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

Memorandum to Clients

August, 2005 | *News and Analysis of Recent Events in the Field of Communications* | No. 05-08

Payola moves to the FCC's front burner

FCC Begins Payola Investigation

Prodded by NYAG, $10M Sony settlement

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On the heels of the $10 million settlement between the New York Attorney General (NYAG) and Sony BMG Music Entertainment (which we reported in last month's *Memo to Clients*), Chairman Kevin Martin has issued a terse and ominous statement on payola. The Chairman has directed the Enforcement Bureau to review the Sony settlement for evidence disclosing payola rule violations and to commence investigation into such incidents. Additionally, the Bureau is to investigate any evidence presented to it outside of the context of the Sony case. In his words, the Commission will take "swift action" against those found to be in violation. Strong language, indeed – and there is reason to believe that serious problems may be on their way.

The NYAG also focused on other, considerably more benign practices which many experienced observers would not ordinarily have viewed as payola.

To begin with, it's important to understand that the Sony settlement is ***not*** a narrowly-confined matter. *Au contraire*, the settlement meticulously describes the nature of Sony's promotional activity with stations across the nation. Names of stations, key Sony and station personnel, specific dates, and the exact text of incriminating correspondence are all provided in unsparing detail. The Enforcement Bureau will not have to dig too deeply to get its investigation started.

In depicting Sony's "multi-faceted pay-for-play strategy", the settlement materials cover a wide range of activities sure to attract the Bureau's attention. For example, in what would appear to be by-the-book payola, free flights were apparently given to station personnel in exchange for playing songs by Sony label artists Jennifer Lopez, quasi-punk band Good Charlotte, and retro glam-rockers Franz Ferdinand (not to be confused with long-deceased Archduke Franz Ferdinand, who was not on the Sony label, as far as we know).

But the NYAG also focused on other, considerably more benign practices which many experienced observers would not ordinarily have viewed as payola. For example, the NYAG suggested that it was improper for Sony artists to perform live at station events for reduced fees, the implication being that the stations may have tacitly provided some reciprocal airplay commitment in return. This kind of activity might not normally have raised any eyebrows at the FCC, particularly in view of the symbiotic relationship between radio and the music industry. Still, the fact that the NYAG appears to have determined it to be misconduct could open a whole new can of worms for broadcasters at the FCC.

Potentially more disturbing for the broadcast industry is the way in which station management was lambasted in the settlement. While directly condemning Sony's marketing strategies, the Sony settlement also portrays broadcasters as directly complicit in those practices. In one example, a

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Wilkommen, Bienvenu, Welcome

Joe Di Scipio Joins FHH

Joseph M. ("Joe") Di Scipio has joined FHH as Special Counsel. Joe's practice areas include mass media, wireless, and common carrier, with a developing specialty in digital/internet regulation. On the mass media side, he specializes in FCC aspects of complex transactional matters and credit facility placements.

Joe is a 1995 graduate of Syracuse University College of Law. (In September he is being honored with the Distinguished Young Alumni Award from 'Cuse.) He also holds a masters degree in public administration from the Maxwell School of Citizenship at Syracuse, and a B.A. (*magna cum laude*, thank you very much) from the University of Denver. Before law school, Joe was an FCC field agent and, after law school, he served as an attorney in the FCC's Compliance and Information Bureau and the Common Carrier Bureau. He has also worked in private practice for several years after leaving the FCC.

Joe and his family reside in Falls Church, Virginia.

Forgotten (perhaps by some), but not gone

Section 307(b): Still A Major Regulatory Factor

"Fair, efficient, equitable" channel distribution mandated by Congress

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With so much media attention lavished on the FCC's efforts against indecency, payola, and media consolidation, it is easy to forget that one of the core functions (if not *the* core function) of the FCC is to distribute licenses to use the radio spectrum in the public interest. One of Congress' central instructions to the FCC in this regard is found in Section 307(b) of the Communications Act of 1934, as amended. Section 307(b) directs the FCC to provide a "fair, efficient, and equitable" distribution of radio services across the nation.

Even though commercial licenses are now distributed by auction, the FCC continues to actively pursue this "fair, efficient, and equitable" directive, as of course it must (since Section 307(b) is still on the books, providing the Commission its marching orders). Because of that, applicants for new stations, new allocations, and major changes to licensed stations are well advised to focus on how their proposals conform to the FCC's Section 307(b) standards.

In making decisions regarding the distribution of commercial radio broadcast services, the FCC generally relies on a well-established system of priorities. Those priorities are (1) provision of first fulltime aural service (so-called "white area"; (2) provision of second fulltime aural service (so-called "gray area"); (3) provision of first local transmission service to a particular city of license; and (4) other public interest matters. Proposals that advance higher priorities are given preference over those that advance lower priorities, with co-equal weight given to priorities (2) and (3). (Note that at this point the ability to find *any* "white", or even "gray", area is very limited, and even if such areas can be found, they tend to be so remote and desolate as to discourage efforts to bring service to them - there's usually a reason that such areas are still underserved.)

Although priorities (1) through (3) are straightforward, application of priority (4) is often the subject of some debate. In general, the FCC's analysis under catch-all priority (4) focuses on population numbers. Proposals that will provide service to a greater number of people typically will be given priority over proposals that will provide service to fewer people. Some critics, including Commissioners Copps and Adelstein, have complained that this approach to priority (4) results in a default preference for urban areas over rural areas, regardless of the number of stations already serving each community. Despite such complaints, the analysis under priority (4) remains primarily a comparison of population numbers, although growth patterns are also sometimes taken into account.

FM licensees have become accustomed to applying these priorities in the context of petitions to change the FM Table of Allocations. With the recent AM windows, however, AM licensees also need to be familiar with the application of the FCC's Section 307(b) priorities. A proposal's status under these priorities can be crucial to its success.

Mutually exclusive applicants for new AM stations or major changes, for example, may be able to avoid an auction if they can establish that their proposal is entitled to a dispositive Section 307(b) preference over the other mutually exclusive applicants. If one applicant in a group of mutually exclusive applicants, for example, can establish that its proposal will bring the first fulltime aural service to a community and the other applicants cannot, the FCC will find that applicant has a dispositive Section 307(b) prefer-

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Focus on FCC Fines

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Media Bureau Issues Fines

Readers who are familiar with the bureaucratic structure at the FCC are aware that most regulatory decisions affecting broadcasting are handled either by the Media Bureau or by the full Commission itself. When it comes to fining or otherwise punishing broadcasters, the separate Enforcement Bureau at the FCC usually steps up to the plate. However, in two recent decisions involving broadcasters, the Media Bureau took it upon itself to issue fines to broadcasters.

Earlier this year, a Denver television station sought an extension of certain technical requirements for digital broadcasts. The station had not met the February 1, 2005, deadline for digital broadcast licensees to implement the ATSC A/65B Program System and Information Protocol (PSIP) standard. After the deadline passed, the station sought an extension of time to comply with the deadline. The Media Bureau granted the station an additional ninety days, but it also fined the station $3,000 for missing the deadline in the first place. As it turned out, the licensee of the Denver station also happens to own more than a dozen other stations, all of which were in the same boat PSIP-wise. In each case, the licensee submitted a request for extension of the deadline, and in each case the FCC granted the extension but only after adding a $3,000 dinger for each station. Total cost in fines: $45,000.

The Media Bureau also decided a case involving a disputed transfer of control and threw in a few fines to boot. An application to transfer control of a Wyoming television station was filed with the FCC several years ago. The transfer was opposed by a competitor and the Media Bureau looked into the matter. Eventually, the FCC approved the transfer of control but noticed a few things along the way. Although the application for transfer of control made reference to a stock purchase agreement and options, any talk of such an agreement and options was news to the FCC – despite the fact that the rules require that such documents be filed with the Commission. Failure to report the agreement to, or file a copy with, the FCC cost the station $6,000. The FCC then tacked on an additional $10,000 fine for the station's failure to put the same documents in the station's local public file (since, if the documents had been filed with the Commission as required, they would also have had to be placed in the public file). Note that the FCC made clear that there was nothing wrong with the stock purchase agreements and options themselves – the only problem was that they weren't properly reported and filed. Total price tag for coming up short paperwork-wise: $16,000.

New York Attorney General Issues Fines

Emmis Communications agreed to pay nearly a quarter million dollars in fines and make significant contributions to domestic violence prevention programs in response to an investigation by the State of New York. The New York Attorney General and the State Athletic Commission looked into the "Smackfest" contests being operated by Emmis's New York City station. The contests featured young women taking turns smacking one another for prizes ranging from tickets to cash. The contests were aired on the radio and video of the contests was made available on the station's website. Under the New York State combative sports statute, the contests should have been regulated by the State Athletic Commission. The underlying commentary from both the Attorney General and the State Athletic Commission was that the contest merely promoted violence. Emmis will now be airing anti-violence messages and promoting domestic violence programs for several months.

FCC Enforcement Bureau Continues to Issue Fines

Even with competition from the Media Bureau and the State of New York, the FCC's Enforcement Bureau continued to issue fines as usual.

Newsrooms: Use Visuals – Readers may recall our June column, in which we reported about a $16,000 fine meted out to Washington, D.C. television stations for failing to make emergency information available to the hearing impaired. And you may also recall our March column, reporting on San Diego TV stations hit with $25,000 fines for failing to make emergency information available regarding wildfires similarly available to the hearing impaired. This month's column involves Florida stations making the same mistake with respect to emergency information regarding hurricanes. Two Fort Myers-Naples stations were each hit with $24,000 fines for failing to make certain announcements available to the hearing impaired. The FCC reviewed days and days of videotapes from the emergency reporting and found three apparent violations.

In one instance, a station announcer reported, aurally, that a

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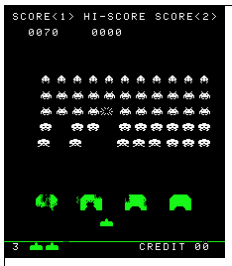

They Came From Outer Space, I

Coming Soon To A Satellite Service Near You: Distant "Significantly Viewed" Signals

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As we previously reported, following Congress's direction in the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA), the FCC has declared that satellite carriers may carry otherwise distant signals that are "significantly viewed" in specified communities. Pursuant to SHVERA and the Commission's February, 2005 Notice of Proposed Rulemaking (*NPRM*), satellite companies must give all in-market stations least at 60 days' prior written notice before importing significantly viewed distant stations. Both DirecTV and Echostar have begun sending such notices in several markets. (Some new SHVERA-related rules concerning local-into-local notification and carriage elections in certain markets became effective on August 15.)

Although many of these notice letters appear to be simply "reserving the right" to carry significantly viewed stations without actually committing to do so, many in-market stations are wondering what, if anything, they can do to block the importation of signals that would violate their network nonduplication and syndicated exclusivity rights.

In the *NPRM* the Commission proposed to extend to satellite the same exclusivity rules, exceptions and procedures currently applied to cable (exclusivity rules do not currently apply to satellite's carriage of network stations, only to carriage of superstations). The *NPRM* also republished the list of stations determined to be significantly viewed, which had not been officially republished since 1972 (the SV List). If and when the FCC's proposed rules are adopted and put into effect, the rights and remedies of in-market stations with respect to imported significantly viewed stations will be roughly the same for both cable and satellite.

In the cable context, television stations that are designated as "significantly viewed" have a limited exemption from the application of the FCC's network nonduplication and syndicated exclusivity rules. Cable companies may carry the signal of out-of-market significantly viewed stations in the communities in which they are "significantly viewed" without deleting the network or syndicated programming of such stations, even if those communities are within the protected geographic zone of the in-market network affiliate or program rights holder.

The FCC has long held that once a station is placed on the SV List it cannot be removed from the list, even if that station subsequently falls below the viewership thresholds required to obtain significantly viewed status. Stations facing incursion(s) into the exclusivity rights which they have been enjoying for some time, however, are not without options. Such stations may be able to file a petition for a waiver of the significantly viewed exception to the exclusivity rules. If such a petition is granted, the significantly viewed station will remain on the SV List but it will become subject to blackout under the exclusivity rules, just as if it did not have significantly viewed status.

A station seeking a waiver of the significantly viewed status of another station must demonstrate to the FCC that the significantly viewed station has fallen below the threshold viewership standards over at least a two-year period.

A station seeking a waiver of the significantly viewed status of another station must demonstrate to the FCC that the significantly viewed station has fallen below the threshold viewership standards over at least a two-year period. For network stations, the threshold viewership standard is at least a three percent share of total viewing hours and a net weekly circulation of 25 percent in "non-cable" households. For independent stations, the test is a share of at least two percent viewing hours and a net weekly circulation of at least five percent. For the purposes of this test, only ABC, CBS and NBC are considered "networks," all others (including affiliates of Fox, the WB and UPN) are considered "independent".

Although the showing required for a waiver petition is, at least in theory, relatively straightforward, assembling the data necessary actually to make the showing can be a time-consuming and expensive process. A station seeking a waiver may ***not*** simply submit the ratings books for the prior two years, even if these books demonstrate that the significant viewed station had no ratings at all in the market in question. Rather, to make the required showing, parties must submit surveys conducted by an independent professional organization (*e.g.*, Nielsen). The surveys must include the results of two weekly periods

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They Came From Outer Space, II

Space Invaders' Local Battlezone

Super Breakout leading to possible Tempest?

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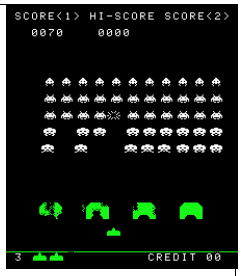

A proposal by XM, the satellite-delivered radio operator, to acquire terrestrial Wireless Communications Service (WCS) frequencies has traditional radio broadcasters up in arms. XM is one of two companies providing national satellite radio service in the U.S. Traditional radio broadcasters have fought XM for several years to try to stop XM from adding localized terrestrial radio service to its national satellite radio service.

Initially, XM sought to construct terrestrial repeaters for its national satellite signal. Traditional radio broadcasters strongly opposed granting XM authorization for terrestrial repeaters, fearing that XM would use them to offer local programming to its national satellite radio subscribers. Recognizing the harm that an XM local radio service could have on traditional local radio stations, in 2001 the FCC granted XM special temporary authority for the repeaters with the condition that the repeaters be used ***only*** for simultaneous retransmission of XM's national satellite programming.

Now, XM has applied for FCC consent to acquire terrestrial WCS frequencies. The frequencies in question are held by a company which obtained them in an FCC auction of WCS spectrum in 1997 but has not initiated any type of service on them. After the FCC's Wireless Telecommunications Bureau, which oversees WCS frequencies, recently placed XM's application in the Bureau's special fast-track "streamlined" processing system, the National Association of Broadcasters (NAB) petitioned the FCC to deny the application or at least remove the application from "streamlined" processing. The NAB argued that before granting the application the FCC must consider the harm that XM could cause to traditional local radio stations by using the WCS frequencies for a new local radio service.

The FCC established WCS in 1997 as a new innovative service which would not be subject to restrictions on how frequencies could be used. Instead, WCS authorizations would make frequencies available for any type of transmission service by any type of communications provider (including broadcasters).

In its application to acquire the WCS frequencies, XM states merely that grant of the application would allow XM to accelerate development of a system capable of providing a wide range of innovative mobile multimedia subscription services, similar to those under development in other frequency bands by other companies. In its petition, the NAB argues that XM may use the frequencies to provide local radio service and other services which differ from market to market and are sold to subscribers together with XM's national satellite radio service. We'll watch to see how the FCC responds to the NAB's petition.

Satellite radio constitutes a direct competitive threat to traditional radio, a threat which is aggravated by the fact that satellite operators are looking at a potentially national audience, as opposed to the local audiences to which terrestrial radio broadcasters are limited.

In a similar vein, XM recently announced that it will begin broadcasting local emergency alerts in the Washington, DC market. XM will receive from local government officials in a nearby suburb of Washington the same alerts local radio stations receive. XM will broadcast the alerts on the same channel it uses in Washington to broadcast local traffic and weather.

All of this suggests the inexorable advance of technology and the difficult – and possibly futile – effort by some to withstand that advance. The traditional radio broadcast industry has always viewed satellite-delivered radio service with more than a jaundiced eye, and quite properly so. Satellite radio constitutes a direct competitive threat to traditional radio. And it is a threat which is aggravated by the fact that satellite operators are looking at a potentially *national* audience, as opposed to the *local* audiences to which terrestrial radio broadcasters are limited. Since satellite and digital technology make it possible not only to reach a national audience, but also to deliver to that audience scores of different programming choices, it is clear that broadcasters' concerns are justified.

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main thoroughfare was closed and that residents would be unable to leave an island. In another instance, a reporter relayed that a mandatory evacuation had been ordered for a certain county. In the third instance, a newscaster announced that another county had requested residents to stop evacuating and to ride out the storm where they were. In none of these cases was a visual of the announced information provided for the hearing impaired. Each station (the coverage was simulcast by two stations) was fined $8,000 per incident – $48,000 total.

It is tricky to pick sides in this particular area. On the one hand, hearing impaired viewers are obviously entitled to the same emergency information as others. That's certainly what the law says, and from a humanitarian perspective it's hard to argue with it. But on the other hand, broadcast stations trying to operate during emergency conditions may find it hard to dot every "i" and cross every "t" in their efforts to keep a useful flow of information streaming to the public. So it does seem a bit nitpicky for the Commission to carp about three apparently isolated incidents which occurred over days of news coverage. Naturally, in a perfect world there would be no mistakes in even the most difficult of circumstances; but we don't live in a perfect world, and the stations in question were indeed facing extraordinary circumstances and still doing their best to serve the public. The stations all could presumably have avoided any exposure to a fine simply by declining to broadcast ***any*** emergency information, either aurally or visually – but is that a result that the Commission really wants?

In any event, readers are reminded that the FCC recently celebrated the anniversary of the Americans with Disabilities Act, and the agency is intensifying its commitment to enforcing the provision of service to the disabled.

Main Studio is Not the Same as Main Gate – In a unique (at least we suspect it's unique) incident from Missouri, we find that an FM station had claimed that its main studio was the guard house at a nearby gated community. The FCC's rules require a main studio to be equipped with production and transmission facilities capable of originating programming and controlling the station's transmitter. Further, the licensee must maintain a meaningful management and staff presence at the studio. An FCC agent went out to inspect the station in question and went first to the transmitter site. There the agent found the transmitter, all of the equipment needed to transmit, and a sign announcing the location of the main studio. According to the sign, the main studio was located in a nearby guard shack. The FCC agent dutifully approached the guard shack and found no indication of its relationship to the radio station. However, the guard was able to produce the station's public file. The guard also admitted that the transmitter could not be controlled from the guard shack. The FCC agent brought the boom down on the station with an $18,000 fine.

Two Feet, Eleven Inches Saves Station from $13,000 fine – FCC agents inspected a West Virginia AM station recently and determined that the station's tower was neither painted nor properly registered in the FCC database. The FCC advised the station that it would be hit with a $13,000 fine. FCC agents continue to focus extensively on tower violations during their inspections – ensuring compliance with painting, lighting and registration requirements. All towers 200 feet or higher must comply with FCC and FAA regulations relating to painting, lighting and registration. However, the station's tower engineer provided the FCC with an affidavit that the tower was less than 200 feet tall. According to the engineer, the tower was constructed of twenty 10 foot sections. Let's see, 20 times 10 would be 200 feet, right? Well, yes, except that (still according to the engineer) 3.5 inches of each section was inserted into the next section, thereby reducing each section's effective length by that amount, and resulting in an actual tower height of 197 feet and 7 inches. The FCC accepted the engineer's affidavit – although they indicated that they calculated the height at 197 feet and 5 inches, two feet and eleven inches less than the 200 foot threshold. The $13,000 fine was eliminated.

*(**Significant Viewing** - Continued from page 4)*

separated by at least 30 days. The viewing samples must be distributed proportionately among the relevant communities, and not more than one of the surveys may be taken between April and September of each year.

Although stations seeking to be added to the SV list may conduct surveys on a county-by-county basis (just as the original SV List was assembled), stations seeking a waiver of the significantly viewed status of another station must have surveys conducted on a community-by-community basis. This last point can make the data collection process more difficult. Although Nielsen may have community-by-community data available in some markets, it does not routinely collect data on this basis in all markets. If Nielsen does not already have the required community-by-community data in a particular market, there is no alternative to commissioning such surveys on a prospective basis, which, as noted above, must cover a two-year period.

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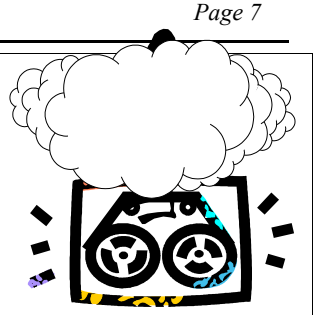
And the FCC will disavow any knowledge of the licenses . . .



BAS Licenses Will Self-Destruct If Licensees Fail to Notify FCC that Construction is Completed

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The Commission plans to implement, in the near future, a new licensing system that will affect many of the recently-licensed broadcast auxiliary licenses. Under that system, auxiliary licenses will be ***automatically terminated*** if a separate notice of completion of construction has not been filed. This system will be instituted in the fall, so early attention to updating the Commission's records is very important.

This new system is merely the latest step in a years-long effort by the Commission to get a better handle on the use of auxiliary broadcast frequencies. Historically, the FCC's files relative to such licenses were, at best, confused and incomplete. Recognizing this, the Commission several years ago adopted new processing rules for broadcast auxiliary facilities. As a result, those facilities are now licensed in the same manner as other wireless licenses. You may recall being called upon by the Commission in the last year or two to review your own records and notify the FCC of the auxiliary facilities you utilize. That was part of the FCC's effort to update its records with respect to ownership of broadcast auxiliary licenses; at the same time new frequency coordination requirements were implemented.

All licensees should check their auxiliary licenses at the same time that they are preparing their regulatory fees to determine if the construction notifications have been filed and properly recorded.

The implementation of the automatic termination procedures is the next step in this process. Specifically, all authorizations for fixed licensed Broadcast Auxiliary facilities, such as Studio-Transmitter Links (STL's) and Intercity Relays, will have a limited six-month construction period. This construction date is listed on the license authorizations issued by the FCC. Before the expiration of that six-month period, the licensee must notify the Commission that construction or installation of the facility has been completed.

Approximately 90 days prior to the expiration of the construction period, the Commission will (ideally) send a reminder letter to the licensee. If the construction period expires without the submission of a construction notification, the licensee (again, ideally) will receive a letter from the FCC advising that the authorization has been cancelled, and a public notice will be issued providing an additional 30 days to file a petition for reconsideration of the termination. If a petition for reconsideration is not filed within 60 days of the cancellation, the license's status in the Commission's records will change from active to terminated.

For those licenses that have been issued by the FCC ***since 2002***, similar procedures will be implemented. Licensees in that position should have already received a letter this past spring from the FCC if a construction notification was not filed. Soon, the FCC will send a second reminder to all such affected licensees, informing them of the deadline for submitting construction notifications. If notifications are not submitted by the stated deadline, the Commission will then issue a public notice indicating that the licenses are cancelled. Licensees will then have 30 days to file a petition for reconsideration, or else the cancellation will stick.

We recommend that all licensees check the auxiliary licenses at the same time that they are preparing their regulatory fees to determine if the construction notifications have been filed and properly recorded. If you have any questions regarding this process or would like any help in determining the current regulatory status of your auxiliaries, you should feel free to call on us.

(Significant Viewing - *Continued from page 6)*

As noted above, the FCC has not yet adopted full rules for satellite carriage of significantly viewed signals, although we expect initial rules to be issued in the near future. In the meantime, stations concerned about the importation of significantly viewed stations should consider whether the significantly viewed stations in question continue to meet the viewership tests described above and whether a waiver petition may be warranted. If, on the other hand, a satellite carrier is proposing to carry your signal as significantly viewed, you should bear in mind that they must first have your consent to do so.

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program director of a Greenville, North Carolina station allegedly accepted gifts including airfare, a Playstation and a laptop computer from the Epic Records division of Sony, all of which were disguised as contest prizes to listeners with fabricated names and social security numbers for accounting. Other examples of station programmers happily receiving lavish gifts from Epic and other Sony divisions in exchange for airplay are recounted in the settlement.

Also under the NYAG microscope were the activities of "independent promoters" who serve as go-betweens between the record companies and radio stations. While they may refer to themselves as "independent", the NYAG concluded that many (if not most) such promoters are merely conduits for funneling money from record companies to stations under the guise of amorphous agreements.

So the folks in the Enforcement Bureau should not have too hard a time getting started on their investigation. The real question, though, is just how egregious any bad behavior will need to be before the Enforcement Bureau starts doling out Notices of Apparent Liability. Certainly, there is considerable political pressure on the Commission, since the NYAG has suggested that the FCC has been asleep at the switch with respect to payola enforcement. The FCC may feel that, to establish its regulatory machismo, it will now have to crack a few heads.

In this regard, however, it is interesting to note some obvious differences between the reactions of Chairman Martin and Commissioner Adelstein relative to the Sony settlement. The latter broadly declared that the "payola scandal" as unearthed by the NYAG "may represent the most widespread and flagrant violation of any FCC rules in the history of American broadcasting." Yikes – can Armageddon be far behind?

Martin, by contrast, was considerably more measured. While he rattled his saber, stating that the FCC "will not tolerate non-compliance", he stopped well short of Adelstein's seeming already-guilty-as-charged verdict. Avoiding any rush to judgment, the Chairman merely stated that if the Enforcement Bureau "determines violations of the payola rules have occurred, the Commission will take swift action."

Before everyone hits the panic button, there are some important factors to bear in mind. First, the NYAG was acting pursuant to a provision of New York State business law which prohibits fraudulent practices. The NYAG was ***not*** purporting to interpret or enforce the sponsorship identification provisions of the Communications Act or the FCC's rules (or the related payola policies derived from those provisions). The FCC still has the primary responsibility for interpreting the Act and its own rules, so the fact that the NYAG may have gotten his knickers in a twist about certain promotional practices does not necessarily mean that the FCC will join him.

Second, the mere fact that the NYAG and Commissioner Adelstein may think that payola violations have in fact occurred does not relieve the FCC of the need to comply with its own due process-based procedures. While the Enforcement Bureau's trail may already have been blazed to a significant degree by the NYAG, the Bureau still has a fair amount of work ahead of it.

The fact that the NYAG may have gotten his knickers in a twist about certain promotional practices does not necessarily mean that the FCC will join him . . . but . . .

But on the other hand, the NYAG did turn up a boatload of very credible evidence of highly questionable practices – and if the NYAG continues his efforts, it is reasonable to expect that there's more to come. Further, the Enforcement Bureau has been charged with pursuing its own investigation. So the radio industry can expect some rough water before the storm passes.

With that in mind, radio licensees should probably review not only ***all*** agreements or understandings, written or oral, with record companies and record promoters, but also all internal station materials relating to such matters. Existing station policies relating to "payola" should be reviewed in detail, and station staff should be expressly reminded of those policies. Station procedures for the monitoring of employee compliance with those policies – through, for example, the regular execution of payola affidavits – should be doublechecked.

It would also be prudent for each licensee to undertake a review of all internal correspondence, memos, emails and the like which might be contained in station files concerning record selection and record promotion. Such materials – whose disclosure could be compelled by the FCC in connection with its investigation – could reveal seeming discrepancies between licensee policies, on the one hand, and the way in which the station-record company-promoter relationships work in actual practice. If such discrepancies are to be found, it would be best to identify them and make any necessary corrections to station practices and procedures ***before*** any governmental investigation uncovers them.

And one final observation. The current payola flap is to a

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Last call for 2005

Reminder: Regulatory Fees Are Due By September 7

Pay now or REALLY pay later

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FCC licensees must make their regulatory fee payments beginning on August 23, 2005 and ending on September 7, 2005. A complete list of this year's reg fees appeared in last month's *Memo to Clients*. You can also check on the FCC's website for the amount you may owe – but if you do that, don't forget to check on fees which may be due because of auxiliary licenses you hold. Auxiliary license fees (which tend to be minimal, but are still due nonetheless) are ***not*** included as part of the main broadcast license fee, and must be separately calculated.

There is a ***very*** substantial incentive to pay by the deadline: Payments received after 11:59 p.m. (eastern time) on September 7, 2005 will be assessed a ***25% late penalty fee***. Additionally, a failure to pay the fee could lead to "red light" problems, which could result in the dismissal of applications or even the rescission of grants issued by the staff when you happen to be in a state of delinquency.

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Fees may be paid using the FCC's on-line fee filer system, wire transfer, ACH Debit or by submitting an FCC 159 with a check or credit card information. We understand that at least some members of the Media Bureau's staff have informally indicated that on-line payment is preferable because it is automatic, immediate and subject to fewer possible mix-ups which might cause your payment to be "lost" in the system. By contrast, payment by mail takes considerably longer and gives rise to the risk that the payment may not be received in time, may be physically lost or simply credited to the wrong account.

If you choose to pay by credit card (whether on-line or by mail), the U.S. Treasury has instituted a new credit card payment policy. Credit card transactions cannot exceed $99,999.99 in a single payment in a single day. So if a licensee must make a payment over that amount and desires to do so in one transaction, it is best to pay by check, wire transfer or ACH Debit. Please remember that ACH Debit payment arrangements must be made 14 days in advance of submitting regulatory fees and the FCC advises that these payments should be made by September 6, 2005 in order to avoid delays in processing.

To find out more information on payment amounts and submission of regulatory fees, the FCC provides reasonably useful information at www.fcc.gov/fees/regfees. In addition, you should always feel free to contact us for assistance in the fee filing process.

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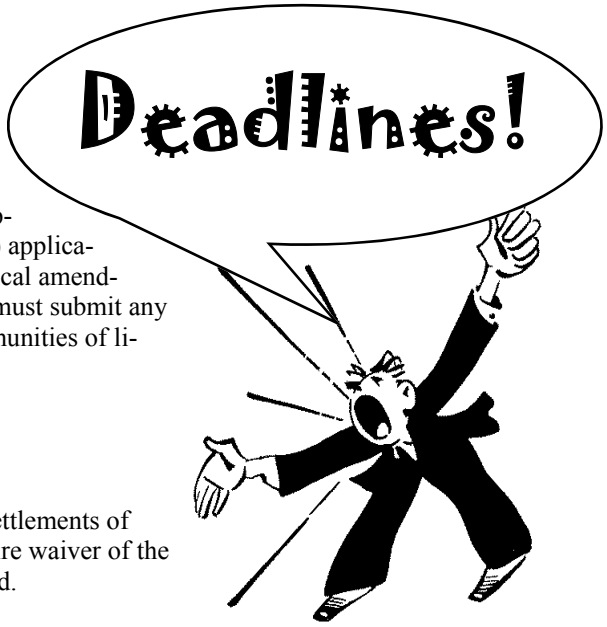
great degree the result of political considerations. The ultimate resolution of such flaps is not always directly related to the nature and extent of any actual wrong-doing that may have occurred. Rather, in such situations the Commission acts – or, more accurately, reacts – in the face of the prevailing political winds, and when those winds die down or shift direction, that which was on the front burner often gets shunted aside for some alternate attention-grabber. It's kind of like giving something shiny to a monkey.

By way of illustration, the last really big noise about enforcement came just 18 months ago, with the hand-wringing over indecency following the Janet Jackson/ Super Bowl incident. At the time it was generally expected that we would see major changes to the Communications Act and to the FCC's rules, not to mention dramatically increased enforcement activity. While a couple of substantial fines were issued and paid (with the licensees receiving extensive get-out-of-indecency-jail-free cards as part of the package, thank you very much), and while the Commission did appear to draw a harder line around the use of some language (a line which was then erased when "Saving Private Ryan" was broadcast on Veterans' Day), by and large the regulatory sea change has yet to materialize on that front.

And now the Commission has been distracted yet again, this time by payola.

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 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.

E/I Logo Requirement – All *television* licensees must identify core children's educational and informational programming with the "E/I" symbol displayed throughout the program.

September 30, 2005

FM Auction No. 62 - Applicants wishing 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

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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.

October 3, 2005

FM Allotment/Community Change Rule Making Proceeding - Comments are due in the rule making proceeding which has proposed to allow changes in communities of license to be made by application rather than rule making and to make other changes in the FM allotment process.

October 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.

(Continued from page 2)

ence and allow it to proceed with its construction permit application without requiring it to bid against the other applicants. If, on the other hand, no Section 307(b) determination is dispositive (or if more than one applicant lays claim to such a preference – say, when there is more than one application for the preferred community), the applicants must proceed to auction.

Even applications that are not mutually exclusive are subject to analysis under Section 307(b). As several "singleton" applicants seeking to change the communities of their AM stations recently discovered, the FCC will require a Section 307(b) showing even in the absence of a competing proposal because such applicants must demonstrate that their proposal is preferable to the existing state of affairs.

Noncommercial educational (NCE) stations are also subject to Section 307(b) review. The FCC has issued over a dozen decisions in the past two months applying 307(b) standards to mutually exclusive applicants for new FM NCE stations.

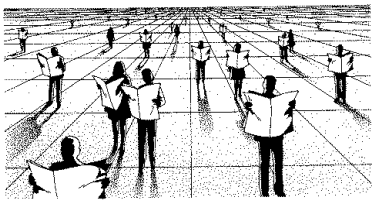
When applicants for new NCE stations are mutually exclusive, the FCC will make a threshold determination of whether grant of any of the applications would further the goals enunciated in Section 307(b). An NCE applicant is eligible to receive a Section 307(b) preference if it would provide a first or second reserved channel NCE aural service (in the aggregate) to at least ten percent of the population (provided that this constitutes at least 2,000 people) within the proposed station's 60 dBu contour. If more than one applicant in a mutually exclusive NCE group qualifies for a preference, the Commission then compares first service population coverage totals. An applicant will receive a dispositive 307(b) preference (sometimes referred to as a "fair distribution preference") by proposing to serve at least 5,000 more potential listeners than the next highest applicant's first service total. If no applicant is entitled to a first service preference, the FCC will consider combined first and second service population totals and apply the same 5,000 listener threshold.

Because Section 307(b) considerations can be central to the success of an application, applicants should make every effort to prepare the most compelling showing possible. Applicants in the upcoming AM Auction No. 84 who have been directed to make Section 307(b) submissions should take care to ensure their submissions include not only all of the information requested by the FCC, but a demonstration of their proposals' status under the Section 307(b) priorities. These submissions are due at the FCC no later than September 16, 2005.

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

Updates on the News

Maybe he knows something we don't - In a recent statement about payola (*see* related story on Page 1), Commissioner Adelstein said, and we quote: "The airwaves belong to the public, not the highest bidder." That high-minded turn of phrase, while eloquent, seems curiously inconsistent with the fact that, for more than a decade, the FCC has been using its auction processes to dole out licenses to (how can we say this delicately?) the highest bidder. And in a statement last month (also related to the payola question), Commissioner Adelstein observed that "[i]t's unfair to listeners if they hear songs on the radio because someone was paid off, not because it's good music." While the truth of that statement can probably not be gainsaid, we are nonetheless curious to know where we might find the definition of "good music" so that we will be able to recognize it easily and thus be spared the difficulty of having to figure it out for ourselves.



Staff re-thinks NCE share-time policy – In the May, 2004 *Memo to Clients*, we reported that the Commission had held that an NCE FM station which had not maintained a daily operating schedule of at least 12 hours per day every day of the year could be forced to share its channel with other NCE outfits. Faced with an incumbent NCE's renewal application and a challenger's competing application, and faced also with the challenger's assertion – not denied by the incumbent – that the incumbent hadn't operated at least 12 hours per day, the Commission designated the two applications for hearing. In so doing, the staff believed that the rules required that the challenger be allowed to share the incumbent's channel. Accordingly, the staff initially granted both applications, and dumped them into hearing for the purpose of allocating the time between the two applicants.

What a difference a year makes. This month the staff announced that it was "modify[ing]" its decision "in light of" a case involving the Seattle Public Schools. The grants of both applications were vacated, and the hearing issues have been revised to include the possibility that the incumbent may not have to share time after all.

While this may permit incumbent NCE licensees to breathe a bit easier, it should be noted that the Seattle case which led the staff to "modify" its 2004 decision was issued in 1986. The July decision does not explain how that earlier case might have been overlooked or misread last year.

Public file obligations by implication – And when the staff isn't re-reading 20-year-old cases, it has been creatively re-reading even older rules. In a recent decision, the FCC's staff granted a renewal application over the objections of a petitioner. Among the gripes raised in the petition was the claim that the renewal applicant hadn't properly maintained its public inspection file. The Commission concluded that the petitioner was correct, but that the public file violation warranted only an admonition. So far, so good.

But then the Commission admonished the licensee that its public file "should be organized so that the public can access and readily locate items in the file." In support, Section 73.3526(c)(2)(iii) was cited. The trouble is, that rule doesn't say anything at all about "organiz[ing]" the file in any particular way for any particular purpose! While it is of course good policy to have the file organized in some way so that items can be found in it, the rules do not appear to mandate what the staff seems to think they mandate. This may get cleared up at some point, but in the meantime, watch out for FCC staffers reading between the regulatory lines.

FHH - On the Job, On the Go

In July, **Frank Montero** participated in MMTC's Access to Capital conference in Washington. Among other activities, Frank joined in a presentation at the Dealmaking Luncheon entitled "Negotiating the Deal". Also last month, Frank attended the Marathon Club's Dealmakers Summit in Washington sponsored by the National Association of Investment Companies.

Meanwhile, **Frank Jazzo** has been named Co-Chair of the Continuing Legal Education Committee of the Federal Communications Bar Association.

The City of Brotherly Love will never be the same. Scheduled to attend the upcoming NAB Radio Show in Philadelphia in September are a raft of FHH folks, including: the two **Franks** (**Jazzo** and **Montero**), **Susan Marshall**, **Kathleen Victory**, **Lee Petro**, **Scott Johnson**, both **Harrys** (**Cole** and **Martin**), **Anne Crump**, **Howard Weiss**, newcomer **Joe Di Scipio**, **Steve ("the Contracts Guy") Lovelady**, **Jeff Gee** and **Jim Riley**. We'll all be staying at the Philadelphia Marriott Downtown.

FM ALLOTMENTS ADOPTED –7/21/05-8/22/05

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
GA	Morgan	128 miles SE of Montgomery, AL	228A	02-109	TBA
LA	New Llano	100 miles S of Shreveport, LA	252C3	04-386	TBA
LA	Leesville	98 miles S of Shreveport, LA	224A	04-386	TBA
MI	Grand Ledge	104 miles NW of Detroit, MI	225A	03-222	None
OH	Georgetown	105 miles SW of Columbus, OH	276A	04-411	None
OH	Mason	85 miles SW of Columbus, OH	249A	04-411	None
KY	Salt Lick	77 miles E of Frankfort, KY	249A	04-411	None
AL	Altheimer	140 miles SW of Memphis, TN	251C3	05-81	TBA
AL	Little Rock	164 miles SW of Memphis, TN	253C0	05-81	None
TX	Big Spring	163 miles NW of Lubbock, TX	265C3	05-137	None
UT	Woodruff	105 miles NE of Salt Lake City, UT	264C	02-294	None
UT	Price	119 miles SE of Salt Lake City, UT	261A	02-294	None
WY	Reliance	188 miles NE of Salt Lake City, UT	254C3	02-294	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.

(XM Looks Local - *Continued from page 5)*

Historically, the one advantage that broadcasters have held onto is that of localism. That is, radio broadcasters are close to their local audiences and are, theoretically, in a far better position to respond to their audience's interests in programming material. XM's past and current efforts to extend its "local" reach seem intended to undercut that advantage. For now XM appears to be looking to do that with the provision of localized weather and traffic information. While it would be a significant leap from such limited fare to a broader offering of locally-oriented programming, it would not be surprising to discover that that goal is somewhere in the satellite operators' playbook.

If nothing else, concern about increased satellite competition should cause traditional radio broadcasters to assess whether their own operations are providing programming – and particularly locally-oriented programming – which the satellite folks are not in a position to provide. Focusing on such programming may in the end be the best way to defend against the space invaders.