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

Memorandum to Clients

January, 2006 *News and Analysis of Recent Events in the Field of Communications* No. 06-01

SoundExchange on the prowl

Webcaster Royalty Audit Underway

By: Ann Bavender
703-812-0438
bavender@fhhlaw.com

SoundExchange, which collects webcasting (internet radio or streaming) copyright royalty fees, has begun an enforcement program to ensure that webcasters are accurately paying royalties owed to the record companies and recording artists represented by SoundExchange. The initial thrust of this enforcement program will be directed against the most popular internet radio websites, *i.e.*, the ones that would be expected to owe the most royalties.

Starting in February, 2006, SoundExchange will begin auditing eleven of the most popular internet radio websites. The audits, which are permitted by U.S. Copyright Office regulations, will cover the years 2002, 2003, and 2004. Four broadcast group owners will be among the first eleven websites to be audited: Bonneville, Clear Channel, Cox, and Susquehanna. The remaining websites to be audited are America Online, Beethoven.com, Live365, Microsoft, MTV Networks, Real Networks, and Yahoo. SoundExchange has announced that this is just the beginning of its enforcement program and it intends to perform regular audits of webcasters, both large and small.

> *This is just the beginning of SoundExchange's enforcement program — it intends to perform regular audits of webcasters, both large and small.*

U.S. Copyright Office regulations permit SoundExchange to audit webcasters once during each calendar year. The audit may cover any or all of the prior three calendar years. No calendar year may be subject to audit more than once. Audits of the webcasters' records must be conducted by an independent and qualified auditor and must take place during reasonable business hours using generally accepted auditing standards. For their part, webcasters must use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit and retain such records for at least three years. Before finalizing its written report, the auditor must review its tentative findings with the webcaster to remedy any factual errors and clarify any issues relating to the audit, but only if the webcaster cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised. The auditor need not review its tentative findings with the webcaster if the auditor suspects fraud.

Once the auditor issues its final written report, SoundExchange and the webcaster are required to accept the findings in the report as the final word on copyright royalties owed in the audited years. SoundExchange is required to pay the cost of the audit, unless it is determined that the webcaster underpaid its royalties owed by 10% or more, in which case the webcaster must, in addition to paying the amount of any underpayment, pay the costs of the audit.

(Continued on page 4)

The Scoop Inside

Some BAS licenses will self-destruct . . .

Automatic BAS Cancellation Programmed Into ULS System

Trigger date: February 1, 2006

By: Lee Petro
petro@fhhlaw.com
703-812-0453

The FCC has announced that it will be implementing a fiendishly helpful new function in its Universal Licensing System that will ***automatically terminate*** those wireless licenses for which mandatory notices of construction and/or coverage certifications have not been filed as of February 1, 2006.

The new automated system will automatically review the licenses for all wireless facilities (including, *e.g.*, broadcast auxiliary stations) to determine if the licensee has filed the required notice indicating that each location and frequency specified in the licenses has been constructed, and, if applicable, meets the coverage requirements for that particular wireless service. ***If such notices have not been filed, the Commission will automatically release a public notice canceling the license of the facility.*** In the event that the Commission cancels a wireless license, the licensee will have thirty days from the public notice to file a petition for reconsideration seeking reinstatement of the license authorization.

In view of the very real risk of impending automatic cancellation, licensees of wireless facilities would be well-advised to review their licenses ***now***, on their own initiative, to determine if the required notifications have been filed with the Commission.

It is important to note that the construction/coverage requirements were not imposed on some licenses until 2002, so some licenses, such as studio-transmitter links issued prior to 2001, will likely not have construction/coverage requirements. However, it would be a good idea to check all auxiliary licenses nevertheless to confirm whether or not they are subject to the notification requirement. This can be done on-line at the FCC's website. The instructions on determining whether you have a "Notification" or "Coverage" deadline will vary depending on the specific wireless service, but you will need to go into the path or location details portion of the FCC database to determine if the notifications have been filed.

Of course, if you would like our assistance in completing this task, please contact the attorney with whom you normally work or Lee G. Petro at 703-812-0453.

Lee Petro Becomes Member of FHH

FHH is pleased to announce that, as of January 1, Lee Petro has become a member of the firm. Lee, who joined the FHH team as an associate in 2002, handles a wide range of regulatory and transactional matters before federal and state regulatory bodies for radio, television, broadband, cellular, and other wireless communications service providers. A 1992 graduate of the James Madison College at Michigan State University in International Relations, Lee received his law degree from the Catholic University of America, where he was editor-in-chief of the Journal of Communications Law and Policy. He is active in the Federal Communications Bar Association.

Fletcher, Heald & Hildreth
A Professional Limited Liability Company

1300 N. 17th Street - 11th Floor
Arlington, Virginia 22209
Tel: (703) 812-0400
Fax: (703) 812-0486
E-Mail: Office@fhhlaw.com
Web Site: fhhlaw.com

Focus on FCC Fines

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

Broadcasters Give Themselves Up – As part of the FCC's renewal process for licenses, broadcast applicants must certify that they have properly complied with rules regarding maintenance of their public files and other records and, in the instance of television, provision of children's content. If renewal applicants can't accurately certify to such compliance, they must certify that they have not complied. Now listen carefully – can we all hear that muffled "cha-ching, cha-ching" sound emanating from the Portals? Sure enough, armed with certifications from broadcasters who admit instances of non-compliance with regulations, the FCC is finding itself able to convert the renewal process into a money-making opportunity by assessing admitted rule violators with fines. During December, the FCC laid the groundwork for an infusion to the U.S. Treasury of thousands of dollars from broadcasters renewing their licenses.

The FCC's recent rash of fines to renewal applicants took some seemingly odd twists. In several instances the FCC determined that violations were isolated and took no action. A TV station with slightly more than a dozen violations of children's commercial content rules paid no fines, because the violations were considered *de minimis* by the FCC. In contrast, an Orlando station is on the hook for $20,000 due to 59 children's commercial programming content violations as well as public file and program guide problems. Several licensees were officially admonished by the FCC but did not have to pay fines. Yet others were hit with fines of only a few thousand dollars.

Despite the fines, though, the good news is that the FCC renewed the licenses of all the applicants, regardless of whether they were fined, admonished or let off the hook. But in all cases, the renewal came with some cost: all those broadcasters who overlooked portions of the FCC's rules during their license term (and honestly admitted to those lacunae in their renewal applications) faced greater scrutiny, and resulting delay, from the FCC.

All clients are reminded that even in the absence of an inspection, the FCC requires broadcasters to police themselves. Rest assured, if you pass through an entire license term without an FCC agent knocking at your door and looking through your files, you will ***still*** have to look through your own files and certify to the FCC what you found (or didn't find). Armed with self-incriminating evidence – the Fifth Amendment is not applicable when you voluntarily choose to renew your license – broadcasters do much of the FCC's work for them. The ideal method to avoid fines, either during an inspection or at renewal time, is to ensure that your records and programming fully comply with FCC rules.

Pirates Give Themselves Away – Some of this month's more interesting broadcast pirate tales involve the pirates walking their own planks. The home of a Philadelphia pirate was visited by FCC agents But nobody answered the door when the agents knocked. Several weeks later, the pirate agreed to meet with two FCC agents at another location. Both FCC agents report that during the meeting the pirate admitted he operated a station. Five months later the FCC sent the pirate a $10,000 fine for his operations. Staring at a five-figure fine, the pirate changed his story and claimed that he never admitted to operating a station – although both agents dispute this. Furthermore, the pirate claimed that nothing had been found at his house. Again, both agents contradicted the fellow by noting that when they first stopped by his house, they spotted a radio transmitting antenna and coaxial cable running from the antenna to the basement. Pirate fined $10,000.

In another interesting instance of a pirate demonstrating the necessity of a Commission-issued license before one can transmit on the electromagnetic spectrum, the pirate made an absurd assumption and directly defied an FCC warning. The FCC received a complaint about an unlicensed radio station in Victorville, California. Agents tracked down the signal to a home and left a Notice of Unauthorized Operation on the front door. The agent returned a few days later and told the homeowner that he could not broadcast without a license. The agents detected no signal for several months.

However, after a few months, the signal reappeared. The agents again approached the pirate and warned him that he could not broadcast without a license. The pirate explained his understanding that the FCC's rules permit him to broadcast as long as the signal carries only music and no advertisements. Nonetheless, the pirate claimed to have ceased broadcasting and says that he destroyed the equipment. The FCC found this to be a little too late and issued a $10,000 fine. It is not clear whether the pirate thinks that he can conduct an on-air telethon to raise money to pay the fine and that – because it is not an advertisement – he can use the radio to do so.

Tower Fines – From high atop the tower structure category,

(Continued on page 6)

Meet the new boss . . .

Deborah Taylor Tate Becomes Fourth Commissioner

By: *Sima Chowdhury*
703-812-0484
chowdhury@fhhlaw.com

The newest FCC Commissioner is Deborah Taylor Tate (known familiarly as "Debi", according to at least one source). She was confirmed by the Senate in December and, on January 3, she was sworn in. Her appointment lasts only until June 30, 2007 (because she is filling the remainder of former Chairman Powell's term).

Commissioner Tate is a Republican who served on the Tennessee Regulatory Authority ("TRA") for six years (with two years as Chairman) and, prior to that, acted as policy advisor to Tennessee Governor Lamar Alexander.

The defining element of all buzz on Commissioner Tate is that there is no buzz…so far. Her views on potentially divisive broadcast-related topics, such as media ownership regulation, remain largely unclear, primarily as a result of her deft and diplomatic deflection of controversy during the Senate confirmation hearings. Published reports quoted one communications analyst as observing that she "brilliantly succeeded in avoiding being pinned down on virtually any issue." A member of the Tennessee Telecommunications Association described her approach at the TRA as "building consensus" with comment from all sides.

Amid all this neutrality, though, some media watchdogs see potential for Commissioner Tate to lean toward new technology because of her familiarity with that area. Her background includes a stint on the Federal-State Joint Conference on Advanced Telecommunications Services and she has spoken in support of IP-enabled services. VoIP industry members are said to be cautiously optimistic about Commissioner Tate's appointment.

Such leanings could pit her against fellow Republican, Chairman Martin. You'll recall that in June, 2005, the Chairman led the drive to require VoIP providers to implement E-911 capabilities and, in his statement accompanying the Report and Order, admonished the industry for failing to ensure its customers access to emergency services. Since then, he has overseen the creation of a joint NARUC/FCC enforcement task force to facilitate the implementation of the new rules. Some see Commissioner Tate's nomination as an attempt by the current administration to mollify the high tech sector, though it's important to note that her background includes time spent as a member of NARUC. She has also expressed a particular interest in seeing that the Commission reaches out to rural Americans – arguably a far cry from rallying behind the proponents of cutting-edge telecommunications services aimed at serving big businesses.

A lawyer by training, Commissioner Tate is also a certified "Rule 31 mediator" in Tennessee, a role which perhaps suggests an inclination to resolve differences through collegial back-and-forth, rather than dictatorial fiat. And lest anyone think that she's just another esquire, Commissioner Tate has also served on the adjunct faculty of the Vanderbilt University School of Nursing.

(Continued from page 1)

The audit could result in hesitation on the part of broadcasters who have not yet decided whether to transmit their programming on the internet. The history of webcasting to date has tended to advance by fits and starts. That may be attributable, at least in part, to uncertainty about the ultimate costs of royalties for the separate copyright "use" which streaming involves. In recent months there seems to have been an increase in internet streaming of broadcast programming, possibly in response to the popularity of iPods and the related trend toward internet-available, downloadable programming. The SoundExchange audit is likely to remind everyone that there are costs associated with the on-line provision of such materials.

Broadcasters currently simulcasting their on-air broadcasts on the internet, or contemplating doing so, should be sure to inform themselves about the record-keeping obligations, reporting requirements and, most importantly, royalty fees to which internet streamers and webcasters are subject. In view of SoundExchange's dominant role in this area, it would be prudent for webcasters to obtain a SoundExchange internet webcasting license, if they don't already have one. And, of course, payment of the required royalty payments is also highly advisable. If you would like information about internet copyright licenses, contact your attorney at Fletcher, Heald & Hildreth or the author.

You make the call.

Letters of Intent:

Essential Roadmaps to Closing or Half-baked Recipes for Litigation?

By: Steve Lovelady
703-812-0517
lovelady@fhhlaw.com

Early in the process of selling a radio or television station, the buyer and seller often sign some type of preliminary document that summarizes the terms of the deal. This document may be called many things—letter of intent, term sheet, memorandum of understanding—but I usually call it "trouble."

The reasons I don't like these documents are: they are frequently half-baked, highly ambiguous documents, thrown together with very little thought about the legal ramifications. By signing, have the parties entered into a legally enforceable contract to sell/purchase the station? Are there critical terms of the deal that have been omitted? What is the purpose of a subsequent "formal" agreement that is usually mentioned somewhere in the document? On numerous occasions, one party to a "letter of intent" genuinely believes that (a) he can enforce the document in court against the other party, but (b) he is also free to walk away from the deal at any time he wants. And the other party feels exactly the same way, but in reverse. Generally, neither of them is right. Either they are bound to the agreement, or they are not. Which is it?

Whether or not a "letter of intent", "term sheet", "memorandum of understanding", or any other such document can be enforced in court as a binding agreement will be a matter of state law, and could be the subject of a long drawn-out legal battle.

Sometimes, the broker in a transaction will encourage the seller and buyer to sign a short document (perhaps even written by the broker) summarizing the "deal". Now I work with brokers all the time and I think they perform a valuable function and provide sound advice and direction to the parties. But it's important to remember that brokers are businesspeople, too, and they have an understandable interest in making sure that they themselves get paid. So it's not surprising if a broker happens, from time to time, to suggest that the parties sign a document which – oh, lookee here – includes a specific provision confirming the broker's entitlement to a fee. When that happens, it's an especially good idea to have the document reviewed by your own lawyer ***before*** it gets signed. And if the parties are inclined to give the broker the commitment he or she wants, it might make sense to draw up a document addressing only that point, and leaving the terms of the parties' own deal (*i.e.*, the purchase/sale of the property) to be addressed separately.

I understand the desire of a seller and buyer to memorialize the terms of their negotiations, especially when the main points have been agreed upon and a "hand-shake" deal has been reached. But the simple fact is that until a "formal agreement" has been drafted and fully reviewed by the lawyers, then signed by both parties after due authorization by their Boards of Directors, etc., it is very risky to sign a document that could be considered a binding contract. Judges have been known to enforce some very odd written agreements of this type. Whether or not a "letter of intent", "term sheet", "memorandum of understanding", or any other such document can be enforced in court as a binding agreement will be a matter of state law, and could be the subject of a long drawn-out legal battle.

(Basic contract law normally requires only an offer and acceptance for an agreement to be binding, and courts will sometimes fill in the missing pieces with "standard" terms, when presented with a signed document that sets forth the salient terms two parties have agreed upon. Further complicating this is the fact that standards can vary from state to state, and oftentimes a contract might be subject to litigation in more than one state. That gives rise to added uncertainty as to how any disputes might be resolved.)

So what do I recommend to the buyer and seller who want to do a deal? Go ahead and sign a "term sheet" if you must, but make sure that it is binding upon the parties only in certain limited ways. First, make it abundantly clear in the document that the obligations to sell/purchase are ***not binding*** upon either party until a formal agreement has been reached. The deal points should be listed only as terms that the parties desire to incorporate into the formal agreement (for example: price, deposits, assets to be included/excluded, employee retention obligations, post-closing indemnity support, and other deal-specific items).

Most buyers will want the seller to agree not to negotiate with any other potential buyers while the lawyers are

(Continued on page 6)

(Continued from page 5)

drafting formal agreements. If a seller is agreeable to taking the station off the market, a ***binding*** "exclusive negotiation period" provision should be added to the term sheet.

Also, sellers usually want the negotiations with, and the information that is disclosed to, a potential buyer to remain confidential. So, a ***binding*** confidentiality provision should also be added to the term sheet.

Set a firm date for the formal agreement to be signed, and provide for expiration of the exclusive negotiation period (but ***not*** the confidentiality provisions) if a formal agreement is not signed by that date. Finally, choose a state's law to govern the document, and also an exclusive jurisdiction in which any disputes arising under the term sheet will be resolved. This gives certainty as to which law will apply if there is a dispute, and it avoids the potential of being sued and having to respond in some far-flung jurisdiction that is convenient only to your opponent.

*Do yourself and everybody else a favor and please, PLEASE, show any term sheet to your lawyer **before** you sign it.*

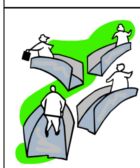
In summary, I recommend a term sheet that is a mixture of non-binding and binding elements. It should be clearly ***non-binding*** with respect to the actual sale/purchase of the station, merely listing as many deal points as possible that the parties want to incorporate into a formal agreement (a formal agreement which will be binding when it is signed, if ever). And the term sheet should include ***binding*** terms such as: (1) an exclusive negotiation period; (2) confidentiality; (3) a drop-dead date; (4) choice of law; and (5) an exclusive jurisdiction clause. Above all, do yourself and everybody else a favor and please, PLEASE, show any term sheet to your lawyer ***before*** you sign it. A few suggestions from an experienced attorney before the term sheet is prepared can save you much grief if you have a subsequent dispute with the other party to your potential deal.

(Continued from page 3)

a California company may have been too relaxed in its tower lighting policy. An FCC agent inspected a California tower and found that the tower had a strobe light in accordance with tower lighting requirements. However, the agent determined that the strobe light was flashing at a speed lower than what is required. The FCC is still considering the case. In another tower incident, a Washington state broadcaster was fined for having a fence which had too large an opening between the bottom of the fence and ground. The broadcaster told the FCC that although there was a gap, no child or adult could fit through the gap without undertaking extraordinary means. The FCC fined the broadcaster $10,000 and questioned the validity of the claim, pointing out that the FCC agent easily slid under the fence during his inspection.

FCC has its Day in Court – Finally, in an incident that shows that justice – together with FCC enforcement – is blind, we share with you the story of 25 walkie-talkies in Brooklyn, New York. FCC agents raided a location in Brooklyn where they detected that a mobile radio signal was being transmitted from the building. The agents swept into the Brooklyn Supreme Court and found an operating transmitter and walkie-talkies. When the FCC checked its records, the issue seemed more like Divorce Court (Henry VIII-style) than the Supreme Court: the license for operating the walkie-talkies belonged to ***Queens*** County, but ***King*** County was using the equipment. It is not clear if the equipment was moved from one county's court to the other's, or whether the licensee was simply using the wrong address. Nevertheless, the FCC wants the truth, the whole truth and nothing but the truth. The Commission issued a notice of violation requiring an officer of the court to respond within 20 days.

And who said that the wheels of justice grind slow? Setting an example of administrative alacrity and regulatory rapidity, the FCC issued its notice of violation within a mere three weeks of the inspection. Then again, after the recent, highly-publicized investigatory incursions by the New York Attorney General into the seamy underworld of payola (an area historically regulated by the FCC, not individual state attorneys general), perhaps the FCC felt the need to push-back a bit on the New York law enforcement machine so as to hold its ground in a governmental turf war. Stay tuned.

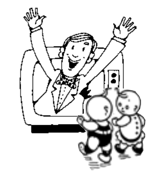


FHH - On the Job, On the Go

Frank Jazzo will be conducting a political broadcasting seminar for the Arkansas Broadcasters Association in West Little Rock on Thursday, February 16.

Splitting the Baby's TV

Updates from Planet Kidvid



Private Parties Push Partial Policy Pull-Back

Rules Stayed as Commission Ponders Proposal

By: *Jeffrey J. Gee*
703-812-0511
gee@fhhlaw.com

As we reported in last month's issue, with the effectiveness of its new children's programming rules fast approaching, the FCC stayed the effective date of those rules in response to a request by "representatives of the broadcast and cable industries and public interest groups." Those "representatives" offered up a number of suggested changes to the rules, changes which had apparently been hammered out by the "representatives" in an effort to avoid a final show-down in court over the legality of the rules.

Since the Commission's prompt – and positive – response to the "representatives'" request for stay suggests that the FCC may be favorably disposed to the other recommendations they have advanced, it would be a good idea to take a look at those recommendations.

The FCC's quick willingness to stay the effectiveness of the rules and to consider the suggested changes may indicate concern on the Commission's part that some or all of the rules which it did adopt may not survive judicial review.

[We have put the term "representatives" in quotation marks because the group includes the big four networks – as well as some public interest groups and others – but ***not*** the NAB or any network affiliates. While the group is thus representative of some elements of the TV broadcast industry, it is not clear that it is representative of all, or even most, of that industry. With that editorial clarification, we'll simply refer to the group, loosely and unofficially, as the "Consortium".]

The Consortium suggested revisions to the website rule, the host-selling rule, the promotions rule, the preemption rule and the multicast rule.

With respect to the website rule, the Consortium agreed that the rule as adopted by the FCC should stand, provided that it be clarified to provide that: (1) the requirements of the rule apply when internet addresses are displayed during program material or during promotional material not counted as commercial time; and (2) if an internet address is displayed during a promotion that does not meet the four-prong test, in addition to counting against the commercial time limits, the promotion will be clearly separated form programming material.

As you may recall, the FCC's Order completely prohibited the display of website addresses in a children's program when the site uses characters from that program to sell products or services. The Consortium concluded that this prohibition went a bit too far. Instead, they suggested, the FCC original rule should be replaced with a rule prohibiting the display of a website address during or adjacent to a program if, at that time, on pages that are primarily devoted to free noncommercial content regarding that specific program (or a character appearing in the program): (1) products are sold that feature a character appearing in that program; or (2) a character appearing in that program is used to actively sell products. The Consortium clarified that this new proposed rule should not apply to third-party sites linked from the companies' web pages, on-air third-party advertisements with website references to third-party websites, or pages that are primarily devoted to multiple characters from multiple programs. The Consortium further proposed that broadcasters would certify compliance with these host-selling rules just as they currently certify compliance with the advertising limits.

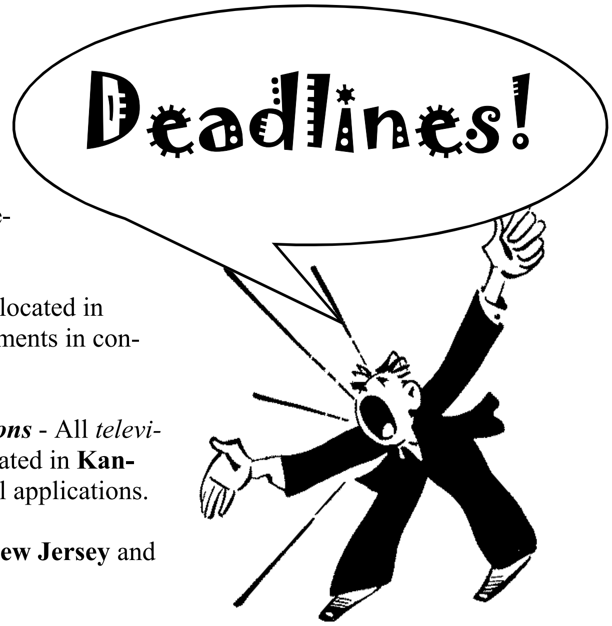
The FCC's definition of "commercial time", according to the Consortium, should not include promotions for ***any*** children's programming on the same channel or educational/informational programming on any other channel. The FCC's Order changed the long-standing definition of "commercial matter" to include promotions of all television programs other than educational/information programs, a change which dramatically expanded the concept of "commercial matter".

With respect to preemptions of core programming, the Consortium recommended eliminating all percentage and other numerical limitations on preemptions of core children's programming.

Finally, the Consortium recommended keeping the new multicasting rule with one minor clarification. As you may recall, the FCC required that at least 50 percent of a station's core programming can***not*** be repeated during the same week to qualify as core programming. The parties agreed that this requirement should be clarified to explain that at least 50 percent of the core programming

(Continued on page 11)

February 1, 2006



Television Renewal Pre-Filing Announcements - *Television* stations located in **Texas** must begin pre-filing announcements in connection with the license renewal process. **Texas** *Class A television* stations and *LPTV* stations originating programming also must begin pre-filing announcements.

Radio Renewal Pre-Filing Announcements - *Radio* stations located in **Delaware** and **Pennsylvania** 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 **Kansas**, **Nebraska**, and **Oklahoma** must file their license renewal applications.

Radio Renewal Applications - All *radio* stations located in **New Jersey** and **New York** must file their license renewal applications.

Radio and Television Renewal Post-Filing Announcements - All *radio* stations located in **New Jersey** and **New York** and all *television* stations located in **Kansas**, **Nebraska**, and **Oklahoma** must begin their post-filing announcements in connection with the license renewal process, and continue such announcements on February 1 and 16, March 1 and 16, and April 1 and 16.

EEO Public File Reports - All *radio* and *television* stations with more than five (5) full-time employees located in **Arkansas**, **Kansas**, **Louisiana**, **Mississippi**, **Nebraska**, **New Jersey**, **New York**, and **Oklahoma** 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 **Arkansas**, **Louisiana**, **Mississippi**, **New York**, and **New Jersey** must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All *television* stations located in **Kansas**, **Nebraska**, and **Oklahoma** must also file a biennial Ownership Report. All reports filed on FCC Form 323 or 323-E must be filed electronically.

April 1, 2006

Television Renewal Pre-Filing Announcements - *Television* stations located in **Arizona**, **Idaho**, **Nevada**, **New Mexico**, **Utah**, and **Wyoming** must begin pre-filing announcements in connection with the license renewal process. **Arizona**, **Idaho**, **Nevada**, **New Mexico**, **Utah**, and **Wyoming** *Class A television* stations and *LPTV* stations originating programming also must begin pre-filing announcements.

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

Radio Renewal Applications - All *radio* stations located in **Delaware** and **Pennsylvania** must file their license renewal applications.

Radio and Television Renewal Post-Filing Announcements - All *radio* stations located in **Delaware** and **Pennsylvania** and all *television* stations located in **Texas** must begin their post-filing announcements in connection with the license renewal process, and continue such announcements on April 1 16, May 1 and 16, and June 1 and 16.

(Continued on page 9)

Beware the electioneering PSA

FEC Expands Definition of "Electioneering Communication"

Airing of some PSA's may run afoul of newly-reinterpreted campaign law

By: Michael Richards
703-812-0456
richards@fhhlaw.com

At the direction of the courts, the Federal Election Commission (FEC) has revised its definition of "electioneering communication" to encompass unpaid PSA's. As a result, broadcasters must now be vigilant in order to avoid running afoul of the election laws.

"Electioneering communication" is a term of art which appears in the Bipartisan Campaign Reform Act of 2002 (BCRA, or to the *cognoscenti*, the McCain/Feingold Act). Under the BCRA, corporations and unions are barred from financing "electioneering statements", which are defined in the Act as any broadcast, cable or satellite communication that: (a) refers to a clearly identifiable candidate for federal office; (b) is made within 60 days of a general election or 30 days of a primary; and (c) is targeted to the relevant electorate. (Some broadcast communications are exempt from the definition – including news stories, commentaries and editorials, as long as the broadcaster is not controlled by a political party or candidate.)

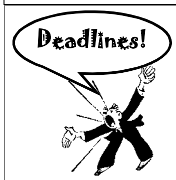
Ordinarily, that prohibition would not directly affect broadcasters (except, of course, broadcasters who happen to be controlled by a party or candidate), since the law is directed against the folks who would be doing the financing, ***not*** the folks who would be transmitting the message as part of their regular broadcast service. That was especially true when the FEC, in its 2002 interpretation of the BCRA, concluded that, in order to qualify as an "electioneering communication", a communication would have to be transmitted "for a fee". Under that reading of the term, broadcasters did not have to give a second thought to whether any PSA's might implicate the BCRA prohibition, since PSA's are by definition broadcast free of charge.

So far, so good.

But then a number of parties took the FEC's interpretation to court and, wouldn't you know it, the court (actually, the courts, since both a trial court and an appeals court agreed) held that the FEC's insertion of "for a fee" in the definition of "electioneering communication" was impermissible. Back came the issue to the FEC and, as instructed by the courts, the FEC has now excised that language from the definition.

As a result, broadcasters now have to be concerned about airing any PSA during the 60/30-day BCRA periods if the PSA happens to refer to a federal candidate – even if the PSA appears to be a garden variety PSA which includes only a passing reference to the politician. Should such a PSA get on the air of a station licensed to a corporation, the licensee could be held to have violated the BCRA prohibition.

The FEC is encouraging non-profit groups which produce PSA's to be sure to assign expiration dates to them, particularly if the PSA's include political figures who may be federal candidates. However, there is no formal and enforceable obligation for such groups to do so, so the monkey lands right on the broadcaster's back: as a precautionary matter, broadcasters should be sure to check the content of their PSA inventory as a precaution against inadvertent election law violations.



(Continued from page 8)

EEO Public File Reports - All *radio* and *television* stations with more than five (5) full-time employees located in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, **Tennessee**, and **Texas** 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 **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, and **Tennessee** must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All *television* stations located in **Texas** must also file a biennial Ownership Report. All reports filed on FCC Form 323 or 323-E must be filed electronically.

FM Allotments Adopted –12/22/05-1/19/06

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
NC	Clemmons	37 miles W of Greensboro, NC	289C1	03-219	None
VA	Iron Gate	48 miles N of Roanoke, VA	270A	03-219	TBA
MI	Hartford	36 miles W of Kalamazoo, MI	252A	03-257	None
MI	South Haven	38 miles W of Kalamazoo, MI	279A	03-257	None
NC	La Grange	65 miles SE of Raleigh, NC	284C2	05-16	None
NC	Swansboro	19 miles E of Jacksonville, NC	281A	05-16	None
NC	Topsail Beach	37 miles NE of Wilmington, NC	229C3	05-16	None
NC	Wrightsville Beach	10 miles E of Wilmington, NC	279C2	05-16	None
TX	Eden	45 miles E of San Angelo, NC	294A	03-74	TBA
CA	Barstow	115 NE of Los Angeles, CA	267A	03-147	TBA
TX	Newcastle	56 miles S of Wichita Falls, TX	263A	03-148	TBA
LA	Anacoco	78 miles N of Lake Charles, LA	276C3	03-177	TBA
PA	Erie	128 miles N of Pittsburgh, PA	240A	03-178	TBA
CA	Greenfield	35 miles SE of Salinas, CA	254A	03-180	TBA
SD	Edgemont	81 miles SW of Rapid City, SD	289C1	05-98	TBA
SD	Ellsworth AFB	17 miles NE of Rapid City, SD	285C	05-98	None
WY	Gillette	141 miles W of Rapid City, SD	260C2	05-98	None
WY	Moorcroft	112 miles W of Rapid City, SD	291A	05-98	None
SD	Murdo	55 miles SW of Pierre, SD	283A	05-98	None
WY	Pine Haven	111 miles W of Rapid City, SD	256A	05-98	Accommodation Substitution
WY	Upton	109 miles W of Rapid City, SD	228A	05-98	Accommodation Substitution

FM ALLOTMENTS ADOPTED –12/22/05-1/19/06 *(continued)*

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
WY	Upton	109 miles W of Rapid City, SD	283C1	05-98	Accommodation Substitution
SD	Wall	56 miles E of Rapid City, SD	299C	05-98	Accommodation Substitution
WY	Wheatland	70 miles N of Cheyenne, WY	247A	05-98	Accommodation Substitution

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 7)

counted toward meeting the additional multicast programming guideline cannot consist of program episodes that had already aired within the previous seven days on either the station's main program stream or on another of the station's free digital program streams.

As part of the deal that the networks and public interest groups (*i.e.*, the Consortium's members) struck with one another, if the FCC adopts these recommendations, the networks and the public interest groups will withdraw their various court challenges to the new rules and will not further appeal the new rules. Presumably, if the FCC adopts rules that vary from the group's recommendations in any significant way, the deal is off and everyone goes back to court. The FCC, of course, has asserted that it will "make an independent determination on the appropriate course of action." Nevertheless, given the parties involved, we should not be surprised if the group's recommendations are given considerable weight in the FCC's determinations.

There is an interesting dynamic at work here. At least two distinct constituencies exist with respect to the children's programming rules. First, there are the broadcasters who will have to comply with the rules once they are in place. They would ordinarily prefer to be subject to as few rules as possible, and they would like those rules to impose the least possible burden. Second, there are the public interest groups who, rightly or wrongly, believe themselves appointed to protect children from a wide array of perceived evils inherent in television programming.

And, of course, in the middle of those two is the FCC, charged by Congress to regulate in certain particular ways, but still given considerable latitude to impose, or not impose, rules in the "public interest".

The Commission did choose to impose some rules, but those rules didn't make either of the private rivals happy – which led both the public interest folks and the broadcasters to file separate, and conflicting, appeals of the rules. In many scenarios, the Commission might have thought that such cross-appeals were an indication that the Commission had achieved an acceptable middle-of-the-road approach (since the Commission had managed to displease both of the rivals). But the Commission's quick willingness to stay the effectiveness of the rules and to consider the Consortium's suggestions may indicate concern on the Commission's part that some or all of the rules which it did adopt may not survive judicial review. The Consortium's stay request and related suggestions, and the Commission's obvious openness to them, may mean that the Commission has already started to re-think its approach. We shall see.

The FCC stated that it will seek public comments on the group's recommendations. Anyone with concerns about the group's recommendations should consider filing comments once the FCC releases its public notice on the matter.