channel. The only gotcha will arise if a bidder in that position wins the channel in question. In that event, the FCC will ***not*** grant a construction permit for that channel until the successful bidder has divested the other interest(s) which give rise to the multiple ownership problem.

It is not yet clear how such a divestiture requirement will work in actual practice: will the winning bidder have to have fully divested before it files the long-form construction permit application, or will it suffice to include in that long-form application a commitment to divest prior to issuance of the permit. In any event, prospective bidders who are already aware of a potential multiple ownership problem should give serous thought to how that problem might be resolved should the need for such resolution arise.

FM ALLOTMENTS PROPOSED –6/21/05-7/21/05

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
CA	Campo	50 miles E of San Diego, CA	241B1	05-219	Cmts-8/18/05 Reply-9/2/05	1.420(i)
MO	Auxvasse	109 miles W of St. Louis, MO	235A	05-230	Cmts-9/6/05 Reply-9/20/05	Drop-in
MO	Crestwood	13 miles SW of St. Louis, MO	234CO	05-230	Cmnts-9/6/05 Reply-9/20/05	Accommodation reclassification
KS	Kiowa	178 miles NW of Oklahoma City, OK	233A	05-228	Cmts-9/6/05 Reply-9/20/05	Drop-in
TX	Rosebud	96 miles NE of Austin, TX	267A	05-229	Cmts-9/6/05 Reply-9/20/05	Drop-in
TX	Tyler	104 miles E of Dallas, TX	268CO	05-229	Cmts-9/6/05 Reply-9/20/05	Accommodation reclassification

FM ALLOTMENTS ADOPTED –6/21/05-7/21/05

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
AR	Strong	138 miles S of Little Rock, AR	296C3	05-141	TBA
NV	Silver Springs	48 miles NW of Reno, NV	273C	05-76	TBA
OK	Covington	63 miles N of Oklahoma City, OK	290A	05-77	TBA
TX	Spur	169 miles S of Amarillo, TX	260C3	05-87	TBA
VT	Poultney	85 miles NE of Albany, NY	223A	05-78	TBA
AL	Coosada	11 miles N of Montgomery, AL	226A	05-82	TBA
AL	Livingston	115 miles SW of Birmingham, AL	242A	05-83	TBA
AL	Rockford	82 miles SE of Birmingham, AL	286A	05-84	TBA
GA	Americus	147 miles S of Atlanta, GA	295A	04-328	TBA
NC	Cary	12 miles W of Raleigh, NC	230C	04-429	None
VT	Grand Isle	61 miles NW of Montpelier, VT	272C3	05-3	None
NY	Tupper Lake	140 miles N of Albany, NY	271C3	05-3	None
CO	Fruita	255 miles W of Denver, CO	255C3	04-300	TBA
CO	Hotchkiss	236 mils SW of Denver, CO	258C3	04-300	TBA
MS	Guntown	117 miles SE of Memphis, TN	257C3	05-80	None

FM ALLOTMENTS ADOPTED –6/21/05-7/21/05 *(continued)*

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
KY	Corydon	142 miles N of Nashville, TN	237C3	04-420	None
MS	Madison	12 miles N of Jackson, MS	242CO	05-135	None
Fl	Islamorada	80 miles SW of Miami, FL	288C2	05-107	None
FL	Sugarloaf Key	139 miles SW of Miami, FL	289A	05-107	TBA
TX	Jacksonville	126 miles SE of Dallas, TX	236A	05-129	TBA
OK	Tipton	136 miles SW of Oklahoma City, OK	233C3	05-128	TBA
TX	Palacios	108 miles SW of Houston, TX	264A	04-330	TBA
TX	Roby	122 miles SE of Lubbock, TX	249A	05-66	TBA
CA	Lost Hills	144 miles N of Los Angeles, CA	245B1	05-88	None
TX	Knox City	222 miles W of Dallas, TX	291A	01-199	TBA
CO	Gunnison	166 miles W of Colorado Springs, CO	265C2	02-171	TBA
OK	Red Oak	175 miles E of Oklahoma City, OK	227A	02-174	TBA
GA	Tignall	115 miles E of Atlanta, GA	244A	02-288	TBA
SD	Rosebud	106 miles S of Pierre, SD	257C	04-170	TBA
NV	Fernley	34 miles E of Reno, NV	231C3	04-349	TBA
OK	Pittsburg	146 miles SE of Oklahoma City, OK	232A	04-351	TBA
TX	Paducah	117 miles W of Wichita Falls, TX	234C3	04-342	TBA
LA	Colfax	138 miles NW of Baton Rouge, LA	267A	05-117	TBA
TX	Moody	78 miles N of Austin, TX	256A	05-119	TBA

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.