

Memorandum to Clients

September, 2005

News and Analysis of Recent Events in the Field of Communications

No. 05-09



In the wake of the storm

FCC Extends, Postpones, Relaxes To Ease Burdens on Broadcasters in Hurricane Zone

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All broadcast licensees (as well as MVPD's and CARS licensees) affected by Hurricane Katrina have been granted special relief authorizing them to operate and restore systems and facilities through expedited processing of requests and applications. In a series of public notices issued in the immediate aftermath of Katrina, the Commission made extraordinarily clear that it is assigning the highest possible priority to assisting licensees in the affected area in order to assure their ability to continue to provide service to the public, regardless of any pesky rules that might have to be temporarily waived (or ignored) in the process.

In the immediate aftermath of Katrina, the FCC made extraordinarily clear that it is assigning the highest possible priority to assisting licensees in the affected area in order to assure their ability to continue to provide service to the public.

Over the Labor Day weekend and the following weekend, Media Bureau staffers were on duty continuously, fielding inquiries and helping in a variety of ways to facilitate the continued operation, or the restoration of operation, of broadcast service to the affected Gulf Coast areas. In addition, the Commission specifically relieved licensees in those areas of a number of immediate burdens.

For example, the deadlines for filing regulatory fees or for television licenses in those areas to make their mandatory carriage/retransmission consent elections were extended (to September

28 and November 15, respectively). Additionally, the rules prohibiting noncommercial educational licensees from broadcasting any commercial matter were suspended (until November 1) for stations in or near New Orleans in order to permit them to rebroadcast programming (including commercial material) from commercial stations.

And permittees located in a "Federal Disaster Area" have been given an extra 90 days in which to complete construction. Permittees outside such areas but nonetheless precluded by the hurricane from completing construction may qualify for a 90-day extension, but they must first demonstrate with particularity how the hurricane delayed their efforts.

In keeping with its solicitous posture, the Commission also announced the relaxation of a number of routine filing requirements in order to ease the burden on broadcasters trying to get back on their feet in Katrina's aftermath. For example, stations which were knocked off the air for more than 10 days would normally have to notify the Commission of that fact by the 10th day. But for the time being,

Hurricane Response Leads to New Deadlines, Temporary Relaxations

As indicated throughout this month's *Memo to Clients*, the FCC has extended a number of deadlines and relaxed a number of regulatory provisions to assist licensees affected by Hurricane Katrina. These include (but are not limited to) extensions of deadlines for some regulatory fee payments and amendments to mutually exclusive AM applications in Auction No. 84, and postponement of FM Auction No. 62. Please feel free to call us if you have any questions about the current status of any deadlines potentially affecting you.

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New adventures in content regulation?

UCC Pushes for More FCC Regulation Of KidVid

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One year ago this month, the Office of Communications of the United Church of Christ, led by former Commissioner Gloria Tristani challenged the license renewal applications of two Washington, DC area television stations on the ground that they had allegedly failed to provide sufficient educational and informational children's programming under the FCC's rules. At that time, Ms. Tristani promised more challenges to future license renewal applications.

Earlier this month, UCC kept that promise, filing renewal challenges against two Cleveland area television stations – including, for the first time, a Spanish-language station.

The UCC petitions to deny allege that both WUAB-TV, an affiliate of UPN, and WQHS-TV, an affiliate of Univision, failed to comply with the Children's Television Act (and the associated FCC rules) because the programs described and relied on by the stations as "core" educational/informational programs were not, in fact, educational or informational. This claim was based in large part on the opinions of UCC members and staff who watched two or three episodes of the programming in question and evaluated them based on criteria provided by UCC. *Sabrina the Animated Series*, which aired on WUAB-TV, was assessed by nine UCC members described as "parents, educators, or grandparents," and one Distinguished Professor of Communications at Cleveland State University. *Complices al Rescate*, aired by WQHS-TV, was reviewed by five UCC members or staff (without any Distinguished Professors).

In general, the FCC has sought to avoid directly regulating the content of broadcast programming (indecent restrictions being a notable exception). Although the Children's Television Act and the associated FCC rules direct broadcasters to serve the educational and informational needs of children, the FCC has left the actual programming choices up to the discretion of individual licensees. Indeed, from the programs which the FCC has previously cited as "educational" (e.g., *Saved by the Bell*), it is an understatement to say that licensees appear to have very broad discretion in selecting programming which might satisfy the obligation to present "educational/information" fare.

The UCC Petitions, however, invite the FCC to substitute its judgment (or that of the UCC's members and experts) for that of the licensees of WUAB-TV and WQHS-TV. If the FCC takes the bait, it will create a deeply troubling environment for all broadcasters. The approach urged by the UCC would place the FCC in the role of evaluating programming content and, more ominously, regulating on the basis of that evaluation. And unlike indecent programming, which can get a station sanctioned because it is "bad" for children, a children's program could get a station sanctioned because it *not good enough* for children. One may justifiably wonder how the FCC will determine how good a program must be to avoid a fine under the children's programming rules.

As the FCC has not acted on the UCC's first two license renewal challenges, it is unlikely that we will see action on the new petitions any time soon. It is also uncertain when the FCC will resolve the many challenges to its new children's programming rules, which, as you may recall, imposed new restrictions on preemptions of children's programming and the inclusion of website addresses in children's programming.

Nevertheless, stations would be well advised to review their own children's program-

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FCC takes aim at Pirate Booty - For those readers who often wonder how radio pirates get their equipment, the FCC has released a treasure map. The FCC fined an electronics retailer \$14,000 for selling unauthorized broadcast transmitters. The FCC found the equipment by looking over the internet. Specifically, the FCC pointed its spyglass at www.hobbytron.com and found a trove of unauthorized equipment for sale.

The Communications Act does allow certain unauthorized equipment to be manufactured and marketed, provided that such equipment is solely for export from the United States. The seller of the transmitters advertised that the equipment was manufactured for export. However, the seller offered to sell the equipment to anyone in the United States as long as the buyer signed a three paragraph release. The release was a promise from the buyer that they would obey "the law of the land" and that they would not hold the seller responsible for any violations. Although inventive, the FCC determined that the release did nothing to protect the seller.

Au contraire, the language in the release convinced the FCC that the seller was aware that the equipment required FCC authorization. Thus, selling the equipment within the United States violated FCC regulations. It should go without saying that equipment that is authorized solely for export should only be sold outside of the U.S. and exported. At the time of this article, www.hobbytron.com still offered the transmitters – with claims that they could reach over six miles – on their website.

Fence violators fess up - FCC agents phoned the contract engineer for a Puerto Rico AM station and advised him that

there would be an inspection of the station later in the day. Eager to help, the engineer told the FCC agent that if they needed to access the tower, there was a gap in the fencing through which the agent could pass. The agent arrived at the tower and found the gap in the fence. However, the agent did not need to use the gap to enter the tower because, according to the agent, the fence gate had been removed and was lying at the side of the road. The FCC fined the station \$5,600.

Focus on FCC Fines

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In a less egregious instance, a Richmond, Virginia, AM operator was fined \$4,200 for failing to lock its fence for four days. An FCC agent inspected the AM station to monitor nighttime power levels. Upon arriving at the transmitter, the agent found that the gate had no lock. The station owner admitted that there was a period of four days when the transmitter was without a lock. However, the station argued that four days was a very brief amount of time and that the fine should be cancelled. The FCC did not accept the claim and issued the \$4,200 fine for the lock lack, along with an additional \$2,400 fine for failing to reduce nighttime power.

Missing Public File Items – A Grand

Apiece - As part of the standard FCC agent inspection of a station, the public file is reviewed. An agent visiting a Maryland FM station found four items missing from the station's public file and issued a \$4,000 fine. According to the inspector, the public file was lacking: (1) a political file; (2) "the Public and Broadcasting" manual; (3) a file of letters and e-mails from the public concerning the station's programming and performance; and (4) a file with quarterly issues/programs list. Readers are reminded that Public files should be kept up to date and contain all of the documents required under FCC regulations.



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...ing to ensure compliance with the children's programming rules. Television stations are required to air at least three hours of programming that qualifies as "core" children's programming per week. To qualify as "core", a program must: (1) have as a "significant purpose" serving the educational and informational needs of children ages 16 and under; (2) be aired between the hours of 7:00 a.m. and 10:00 p.m.; (3) be "regularly scheduled" on a weekly basis; (4) be at least 30 minutes in length; (5) have an educational and informational objective and the target child audience as specified by the licensee in writing in its Children's Television Programming Report (FCC

Form 398); and (6) be identified on air and in program guides as educational or informational.

In addition, as of September 19, 2005, television stations must identify "core" children's programming with the symbol "E/I" on screen *throughout the entire broadcast of a program*, rather than just at the beginning and after breaks. Licensees facing upcoming license renewal applications in particular will need to review their records to ensure that the required Children's Programming Reports have been filed on a quarterly basis, accurately reflect the amount and nature of their station's children's programming, and have been adequately publicized in accordance with the FCC's rules.



For whom the bar tolls

Tolling Agreements: Jump Starts for Stalled Applications?

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Recently, the FCC has proposed “Tolling Agreements” with certain broadcast licensee holders who are trying to transfer their station licenses but cannot because of pending unresolved complaints of FCC rules violations against the stations. For those of you who are unfamiliar with the term “Tolling Agreement” and how it can apply to broadcasters under these circumstances, we offer the following introduction.

The Merriam Webster OnLine Dictionary defines the word “toll” as a verb that means “to sound a bell by pulling the rope.” An alternative meaning given by Merriam Webster is “allure, entice . . . to attract (fish) with scattered bait . . . to attract (domestic animals) to a desired point.”

Black’s Law Dictionary defines “toll” as “to bar, defeat . . . to toll the statute of limitations means to show facts which remove its bar of the action.”

In terms of the FCC’s offered “Tolling Agreement,” the word “toll” has aspects of all of the above definitions: (1) the cash register bell rings; (2) the FCC attracts domestic license holders to a place desired by the FCC; and (3) the statute of limitations – which would otherwise prevent the FCC from fining a license holder after its broadcast license is renewed – is removed.

The issue results from the confluence of two separate regulatory considerations.

First, the FCC cannot impose fines on a licensee for violating any rules if the violation occurred before the last license renewal *unless* the violation occurred less than one year before the last renewal *and* the FCC issues a notice of apparent liability within a year of the violation. So once a broadcast license is renewed, this “statue of limitations” prevents the FCC from fining the license holder for a rule violation incident that occurred more than a year before the renewal. But as long as the license has *not* been renewed, the Commission can reach back and penalize any conduct since the previous license renewal, *i.e.*, a period of at least eight years.

The second consideration which comes into play here is the policy is that the FCC will not grant an application to assign a station’s license until after a pending license renewal application has been granted.

Because of the first consideration, and because the FCC has never been known to push itself into making any decisions it didn’t absolutely have to make, the FCC Media Bureau has been sitting on numerous pending broadcast license renewal application for as long as a year or more, if the renewal applicant is the subject of a rule violation complaint and investigation by the Enforcement Bureau of the FCC. The universe of affected licensee/renewal applicants is not insubstantial, as it includes a number of stations which are the subject of indecency complaints which have not yet been resolved.

For most license holders the delay in getting their licenses renewed is only a mildly irritating circumstance. The license holder knows that something may be wrong (because the FCC is holding up the license renewal application for an extra-long time), but it may not know exactly what the problem is. The wheels of justice grind slowly and eventually the FCC will get around to issuing a notice of apparent liability, and then grant the license renewal, but exactly when that may happen remains a mystery. Not everyone likes a mystery, but the situation is tolerable.

But for a license holder trying to transfer a station license, this delay can be especially frustrating, to say the least. Because of the second consideration mentioned above, the license holder’s application to transfer its station’s license is also delayed until the FCC decides whether to act on the alleged rules violation and grant the pending license renewal application. So a multi-million dollar sale of a station can be delayed indefinitely, while the FCC decides whether to issue a fine that might only amount to several thousands of dollars.

Understandably, licensees in this latter category, trying to complete the sales of their stations, have been trying to

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As the FCC has drafted its proposed Tolling Agreement, a licensee who signs a Tolling Agreement does not receive any contractual assurance that its license renewal will be granted within any particular time frame.



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pressure the FCC to act. Rather than just deciding to fine the stations and get on with it, the FCC's Enforcement Bureau has been offering "Tolling Agreements"

to such license holders.

Under the FCC's proposed form of Tolling Agreement, a current license holder contractually waives, for a period of three years after the grant of a pending license renewal application, the license holder's right to use the statute of limitations as a defense against an alleged FCC rule violation. The licensee also agrees that it will not in the future challenge the FCC's authority to issue a fine due to the fact that the license holder is no longer the holder of the FCC license that it is assigning to another party. Nothing in the proposed Tolling Agreement will be deemed to be an admission of guilt by the license holder for the actual alleged violation.

While it is difficult to know the FCC's precise motivation here, it's a good guess that the agency is reluctant to accelerate its resolution of especially thorny issues, such as "indecentcy", in any particular case. Presumably the Commission does not want to paint itself into a corner in one case and then have to live with that consequence in a long line of other cases waiting to be disposed of. (Of course, one answer to that conundrum would be for the Commission simply to get on with its disposition of *all* such cases in a reasonably timely manner – but that's probably expecting too much.)

Generally, we believe that the Tolling Agreement is a good idea for any license holder who wants to sell its station but whose assignment application is hung up in the FCC's system due to a pending renewal application because of a pos-

sible rule violation complaint and/or investigation. But our support for that approach – at least as far as we have seen it as proposed by the Commission – is not without some reservations.

One problem we have with the proposed Tolling Agreement which the FCC has presented is that the FCC's form does not contain any reciprocal commitment by the FCC to actually grant the pending license renewal application within a particular time period. Since the licensee, in signing onto such a Tolling Agreement, is giving away something (*i.e.*, the right to assert the statute of limitation defense), the licensee can and should expect to get something in return. And what the licensee normally is hoping to get out of the deal is a reasonably quick license renewal, which will in turn allow it to get on with its affairs.

But as the FCC has drafted its proposed Tolling Agreement, a license holder who signs a Tolling Agreement does not receive any contractual assurance that its license renewal will be granted within any particular time frame. The FCC has refused requests to negotiate wording into the form of Tolling Agreement that would address this concern. Basically, the form of Tolling Agreement that the FCC offers is "take-it-or-leave-it." But we have anecdotal evidence that the Media Bureau will act quickly to grant license renewal applications for license holders who sign Tolling Agreements.

In conclusion, if you have been stymied in your efforts to consummate the sale of a station because of a pending license renewal application that is being delayed by an Enforcement Bureau investigation, the new Tolling Agreement being offered by the FCC is worth considering. It might just ring your bell.



FM Auction 62 Postponed to January 12, 2006



With fewer than ten days before upfront funds were due for the forthcoming FM auction, the FCC postponed Auction No. 62, the auction of 171 new FM channels originally scheduled to begin on November 1. The last-minute postponement sent chills up the spines of many interested observers who recalled Auction No. 37, the last time the Commission brought the gavel down on a passel of new FM channels. Auction 37 was originally scheduled for Spring, 2001. At the last minute it, too, was postponed; it was finally held in the Fall, 2004.

This time around, however, the FCC stated that the delay in Auction 62 will last only two months. According to the Commission, January 12, 2006, will mark the start of the auction. The fast-approaching deadline of September 30

– by which date applicants had to adjust any errors in their applications and submit upfront money – has been extended to December 2. Only applicants who submitted applications in August will be allowed to participate in the upcoming auction.

The FCC blamed the delay on the hurricane in the Gulf Coast and the need to allow bidders to better prepare for the auction.

Auction 62 had already begun its preliminary phases. Short-form applications (FCC Form 175) to participate in the auction were filed last month. The FCC plans to release, by mid-November, a list of all applications received by last month's deadline.

September 30, 2005

FM Auction No. 62 – Originally announced deadline for applicants to submit a sufficient upfront payment. This deadline has been extended to December 12, 2005.

October 1, 2005

Television Renewal Pre-Filing Announcements - Television, Class A television, and LPTV stations originating programming 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.

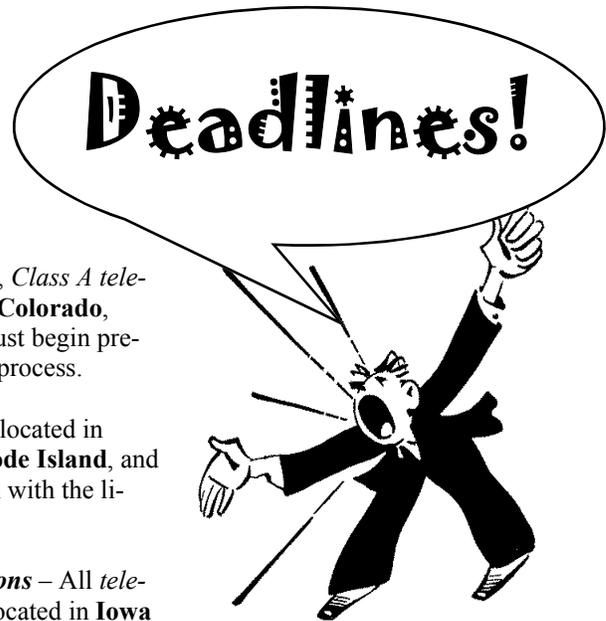
EEO Public File Reports - All radio and television stations with five (5) or more full-time employees located in **Alaska, American Samoa, Florida, Guam, Hawaii, Iowa, Mariana Islands, Missouri, Oregon, Puerto Rico, the Virgin Islands, and Washington** must place EEO Public File Reports in their public 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.

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.

Settlements of Pending Rule Making Proposals - Universal settlements of pending allocation rule making proceedings which would otherwise require waiver of the caps on payments to reimbursement amounts must be submitted. (The previously announced deadline of September 19 has been extended to October 3.)



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Deadlines!

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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.

October 31, 2005

AM Auction No. 84 - Applicants reaching settlements with mutually exclusive applicants must submit the settlement agreements by this extended deadline. 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 Section 307(b) showings with regard to proposed communities of license.

December 1, 2005

DTV Ancillary Services Statements - All *DTV licensees (not permittees)* must file a report on FCC Form 317 stating whether they have offered any ancillary or supplementary services together with its broadcast service during the previous fiscal year. If a station has offered such services, and has charged a fee for them, then it must separately submit a payment equal to five percent of the gross revenues received and an FCC Remittance Advice (Form 159) to the Commission. The report on Form 317 specifically asks for a list of any ancillary services, whether a fee was charged, and the gross amount of revenue derived from those services.

Television Renewal Pre-Filing Announcements - *Television* stations located in **Kansas, Nebraska, and Oklahoma** must begin pre-filing announcements in connection with the license renewal process.

Radio Renewal Pre-Filing Announcements - *Radio* stations located in **New Jersey and New York** 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 **Colorado, Minnesota, Montana, North Dakota, and South Dakota** must file their license renewal applications.

Radio Renewal Applications - All *radio* stations located in **Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont** must file their license renewal applications.

Radio and Television Renewal Post-Filing Announcements - All *radio* stations located in **Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont** and all *television* stations located in **Colorado, Minnesota, Montana, North Dakota, and South Dakota** must begin their post-filing announcements in connection with the license renewal process, and continue such announcements on December 1 and 16, January 1 and 16, and February 1 and 16.

EEO Public File Reports - All *radio and television* stations with more than five (5) full-time employees located in **Alabama, Colorado, Connecticut, Georgia, Maine, Massachusetts, Rhode Island, Minnesota, Montana, New Hampshire, North Dakota, South Dakota, and Vermont** 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 **Alabama, Connecticut, Georgia, Maine, Mas-**

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The job isn't over until the paperwork is done . . .

TV Licensee Fined For Failure to Document EEO Recruitment Efforts

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Honolulu may boast a multicultural diversity second to none, but when Emmis Television did not maintain the proper paper trail demonstrating that it was reaching out broadly in this rainbow-hued community when it needed to fill a number of employment positions, the FCC responded with its first-ever fine under the current EEO Rules.

The Commission's Enforcement Bureau found insufficient documentation detailing the job seekers interviewed and the recruitment sources from which those job seekers learned of the openings. Such information is required in the public inspection file of any station employment unit with five or more full time employees.

As a result, the big kahunas in Washington concluded that Emmis's two Honolulu TV stations "failed to recruit for every full-time vacancy", and failed to present "exigent" circumstances for these failures. They also concluded that, in the absence of the missing data, Emmis was unable to perform the self-evaluation required by the EEO rules.

Emmis's Honolulu records were brought to the surface

when the FCC threw out a dragnet in the form of its recent EEO audits. According to Emmis, the licensee had identified the problems on its own and, *wikiwiki*, had taken corrective action. But it was not quick enough for the FCC, which levied an \$18,000 dollar fine and required Emmis – and anyone who may later buy the stations – to report on EEO compliance by a date certain once a year until November 2007.

This is the first EEO-based fine imposed by the Commission in years, and may be the harbinger of more such fines to come.

This is the first EEO-based fine imposed by the Commission in years, and may be the harbinger of more such fines to come. If you have been complying with the EEO rules diligently, **and** if you have the records to prove it, you should have nothing to fear. But the moral of this story is not to be on

an extended vacation when it comes to EEO record-keeping. Do it by the book, and be sure to keep sufficiently detailed records to permit you to demonstrate – possibly years down the line – that you did what you were supposed to do. The absence of such data will lead the FCC's auditors to conclude that you're not doing the right thing, and they are then likely to make you say *aloha* to some money

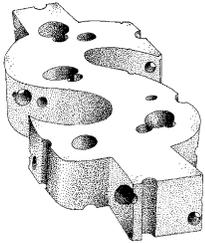
FM ALLOTMENTS ADOPTED –8/22/05-9/22/05

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
TX	Hawley	13 miles N of Abilene, TX	269A	04-408	TBA

Notice Concerning Listings of FM Allotments

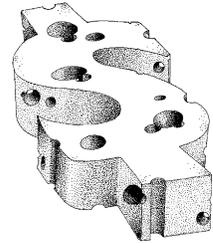
Consistent with our past practice, Fletcher, Heald & Hildreth PLC provides these advisories on a periodic basis to alert clients both to FM channels for which applications may eventually be filed, and also to changes (both proposed and adopted) in the FM Table of Allotments which might present opportunities 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.

Keep those 175's up to date



Post-filing Changes In Media Ownership May Reduce Eligibility for Bidding Credits

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The recently-announced postponement of the next auction of FM channels provides an opportunity for would-be bidders to re-assess their bidding strategies. And those who take advantage of that opportunity should consider a recent FCC decision relating to bidding credits – or, more specifically, the loss of such credits – when the bidder's position vis-à-vis its claims of credits changes after its application.

The Commission's bidding rules provide that applicants with no other media interests are entitled to a 35% bidding credit. That means that a bidder entitled to such a credit needs considerably less (35% less, to be exact) financing available to it in the bidding process. If such a bidder were to prevail with a bid of, say, \$1,000,000 for a permit, by applying the 35% credit it would have to pay only \$650,000. A pretty schweet deal, you'd have to agree.

The purpose of the bidding credits policy is to encourage new entrants into broadcasting by giving them a financial advantage in the auction process.

Bidders who hold one to three media interests are deemed to be entitled to a slightly lesser advantage, in the shape of a 25% bidding credit. The FCC wants to encourage such not-quite-new-but-still-small entrants to try to increase their holdings.

Would-be auction participants are required to disclose their other media holdings – and, therefore, their eligibility for bidding credits – in their short-form application (FCC Form 175) which is filed several months in advance of the auction. But, as the Commission made clear

in its recent decision, the fact that a party's application may seem to reflect entitlement to a credit does not necessarily mean that, when the time comes to pay up, the credit will still be applicable.

In the recent decision, an applicant's Form 175 application showed, accurately, that it had no other media interests. But that was only as of the date the application was filed. As it turned out, shortly after the Form 175 was filed, the applicant closed on its acquisition of another media interest. As a result, the FCC reduced the applicant's bidding credit from 35% to 25%.

The applicant argued, unsuccessfully, that the FCC's auction policies provide that bidding credit eligibility is to be based on media ownership at the time the auction applications were due. The FCC soundly rejected this argument, pointing out that it had previously clarified in other rulings that an auction applicant's bidding credit status is **not** frozen at the time auction applications are filed, and can be lost or reduced after

the filing date if and when attributable media ownership increases.

This should be a reminder to all auction applicants that they are required to amend their applications whenever any of the information in the application changes. This includes ownership information (including non-ownership changes which nonetheless affect attribution of media interests, such as newly-acquired officerships or directorships in entities with attributable interests), but it also includes any other information which is contained in the Form 175.

An auction applicant's bidding credit status is not frozen at the time auction applications are filed, and can be lost or reduced after the filing date if and when attributable media ownership increases



(Continued from page 1)

stations suffering that fate as a result of Katrina do not have to file that notification until the 30th day of non-operation. Similarly, stations ordinarily must request special temporary authority to stay off the air for more than 30 days; now, that deadline has been extended to 60 days for Katrina victims. These temporary extensions are effective until January 1, 2006.

Along the same lines, the Media Bureau has waived the requirement that licensees notify the Commission within 24 hours if they have installed and are using an emergency antenna system; that time-frame has been extended to 10 days (although if the licensee wishes to use such a system beyond the 10 days, it is still technically required to file a request special temporary authority to do so within that initial 10-day period). Note that this waiver extends to January 1, 2006.

The Bureau has also waived the rules to permit AM licensees to operate with their daytime facilities during nighttime hours based on the licensee's good faith determination that such operations are necessary to the safety of life or property or where dangerous conditions of a general nature exist. Licensees wishing to take advantage of this waiver must notify the FCC within 48 hours of the commencement of such operations. (Authority to operate with daytime facilities during nighttime hours may be rescinded upon the licensee's failure to resolve all interference complaints.) This waiver, however, is effective only until November 1, 2005.

Also in light of Katrina, the deadline for universal settlements in FM allotment proceedings was moved from September 19 to October 3, and the long-awaited Auction No. 62, initially scheduled to commence November 1, has been put off until January, 2006.

On the non-broadcast side, the Commission was similarly considerate:

CARS – CARS stations may file for special temporary authority or modifications to existing facilities informally through email communications. Once local frequency coordination has been completed, these operators may commence operations immediately, provided that notification to the FCC is made within 48 hours. Of course, interference protection must be maintained, especially to public safety service providers.

MVPDs – Technical requirements will be waived for 90 days starting August 31, 2005 for Performance Tests and Technical Standards. Certain other provisions of Part 76 of the Rules (specifically leakage limits and system monitoring) will be given expedited processing and temporary rule waivers where the Commission staff deems necessary.

It is possible that the FCC's extraordinary public posturing may also be, at least to some degree, part of an overall effort by the current administration to help overcome the adverse publicity it encountered in the immediate aftermath of Katrina.

It is clear that the Commission is making a tremendous effort to demonstrate its concern about the victims of Katrina. That is a welcome role for the agency, and one which we all should encourage. Of course, it is possible that the Commission's extraordinary public posturing may also be, at least to some degree, part

of an overall effort by the current administration to help overcome the adverse publicity it encountered in the immediate aftermath of Katrina, when the responsible federal agencies appeared to be less than well-organized. Certainly the FCC, with no direct responsibility for post-catastrophe relief or recovery, cannot be held responsible for the shortcomings, real or imagined, of any of its sister agencies. But while it may not have been a part of the problem, the Commission is clearly trying its best to be part of the solution. For that it should be commended, regardless of its motives.



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Massachusetts, New Hampshire, Rhode Island, and Vermont must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All **television** stations located in **Colorado, Connecticut, Maine, Massachusetts, Minnesota, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, and Vermont** must also file a biennial Ownership Report. All reports filed on FCC Form 323 or 323-E must be filed electronically.

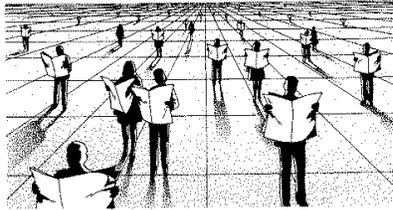
December 2, 2005

FM Auction No. 62 -- Upfront payments due via wire transfer by 6:00 p.m. Eastern Time. (The previously announced deadline for upfront payments has been postponed to December 2, 2005.)

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

Updates on the News

More Katrina fall-out As chronicled elsewhere in this issue, the Commission has made an extraordinary effort to respond to the devastation in the wake of Hurricane Katrina. The commitment of Commission staffers to that effort, at considerable personal sacrifice, cannot and should not be underestimated. But the agency's contributions following Katrina were undermined to some degree by two FCC-released items. First, Chairman Martin and Commissioner Copps issued a joint statement following a trip to the Gulf States Region that got whacked by the storm. In their statement, they saluted the "Herculean efforts" of telecommunications carriers seeking to restore service – but they neglected to mention anything about the local broadcasters who were on the air already, or who were making the same kind of "Herculean efforts" to get back on the air, in order to serve their communities. Such an omission is incomprehensible. All Commissioners (including Martin and Copps) and other senior staffers have since repeatedly lauded the broadcast community – particularly at the recent NAB Radio Show in Philadelphia – for its substantial and on-going contributions. But it does seem at least noteworthy that, in their initial statement, Messrs. Martin and Copps turned a blind eye to the broadcast community.



And speaking of blind eyes, at the same time that just about all the rest of the Commission was bending over backward to cut Gulf Coast broadcasters as much slack as possible to enable them to get back to serving the public, our pals at the Consumer & Governmental Affairs Bureau were thoughtful enough to issue a public notice reminding video programming distributors (a universe which includes all television licensees) of their obligation to make emergency information accessible to persons with hearing and vision disabilities. That's the same obligation that was invoked in August when the FCC fined a couple of Florida TV stations a total of \$48,000. As you may recall, those stations were covering the arrival of Category 4 Hurricane Charley when it rolled ashore into their communities. The Commission reviewed approximately 48 hours of tapes of the stations' coverage *while the storm was hitting town*. And the Commission determined that "in several instances" (which, we understand, amounted to a matter of a minute or two) some of the information the station imparted aurally was not also imparted visually – hence the \$48,000 penalty.

So this month the FCC was kind enough to remind struggling broadcasters that the same fate might await them if, in the course of extended coverage of the pre- and post-hurricane situation, somebody might say something on air that was not also written down and shown visually.

Payola redux As they used to say in the old Westerns, it's quiet out there . . . too quiet. Since Chairman Martin announced the initiation of an investigation of possible payola violations, virtually nothing has come out of the Commission to shed any light on how that investigation might be shaping up. But in an apparent effort to prevent the issue from quietly burning out without further eruption, a Connecticut broadcaster has tossed a considerable amount of gas onto the flames. The broadcaster – Red Wolf Broadcasting – has been facing off against Citadel Broadcasting over a number of issues in the last year or two, most recently over Citadel's alleged involvement in opposition to a Red Wolf translator application. Now Red Wolf has upped the ante somewhat by accusing Citadel of payola violations. To make life easy for the Commission, Red Wolf included a copy of the New York Attorney General's settlement with Sony BMG as an attachment to its complaint. So it's a safe bet that the question of payola will remain a hot spot at the FCC for some time to come.

Longley-Rice on the prairie In case you were wondering, the FCC clarified in August that the Longley-Rice method of calculating predicted coverage can be used to show that a station's signal does not go as far as the FCC's method would otherwise predict. An applicant seeking to buy a TV station in Kansas also had an attributable interest in a newspaper serving a town located within the station's Grade A contour – or, at least, the Grade A contour as predicted by the FCC's method. Not so fast, said the applicant – let's take a closer look at that predicted contour. Using Longley-Rice, the applicant satisfied the Commission that, because the town in question happens to be in a "geological bowl" (who knew there were such things, especially in Kansas?), the station's Grade A signal would not in fact reach receivers there. Result: application granted.

But who's counting? We quote *in toto* the first and last sentences of the FCC's announcement of the recipients of its annual "Excellence in Economic Analysis" awards:

The Federal Communications Commission today announced the names of seven FCC employees who are recipients of the fourth annual FCC "Excellence in Economic Analysis" awards.

* * *

Up to five awards are given annually and all Commission staff are eligible for nomination.