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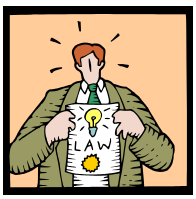
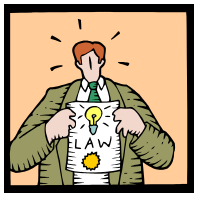
Memorandum to Clients

October, 2005 | *News and Analysis of Recent Events in the Field of Communications* | No. 05-10



Maybe we should just pencil it in for the time being . . .

DTV Transition: Senate Commerce Committee Sets the Date



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Our coverage of the Digital Television Transition continues. This month, while the FCC grappled with the nitty-gritty details (*see* article on page 9), the Senate Commerce Committee addressed the Big Picture when it considered a bill mapping out the last steps of the transition, including timing of the final switch, multicast carriage and budgetary concerns.

At a conference held in early October by the Association of Maximum Service Television, Senator Ted Stevens, Chair of the Commerce Committee, outlined the four goals he hoped would be achieved by the Senate DTV bill to be presented for a late October markup session. Those goals, in no particular order, were: increasing public safety; advancing service to the American consumer; advancing the digital transition; and funding all or various aspects of the whole process.

*The Senate bill sets the hard date for the transition at **April 7, 2009**, and directs the FCC to commence the auction for recovered spectrum on January 28, 2008, but it makes no mention of mandatory multicast carriage.*

Stevens advocated the establishment of a realistic, hard deadline for the transition (in 2009). He noted that such a deadline would provide the necessary incentive to analog operators to expend the time and capital required for the switch, while still reducing the overall amount of government money needed to provide subsidized analog converter boxes to unprepared consumers. Stevens reasoned that by providing more time (*i.e.*, until 2009) before the final conversion date, Congress would be giving a greater number of consumers the opportunity to buy digital sets.

Perhaps more importantly, Stevens indicated that Congress would likely take a bifurcated approach to implementing the transition, with the first bill addressing only timing and financial considerations. A later bill would follow up on issues of mandatory multicasting and the remaining funding.

As Stevens had projected, the draft bill (co-sponsored by Senator Daniel Inouye) started making the rounds in mid-October, and was passed by the Commerce Committee on October 20. It sets the hard date for the transition at ***April 7, 2009***, a date purposely chosen to fall during a Congressional session (and after the NCAA Men's Basketball championships have ended). In voting resoundingly for the 2009 date, the Committee rejected an amendment advance by Senator John McCain that would have set a 2007 deadline for the transition.

The draft bill makes no mention of mandatory multicast carriage. It directs the FCC to commence the auction for recovered spectrum on January 28, 2008 and to place the proceeds of the auction into the Digital Transition and Public Safety Fund, to be overseen by the Department of Com-

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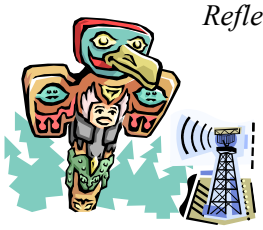
The Scoop Inside



Reflecting reservations, FCC tweaks policy

FCC Limits Non-responding Tribes' Right to Object to New Towers

FCC caps previously open-ended notification procedures

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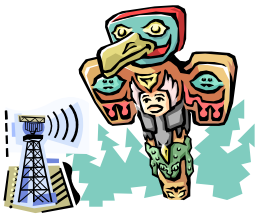

History creates burdens. Ask anyone who's waited . . . and waited . . . and waited for an answer that's never come from tribal or native organizations entitled to review tower site proposals under the National Historic Preservation Act of 1966 (NHPA).

The NHPA requires federal agencies to consider the effects of federal – and federally-licensed – undertakings on historic sites. The FCC's NHPA-compliance process includes consultation with the relevant State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) relative to proposed new construction (including, in particular, new towers) to determine whether the proposed facility may create an adverse effect on an eligible or listed historic property. The goal is to identify and resolve, *before* new towers are authorized to be built, any possible objections to such towers arising from historic preservation concerns.

Achievement of that goal, of course, requires input – or, at least, the opportunity for input – from folks who are knowledgeable about the historic sites. And that, in turn, means that the application process must (a) include steps designed to put such folks on notice of the proposed construction, and (b) give those folks the chance to alert the Commission to potential problems.

As we reported in the January, February and April, 2005 *Memos to Clients*, earlier this year the FCC adopted rules to implement a "Nationwide Programmatic Agreement" (NPA) which is intended to streamline compliance with the NHPA. The NPA is a negotiated settlement hammered out by representatives of the FCC and various historic preservation organizations. It sets up a review process of hoops through which applicants must jump. While that process was intended to be streamlined, it hasn't turned out quite that way.

While the NPA and the FCC's new rules do provide a mechanism by which the broad universe of potentially interested SHPOs and THPOs can be contacted more or less automatically, that system as originally adopted left something to be desired. For example, while the system did provide automatic notification out to the SHPO's, THPO's and the like, it afforded no assurance that the folks who were notified would respond within any particular time frame. In other words, the proposal could be left in indefinite limbo if the historic preservation representatives dragged their feet, intentionally or otherwise.

This was a matter of special concern with respect to native American tribes, who are also on the receiving end of notices. Notice of a proposed tower is generally sent to a significant number of different tribes in order to assure that there is no possible objection. But the more notices that get sent, the greater the possibility that some notice recipients will fail to respond. To prevent such silence from keeping the construction crews from ramping up, the Commission recently announced a new policy for dealing with tribal and native Hawaiian organizations. The new policy imposes something of a deadline by which such groups must respond or risk losing the opportunity to do so.

Now, a new tower proponent must make two good faith efforts to obtain a response from a tribal or native Hawaiian organization. The first try is through the written notification process. If the proponent receives no response in 30 days, it must made a good

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Focus on FCC Fines

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Consumers Turn In Fewer Complaints - The FCC reported that during the second quarter of 2005 it received only 6,429 complaints about broadcasters. This is significantly fewer than the 157,650 complaints received during the first quarter of 2005, and an even greater drop-off from the second quarter of 2004, when a whopping 272,818 complaints were filed against broadcasters.

The FCC does not speculate on why complaints would drop from more than 250,000 in the second quarter of 2004 to a paltry 6,429 in the same quarter this year. However, the decrease paralleled a decrease in complaints with respect to all industries under the FCC's purview, with cable and satellite complaints declining to only 191 during the second quarter of 2005.

While the FCC may not be inclined to speculate, that doesn't stop us. A major difference between 2004 and 2005 can be summed up in a name: Janet Jackson. The seismic shockwave set off by her performance at the 2004 Super Bowl continued to reverberate across the broadcast terrain for months afterward. Where the Commission had received a total of 166,683 broadcast indecency complaints in 2003, in 2004 that number skyrocketed almost ten-fold, to 1,405,419. Yikes. And those numbers are even more impressive when you realize that, in 2002, a mere 13,922 indecency complaints were filed, while in 2001, the number was only 346. So while the numbers have been trending upward for years, we may have hit the high-water mark in 2004 with Ms. Jackson's "mammorable" appearance.

Still, the FCC appears to be doing its best to encourage indecency complaints (*see* related story on page 11). With the lowering of procedural requirements for such complaints and the click-and-send ease with which complaints may now be electronically filed, we should not be surprised if consumers – or, at least, individuals or groups purporting to represent the interests of consumers – continue to lob in indecency complaints.

Of course, in its statistical reports the FCC prominently reminds the public that just because complaints are filed against a broadcasters, this does not mean that the Communications Act or FCC regulations have been violated.

Broadcasters Turn In Themselves - As part of the latest renewal cycle, television broadcasters have been evaluating their own children's programming compliance and reporting the results to the FCC. As they undertake their self-policing, some broadcasters have found that they may not have fully complied with FCC regulations. The appropriate step to take in such an instance is to report the deficiency to the FCC.

A Florida station followed exactly those steps. The station reviewed its public inspection file prior to filing its renewal. It found that a few children's reports from seven years ago were missing from the file. Copies of the reports were located, a few were recreated and all copies were placed in the station's public file. However, because the FCC's renewal application asks licensees if the reports were placed in the public file "at the appropriate time", the station had to check the "No" (or "guilty with an explanation") box on its application. (Had it not reported the violation, the licensee would been engaging in misrepresentation, misconduct with far greater potential adverse consequences.) While the station went to great lengths to update and keep its file current, its lapse from seven years before came back to haunt it during the renewal cycle.

The FCC determined that the station should pay a $10,000 fine for failing to keep its public file up to date. Because of the substantial period of time during which the public file remained incomplete, the Commission determined that the regulatory base fine was appropriate. However, the FCC went on to declare that the $10,000 mistake does not constitute a "serious violation" and renewed the station's license. The latest fine is one of several involving recent renewals in which the FCC has relied on licensees to police their own public files. All licensees should periodically review their public files to ensure that all information is current and complete. If you have any questions concerning the specifics of the Commission's public file rule, let us know.

FCC Agents can Turn In Broadcasters, Too - Don't forget that FCC agents also poke their noses around and can come up with reasons to fine stations. Indeed, a Kansas station faces the same $10,000 fine as the station, described above, that turned itself in. The Kansas station was hit with the fine for public file violations as well. However, in this case the station did not narc on itself; rather, FCC agents conducted an inspection of the station and determined that documents were missing. The G-men did find a public inspection file, but it contained only blank FCC forms even though the completed FCC forms were readily available – and had been recently filed with the FCC – by the licensee. Again, readers are reminded that public inspection files should be readily

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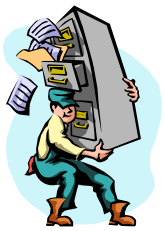
Up to 30 (count 'em, 30) months' worth of data requested

More EEO Audits Underway



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And the beat goes on.

In late September, the FCC sent out EEO audit inquiries to almost 100 randomly selected radio licensees. All of the selected stations are required to respond. Those with fewer than five full-time employees get off relatively lightly – they need provide only a list of their full-time workers (showing titles and numbers of hours worked), and information concerning any employment-related complaints filed against them.

Stations with bigger staffs have a more voluminous showing to make.

Stations which employ five or more full-time employees must provide the Commission the following:

- Copies of the station's two most recent EEO public file reports, and if applicable, the station's website address with verification that the public file report is posted to the website;
- Dated copies of all job announcements communicated to the public (*e.g.*, newspaper ads, website postings). If an organization has requested copies of job vacancies, those specific job announcements must be attached and identified separately;
- The number of interviewees for each job vacancy, plus the referral source if the position has been filled;
- All documentation of recruitment initiatives, the station personnel involved, and whether the station's market has 250,000 or more people, as this will determine if the station is required to perform two or four recruitment initiatives in a two-year period;
- Any and all pending or resolved EEO complaints during the current license term;
- A description of management's EEO enforcement responsibilities and employee and applicant dissemination of this information from March 20, 2003 until September 29, 2005. Additionally, a description of the analyses of the station's recruitment policies to ensure compliance with anti-discriminatory practices, such as compensation, promotions, and testing.

Licensees who have been maintaining proper records should not encounter much difficulty in pulling together the showing required by the audit.

For brokered stations, the above-referenced information must be provided for all of the broker's employees at the station. If the audit request is for a licensee which owns one station and brokers another, then the information must be combined for both.

Licensees who have been maintaining proper records of their hiring efforts over the last couple of years should not encounter much difficulty in pulling together the showing required by the audit. As a practical matter, all licensees with five or more full-time employees should already be keeping such records, since that information is necessary for the preparation of annual EEO reports which must be placed in the station's local public inspection file (and on the station's website, if the station has a website).

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faith effort to contact the non-responsive organizations by phone or email.

If no response is received to that second notification, the tower proponent is supposed to notify the FCC (by email sent to TribalTowerExchange@fcc.gov), at which point the Commission will send a letter or email to the group's "designated cultural resources representative" asking whether the group is interested in participating in the review of the proposed facility; the Commission will also follow-up with a telephone contact within 20 days of sending the mail/email. If the native American organization does not respond to the Commission within that 20-day period, the organization will be deemed to have no interest in the matter and the tower proponent will have fulfilled its notification obligations. Silence, rather than a roadblock, will be deemed a lack of interest in the proceeding.

Clearly, the Commission recognizes that the open-ended system which it initially set up was subject to potentially crippling delays arising from non-responsive organizations. To its credit, the FCC is attempting (perhaps as a concession to the shortness of life) to adjust the system to accommodate the legitimate interests of tower proponents who wish to proceed with construction. Whether the new policy will in fact move things along more quickly remains to be seen.

*When failure **is** an option . . .*

The "Failing Station" Exception: TV Duopoly Made Easy

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Brainteaser of the month: The FCC's rules prohibit common ownership of two televisions in the same DMA with Grade B overlap where less than eight independently-owned and -operated full-power stations would remain once such common ownership was achieved. Now let's assume that you own a TV station in a DMA, and you want to acquire another station in the same DMA, and the two stations' Grade B contours overlap. And let's further assume that, if you were to own both stations, there wouldn't be eight independently-own stations in the market.

Question: Can you own both stations?

Seemingly Obvious Answer: Of course not.

Actual Correct Answer: Sure, as long as you and the other station's seller can show that the station you want to acquire is a "failing station".

Given the roadmap to Loserville that the FCC has kindly sketched out here, it's not that hard to make it look like almost any station is on its last legs.

The Commission is willing to overlook its multiple ownership limitations in situations where the parties demonstrate, in effect, that unless the sale is approved, the "failing station" will not be able to survive and will go dark, and the public will, as a result, be deprived of service.

For these purposes, the FCC defines a failing station as one: (a) which has low all-day audience share (4% or less); (b) which has negative cash flow for the previous three years; (c) where the ownership of the failing station by the successful station's owner will produce public interest benefits outweighing any harm to competition and diversity; and (d) where the proposed in-market buyer is the only reasonably available buyer.

In a decision released in late September, Sinclair Broadcast Group, the owner of KSMO-TV, Kansas City, MO, persuaded the FCC that KSMO was a failing station so that Meredith Corporation, the licensee of KCTV, the CBS affiliate in Kansas City, MO, could own both stations, even though the Kansas City, MO, DMA would be left with fewer than 8 independently owned and operated stations post merger. The showings made in support of the deal provide an excellent roadmap for anyone who might want to run a station into the ground – or at least run it close enough to the ground to be able to sell it to the competitor down the street.

As proof of KSMO's failing status, Sinclair showed that it had all-day audience shares of less that 4% since 2002. This of course meets the first FCC criterion of failure – low all-day audience share. But when you think about it, that target should be easy to hit, since a station that doesn't broadcast any programming that anybody would want to watch can pretty much guarantee low audience numbers.

Sinclair met the second criteria of failure (poor financial condition) by showing that KSMO had negative cash flow for the preceding three years and that revenue had declined steadily over the past five years. Again, these are conditions that an interested licensee can pretty much guarantee: if you stop selling advertisements, revenues naturally decline. Sinclair also provided an analysis of KSMO's financial condition by two "independent" economists which surprisingly found that KSMO has shown steep declines in traditional measures of liquidity over time and in comparison with other Sinclair television stations. We put quotation marks around "independent" here because, presumably, the economists were being paid by Sinclair. We also are constrained to recall the bon mot (attributed variously to Twain, Disraeli and others) about lies, damned lies and statistics.

For its part, Meredith stated that allowing it to own both KSMO and KCTV would result in boatloads of public interest benefits that would outweigh any harm to competition and diversity. As proof, Meredith pledged to invest more than $1 million to restore and upgrade the station, add a 30-minute prime-time local newscast Monday-Friday, and add a weekly 30-minute public affairs program on issues of concern to the community. As if that were not enough, Meredith also promised to add a second weekly 30-minute public affairs program hosted by local high school students and aimed at teens and young adults, increase the hours of "core" children's programming from 3-1/2 hours to 4, increase PSAs by 10 percent, and (here is the kicker) Meredith pledged to attempt to secure the rights to broadcast the Kansas City Chiefs football games. Who could say no to such a veritable cornucopia of public service?

To meet the fourth "failure" criterion, Meredith demon-

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TV channels will be going once, going twice—SOLD!

Auction of TV Channels Scheduled for 2006

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The FCC has become so confident in its ability to auction FM radio permits, it is finally dipping its toes into the waters of TV permit auctions. Both the FCC and the US Treasury have watched the success of the FM auctions conducted over the last several years and appear satisfied that the system is working. While the FCC has dabbled in a few TV permit auctions before, March, 2006, will see the introduction of a full-scale open auction of ten television construction permits.

The FCC is selling two TV permits each in Colorado and Kansas, as well as one permit each in Florida, Minnesota, Mississippi, Missouri, Oregon, Texas and Washington. The minimum opening prices for the permits range from $80,000 to $ 705,000. (*See* the accompanying handy clip-and-save box for a list of all channels on the open block and their associated opening payments.) The procedures for the TV permit auction are the standard methods that the FCC has used for most of its FM auctions. The FCC will likely call for applications for channels in the auction to be submitted by the end of December.

The technical specifications for each of these permits vary. Some of the permits are for regular NTSC stations while others are limited to DTV channels. In addition, the FCC has no remorse in disclosing that nearly a decade ago, other parties identified these frequencies, prepared engineering applications and requested that the permits be issued to them. In the new era of auctions, the frequency will go to the highest bidder who happens by now. (The one exception, an 11th channel on the block, is a Jackson, MS, channel, which is available only to certain applicants who filed for the channel before 1997.)

New Channels on the Block

Location	Channel	Upfront Payment
Greeley, CO	DTV 45	$705,000
Pueblo, CO	NTSC 48	$295,000
Apalachicola, FL	DTV 3	$80,000
Derby, KS	DTV 46	$295,000
Topeka, KS	NTSC 22+	$100,000
Duluth, MN	NTSC 27	$100,000
Osage Beach, MO	NTSC 49+	$295,000
Bend, OR	NTSC 51	$80,000
Victoria, TX	NTSC 31	$80,000
Medical Lake, WA	DTV 51	$420,000

Clients who would like further information about the auction, the permits being auctioned and the FCC procedures should contact the attorney at our firm with whom they regularly work.

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available for inspection and, equally as important, should be kept up-to-date with all necessary information.

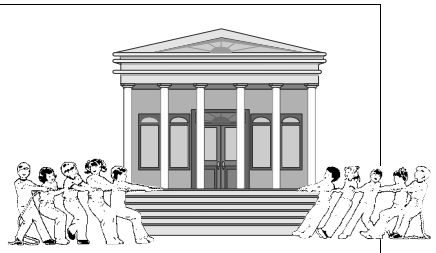
Main Studio Violation - Readers may recall that the FCC recently fined a station for claiming that a nearby local guard shack served as its main studio. In a recent instance, the FCC fined a station $7,000 for having no main studio at all. FCC rules require that a main studio be located either: (1) within the station's community of license; or (2) at any location within the principal community contour of any broadcast station licensed to the station's community of license; or (3) within twenty-five miles from the reference coordinates of the center of its community of license.

Five years ago, the FCC inspected a Puerto Rico FM station and fined the station for failing to maintain a properly located main studio. In 2004, the FCC returned to inspect the station again. Lo and behold, no change had been made. The FCC was less than impressed (not favorably, at least) that it had fined one of its licensees and the licensee took no heed of either the fine or the lengthy FCC order that accompanied the fine. This time the FCC went to great lengths to point out that the studio was 65 miles from the reference coordinates of its community of license. Although the station previously had sought a waiver of the main studio rule, the waiver was related to another station that the owners had since sold. The FCC was steadfast that as a two-time offender, the station should pay a $70,000 fine. Presumably, the station will get the message and establish its main studio in an appropriate location. . It is quite likely, though, that the FCC will return to the station to see if the third time is the charm.

Too much? Not enough? Too soon? Too slow?

KidVid Rules Head to Court

With effective date fast-approaching, divergent parties look for courts to help resolve open issues



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As we reported last year, in September, 2004, the FCC announced major changes to its children's programming rules. The new rules extended children's programming requirements to multicast channels and imposed new restrictions on preemptions of "core" children's programming, promotions of "non-E/I" children's programming, and displays of Internet web addresses. The rules, which were not released until November, 2004, immediately prompted more than a dozen petitions for reconsideration which are still pending.

Some of the new rules – such as the requirement to display the "E/I" symbol during the entirety of a "core" children's program – have already taken effect. The remaining rules are due to become effective on January 1, 2006. The FCC, however, has not shown any signs of acting on the various petitions for reconsideration. With less than three months to go before the new rules take effect, it is thus no surprise that a new round of challenges to the rules has emerged over the past several weeks.

Viacom argues that the new rules violate the First Amendment, exceed the FCC's authority, and ignore other laws. By contrast, the UCC argues that the rules don't go far enough.

At the FCC level, at the end of September, the parent companies of CBS, ABC, and NBC requested that the FCC hold off on putting the new rules into effect until 90 days after the FCC acts on the pending petitions for reconsideration. The mere filing of a petition for reconsideration or a petition for stay does ***not*** delay the effective date of the challenged rules. Rather, absent the affirmative grant of such a delay by the FCC, television stations would be required to comply with the new rules, regardless of the likelihood that the new rules might be substantially revised on reconsideration. The networks' request for a delay seeks to avoid the extensive disruptions and costs the new rules would impose until the FCC settles upon final versions of the rules.

Not surprisingly, the Children's Media Policy Coalition, which supports the new rules, has opposed the stay request, arguing that any further delay would harm the public interest by overexposing children to commercial matter and permitting television stations to "develop and expand business models that do not serve children's needs."

Taking its request to the next level, on October 11, 2005, Disney filed a petition with the United States Court of Appeals for the DC Circuit seeking a "writ of mandamus" or, in the alternative, a "writ of injunction," essentially asking the court to order the FCC to either act on the pending petitions for reconsideration by November 15th or enjoin the enforcement of the rules until the FCC does act on the petitions for reconsideration. In a sign that the court is taking Disney's petition seriously, the court ordered the FCC to respond to Disney's petition by October 25th and required Disney to reply by November 1st.

Meanwhile, as the networks were asking the FCC to delay the new rules, the United Church of Christ and the Children's Media Policy Coalition withdrew their petition for reconsideration and, on September 26, 2005, filed for review of the new rules in the United States Court of Appeals for the Sixth Circuit. (The Sixth Circuit encompasses a geographic region which includes Ohio, where the UCC is headquartered, and is perceived as a more receptive venue for UCC than the typically de-regulatory DC Circuit. This kind of "forum shopping", *i.e.*, choosing a court thought to be more receptive to the appellant's position, was perhaps most notably seen in the appeal of the broadcast ownership proceeding, which was filed with the Third Circuit in Philadelphia.) The UCC argues that the rules are not acceptable because they don't go far enough in restricting preemptions and interactive advertising.

UCC's Sixth Circuit gambit prompted Viacom to withdraw its petition for reconsideration and file its own appeal with the U.S. Court of Appeals for the D.C. Circuit. In its court filings, Viacom seeks to have the new rules vacated entirely or returned to the FCC for revision.

Viacom also requested a stay of the new rules pending the outcome of its appeal. In its stay request, Viacom argues that the FCC's new kidvid rules violate the First Amendment, exceed the Commission's authority, and ignore laws requiring adequate public notice and comment on new regulations.

Viacom did ***not*** challenge the existing children's program-

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merce. The draft bill authorizes Commerce to draw money from this fund to establish a program to "assist consumers in the purchase" of set-top converter boxes for consumers still using analog televisions, as well for assistance with the LPTV and TV translator digital conversion, to facilitate emergency communications systems, to implement E-911 provisions, and to provide aid to states affected by natural disasters.

As presently envisioned by the Committee, the sale of the returned analog spectrum should generate approximately $10 billion in revenues. Of that, the lion's share ($3 billion) would be ear-marked for converter box subsidies, while another $1.25 billion would go to first responders for interoperable communications systems. Coastal Indian tribes affected by hurricanes would get a chunk ($200 million), while significant amounts would go for EAS ($75 million) and enhanced 911 services ($250 million).

The NAB has announced its tentative endorsement of the proposed 2009 deadline, but numerous concerns have been voiced by others in response to the five-page draft. Among those concerns, the draft is notably vague as to how Commerce is to allocate the fund's money among the various programs; notably, it does ***not*** specifically mention a subsidized purchasing mechanism for the converter boxes. One policy analyst observed that the "assistance" called for by the bill could very well be construed as merely requiring that funds be spent on consumer education and nothing more. Also, the generous $3 billion figure in the Senate draft is not etched in stone – the House Commerce Committee reportedly plans to propose a converter subsidy somewhere under $1 billion.

The fact that the draft bill fails to address mandatory multicast carriage, while not surprising in light of Stevens' remarks, is a disappointment to broadcasters, particularly in light of word that the companion bill will not be a focus of the current markup session.

According to Senator Stevens, the crucial problem currently facing emergency response workers is not availability of spectrum, but rather interoperability of communications systems.

While no one discounts the likely usefulness of to-be-freed-up spectrum to first responders, there is considerable doubt as to whether the available technology would permit first responders to utilize the new spectrum within the time frame contemplated by McCain (who proposed the rejected 2007 deadline). According to Stevens, the crucial problem currently facing emergency response workers is not availability of spectrum, but rather interoperability of communications systems. Until that latter problem is solved, freeing up spectrum is not likely to provide substantial benefits.

The battle lines are now being drawn, and we can look forward to a good deal of legislative spectacle in the coming months. Interestingly, it appears that the anticipated clashes may not merely track party lines, which should spark some entertaining, or at least interesting, commentary.

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strated that Sinclair was unable to find an out-of-market buyer willing to pay a reasonable price despite the best efforts of Bear Sterns, a nationally recognized independent broker. Bear Sterns was apparently unable to convince any potential out-of-market buyer of the around 40 it contacted that KSMO was worth $33.5 million (the final sale price of KSMO), particularly since (a) $1 million would be required to restore the station and (b) the station had no local news or virtually any other local presence in the market. Potential buyers may also have been concerned that they would have to compete against a well-established CBS affiliate in town – that is, Meredith's other station.

The FCC, for its part, found all of this persuasive and agreed that Sinclair and Meredith proved that KSMO was indeed a failure under Sinclair's ownership.

The "failed station" exception to the local multiple ownership rules might make sense, if the supposedly failing station really is at risk of going off the air. The problem is that, given the roadmap to Loserville that the FCC has kindly sketched out here, it's not that hard to make it look like almost ***any*** station is on its last legs. And it's also not hard to scare away potential buyers, since the competitor in town can probably afford to offer a premium price knowing that: (a) it can probably reduce operating costs by sharing some operations with its existing station; and (b) by buying the "failing" station it is removing a potential competitor from the market.

Whether or not the FCC's policy really does make sense, though, that policy is clearly in place and available to others who might want to take advantage of it.

Full-service elections, LoPo flash-cuts and more

DTV UPDATE

By: Lee G. Petro
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While much attention has been paid in recent weeks to Congressional activity on the DTV front (*see* article on page 1), the FCC has still been plugging away with its own efforts to get the DTV football across the regulatory goal line. Recent DTV developments on the FCC front include DTV Channel Election and flash-cutting by full and low power television licensees.

First, in early October the Commission released the results from the first round of channel elections. In connection with that announcement, the FCC also set a deadline for the second round elections. Licensees who did not participate in the first round – either because they lacked an in-core channel or because their proposed channel caused impermissible interference with other channel elections – must make a selection by that deadline or else be relegated to the third round of elections, which is expected to take place in early 2006.

Licensees who did not participate in the first round must make a selection by that deadline or else be relegated to the third round of elections

As originally announced, the second-round election deadline (October 24, 2005) gave affected stations only a matter of a few weeks to make their elections. The AFCCE (whose members would in many cases be the folks actually preparing the analyses on which elections would be based) filed a request for additional time so that the remaining 80 or so licensees could better coordinate their efforts to resolve interference conflicts. Ever compassionate and understanding, the Commission graciously extended the deadline one week, until October 31.

Next, the Commission released a public notice which allowed LPTV and TV Translator licensees to immediately file applications to convert their in-core analog facilities to digital operations with the filing of a minor modification application. The Commission has permitted Class A LPTV licensees to file such applications for some time now, and many LPTV licensees have been waiting eagerly for this opportunity.

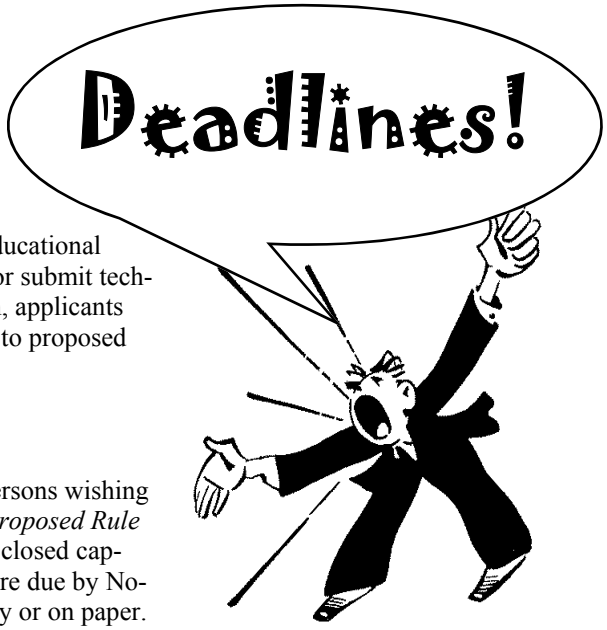
That eagerness may be tempered by the potential downside to the leap to digital-only operation. In filing an application to convert to digital operations on its current channel, LPTV and TV Translator licensees will give up their right to file for a companion channel when the Commission opens a window in the future. As you may remember, the Commission adopted rules that will permit Class A, LPTV and TV Translator applicants to select an available digital channel to operate in conjunction with their analog facility once the DTV Channel Election process is almost completed. Informed sources have indicated that a filing window for companion channels will likely be opened by the end of 2005.

Finally, the Commission recently released an order granting a request by a full-power television station to cease operating its analog facility and to operate instead only as a digital station on its digital channel. Specifically, a television station in Riverdale, New York, had received two out-of-core channels; it sought authorization to turn off its analog facility, and agreed in the process to broadcast in digital only.

While it was the only television station licensed to Riverdale, the Commission reasoned that any adverse impact on the viewing public would be minimal since the area had over 92% cable penetration. Moreover, the licensee agreed to provide cable systems the equipment necessary to down-convert the digital signal to analog for carriage of the station on their systems. Finally, the licensee cited the support by the licensee of the 700 MHz spectrum who is waiting patiently to use the lower 700 MHz band once the broadcasters vacate the premises. The Commission agreed that these factors weighed in support of the request, and granted authorization to terminate its analog service.

As noted above, we expect that the Commission will conclude the second round of elections by the end of the year, and most likely open a window for filing of companion DTV channel requests. This, coupled with the DTV legislation discussed elsewhere herein, will lead to an exciting conclusion to the end of 2005, and give us reason to eagerly anticipate the new year.

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 showings with regard to proposed communities of license.

November 10, 2005

Closed Captioning of Video Programming Rule Making - Persons wishing to file comments in response to the Commission's *Notice of Proposed Rule Making* which addresses several aspects of the Commission's closed captioning rules must submit such comments. Reply comments are due by November 25, 2005. Comments may be filed either electronically or on paper.

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 TV*, *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.

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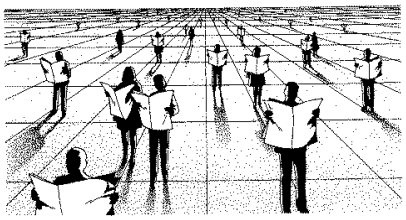
Stuff you may have read about before is back again . . .

Updates on the News

On the Payola Front – Rumors and reports continue to swirl around the New York State Attorney General's on-going investigation of record promotion practices. While the NYAG has already bagged an impressive $10 million settlement from Sony BMG, there are other record companies out there who might be similarly inclined to make a substantial payment to avoid further hassles (and in this case, "hassles" could include, say, prosecution under NY state laws). And while the NY law which the NYAG relied on in the Sony BMG deal does not appear to open the door to prosecuting broadcasters (unless, that is, the FCC has previously concluded that the broadcasters have violated the payola laws), broadcasters may still be getting nervous. Trade press reports indicate that a couple of Clear Channel program directors in big markets have been fired in recent weeks, possibly as a result of fall-out from the NYAG investigation.



On the Ownership Front – Once was a time that the question of broadcast multiple ownership was on everyone's lips. That was almost three years ago, in the run-up to the Commission's June, 2003 decision to revise the ownership rules. Things calmed down considerably once the Commission acted, appeals were filed, and everyone was placed in a wait-and-see mode for a couple of years. And even though the Court acted almost 18 months ago (upholding some of the FCC's handiwork, shipping some of it back for further agency consideration), we are still in that wait-and-see mode. That appears to be mainly a result of the fact that the four Commissioners are split 2-2 on ownership issues, and Chairman Martin presumably does not want to spend a lot of time, effort and political capital fighting a fight that he does not currently have the votes to win. But the 2-2 stand-off hasn't stopped the Copps-Adelstein tag-team from continuing to flog their joint opposition to ownership overhaul. Commissioner Adelstein ventured out to a town meeting in Iowa City, Iowa, in October to urge that "we had better address the very real issues raised by concerned citizens of Iowa before we consider further media consolidation." Commissioner Copps was originally scheduled to join in the festivities, but a medical emergency prevented him from doing so.

On the Indecency Front – The Commission has launched a "new, user-friendly" web site designed to "educate the public" about the FCC's enforcement of indecency laws. According to the Commission, the new site "adds transparency to the Commission's work in this important area." You can check it out at http://www.fcc.gov/eb/oip/welcome.html. Unfortunately, the site does not shed much light on the bottom-line question of what is and isn't "indecent". It claims that "context is critical", and then lists a couple of factors considered in determining whether something is "indecent" – but if you were to apply those factors to, say, the famous Golden Globes incident (in which U2 singer and global do-gooder Bono expressed his surprise and appreciation for the award by saying that it was "fucking brilliant"), you'd be hard-pressed to understand how the FCC concluded that that exclamation was indecent.

And as for "profanity", the FCC says that that term includes "language so grossly offensive to members of the public who actually hear it as to amount to a nuisance". That pretty much narrows it right down, now, doesn't it?

So while the Commission invokes the New Age-y bureaucratesian notion of "adding transparency" to the agency's work, it strikes us that the FCC's work in the indecency/profanity area is already pretty darn transparent . . . sort of like the emperor's new clothes.

The new site also includes a draft "FCC Form 475B" ("Obscene, Indecent, and/or Profane Material Complaint Form"). This form has not yet been approved by the Office of Management and Budget, so technically the Commission probably isn't supposed to be using it. But that hasn't stopped the Commission from posting it as a form which will "provide the public an easy method for submitting to the Commission all of the information that will help staff resolve complaints". You might want to take a gander at http://www.fcc.gov/eb/oip/ICForm.pdf.

The form seeks seven specific pieces of information from the complainant: date of program; time of program; network; call sign or channel or frequency; city and state "where program was viewed"; name of program or DJ/personality/song/film; and as "many details as possible" (such as "specific words, language, images, etc."). Amazingly enough, a bold-face, underlined, italicized advisory notifies the potential complainant that ***none*** of those pieces of information is required – although the notice does helpfully point out that "providing [responsive information] should eliminate our need to contact you for more information".

So the FCC has devised a complaint form in which the complainant would not be required to provide any particular information. In a twisted kind of way, that, too, seems consistent with the FCC's penchant for "transparency".

FM ALLOTMENTS PROPOSED –9/23/05-10/20/05

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
MI	Allegan	27 miles NW of Kalamazoo, MI	265A	05-269	Cmnt: 11/17/05 Rply: 12/2/05	Section 1.420(i)
MI	Mattawan	15 miles W of Kalamazoo, MI	223A	05-269	Cmnt: 11/17/05 Rply: 12/2/05	Section 1.420(i)
GA	St. Simons Island	84 miles S of Savannah, GA	229C3	05-267	Cmnt: 11/18/05 Rply: 12/5/05	Drop-in
FL	Ocala	78 miles W of Daytona beach, FL	229C0	05-267	Cmnt: 11/18/05 Rply: 12/5/05	Accommodation Reclassification
TN	Charleston	43 miles NE of Chattanooga, TN	250A	05-273	Cmnt: 11/18/05 Rply: 12/5/05	Drop-in
OK	Coalgate	116 miles SE of Oklahoma City, OK	242A	05-274	Cmnt: 11/25/05 Rply: 12/12/05	Drop-in
FL	Silver Springs Shores	80 miles W of Daytona Beach, FL	259A	05-275	Cmnt: 11/25/05 Rply: 12/12/05	Drop-in
GA	Aragon	50 miles NW of Atlanta, GA	296C1	05-282	Cmnt: 12/5/05 Rply: 12/20/05	Section 1.420(i)
TN	Chattanooga	112 miles SW of Knoville, TN	293C0	05-282	Cmnt: 12/5/05 Rply: 12/20/05	Accommodation Reclassification
TN	Lynchburg	74 miles S of Nashville, TN	230A	05-282	Cmnt: 12/5/05 Rply: 12/20/05	Accommodation Substitution
VA	Keswick	62 miles NW of Richmond, VA	291A	05-292	Cmnt: 12/8/05 Rply: 12/23/05	Section 1.420(i)
WV	Marlinton	130 miles N of Roanoke, VA	292A	05-292	Cmnt: 12/8/05 Rply: 12/23/05	Drop-in
LA	Addis	11 miles SW of Baton Rouge, LA	288A	05-291	Cmnt: 12/8/05 Rply: 12/23/05	Section 1.420(i)

(Continued from page 7)

ming rules or the Children's Television Act as a whole, despite widespread speculation that it would do so. The Children's Television Act and the FCC's children's programming rules have never been seriously challenged in court and many observers, including the UCC's Gloria Tristani, have expressed concern that such a challenge could succeed in getting the children's programming rules thrown out entirely because of First Amendment considerations.

Although the various FCC and DC circuit filings mean that it is at the very least possible, perhaps even probable, that the effective date of some or all of the new children's programming rules will be pushed back, it would be unwise to count on any such delay. Accordingly, television stations should prepare themselves for full compliance by January 1, 2006. This means potentially drastic changes in how stations handle preemptions and promotions, the elimination of "commercial" web site address from children's programming and the inclusion of children's programming on multicast channels. Television licensees who are uncertain as to how the new rules affect their operations should take immediate steps to get themselves up to speed.

Factoid of the Month

April 7, 2009 — the date set by the Senate Commerce Committee for the final transition to DTV — will be the 82nd anniversary of the first simultaneous telecast of image and sound, which occurred in 1927 when then-Secretary of Commerce Herbert Hoover read a speech in Washington which was transmitted to Bell Labs in New York, where Hoover's image was heard and seen on a 3-inch screen.

FM ALLOTMENTS ADOPTED –9/23/05-10/20/05

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
FL	Big Pine Key	30 miles E of Key West, FL	*239A	04-248	TBA
KY	Clinton	170 miles NW of Nashville, TN	234C2	05-152	None
KY	Mayfield	132 miles NW of Nashville, TN	271C2	05-152	None
OK	Cheyenne	140 miles W of Oklahoma City, OK	247C3	05-130	TBA
OH	Cridersville	95 miles NW of Columbus, OH	257A	04-343	TBA
MN	Fisher	84 miles N of Fargo, ND	262C1	05-116	None
TX	Rule	58 miles N of Abilene, TX	253A	01-219	TBA
KS	Haven	35 miles NW of Wichita, KS	246C2	04-376	None
NM	Pecos	25 miles E of Santa Fe, NM	264C3	04-218	None
LA	Cameron	170 miles SW of Baton Rouge, LA	296C3	05-138	TBA
NC	Weaverville	142 miles W of Charlotte, NC	290C2	02-352	None
PA	Gallitzin	138 miles W of Harrisburg, PA	228A	05-103	None
WA	Goldendale	116 miles E of Portland, OR	240A	05-8	TBA
WA	Port Angeles	138 miles NW of Seattle, WA	229A	05-11	TBA
GA	Ty Ty	187 miles S of Atlanta, GA	249A	05-12	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.

(Continued from page 10)

Radio and Television Ownership Reports - All *radio* stations located in **Alabama**, **Connecticut**, **Georgia**, **Maine**, **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.