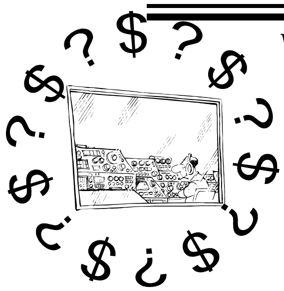
FLETCHER, HEALD & HILDRETH, P.L.C.

# Memorandum to Clients

April, 2006 | News and Analysis of Recent Events in the Field of Communications | No. 06-04



*VNRs, Payola back on the front burner*

## Sponsorship ID Confrontations Open on Two Fronts

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


If it's April, it must be spring-cleaning time. And that means the seemingly annual ritual in which FCC officials try to get broadcast newsrooms to clean up their acts. We're not talking about dirty language here. No, that was last month's headline. We're talking about allegedly tainted editorial material that might otherwise sully a broadcast newsroom's product. We're talking Video News Releases.

About a year ago, the FCC publicly warned licensees that they might have to disclose the origins of any tape used in a newscast if it was originally provided as part of a video news release. The warning arose from the appearance on some stations of government-produced VNRs – including fully-produced packages used as news spots. This warning presumably applies equally to radio stations that receive promotional audio materials.

*The FCC's raised eyebrow and on-going inquiry may not have had the intended effect. Au contraire, the study claims to show that as many as 77 TV stations used VNR-provided tape in the last year or so without disclosing its origins.*

And in case its warnings were not enough, the Commission also asked for public comment on VNR use. Such public input could serve as a precursor to additional regulation. Of course, nowhere did the FCC establish that the First Amendment allows it to interfere in editorial decision-making at the newsroom level. But as with spring cleaning, the FCC was apparently using a Washington ritual – the archly-raised eyebrow of the bureaucratic agency which just happens to hold life-and-death power over broadcast licenses. What better way to encourage regulatees to honor their own independently-created canons mandating the kind of conduct that the FCC would, apparently, like to see. (In this case, the ethics code of the Radio Television News Directors Association call on professional journalists to "clearly label all material provided by outsiders," so viewers and listeners might grasp when they're being spun.)

But according to a recently-released study prepared by a couple of watchdog groups, notably the Center for Media and Democracy and Free Press, the FCC's raised eyebrow and on-going inquiry have not had the intended effect. *Au contraire*, the study claims to show that as many as 77 TV stations, in both large and small markets, used VNR-provided tape in the last year or so without disclosing its origins. The study was released with considerable fanfare, accompanied by a statement from Commissioner Jonathan Adelstein, a long-time critic of VNRs. Commissioner Adelstein, along with his colleague, Michael Copps, has demanded that these stations apologize to their viewers.

CBS's New York flagship, WCBS-TV, was among the sta-

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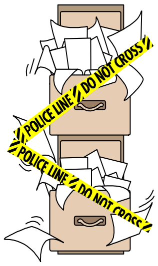
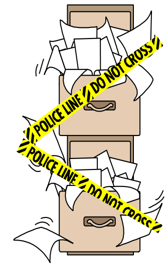
### The Scoop Inside




*It meant what it said and it said what it meant*
*Enforcement's for real one hundred percent*




# Diligent Public File Maintenance Through License Term Can Prevent Forfeitures Down The Line

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

Although the last of the radio license renewal applications were filed April 1st and television renewals will be winding down by this time next year, it's never too early to think about the next renewal. What you do now will determine the fines you pay eight years from now. At least, that is the message the FCC delivered in one recent license renewal case involving the FCC's public file requirements.

In the FCC's license renewal application, licensees must certify that all documents required to be placed in the public inspection file have been placed in the station's public inspection file "at the appropriate times". The wording of this demand is important. It is ***not*** enough that all required items happen to be in the public file at the time the license renewal is filed – the required documents must have been placed in the public file ***"at the appropriate times".***

For example, the FCC requires that issues/programs lists be placed in the public inspection file within ten days of the start of each calendar quarter (January 10th, April 10th, July 10th, and October 10th of each year). A station that habitually misses these deadlines but places eight years of issues/programs lists in its public file the day before filing its license renewal may have all required documents in its public file, but to that the FCC would say "so what" – because the important point would be that the licensee failed to place them there ***"at the appropriate times"***, *i.e.*, quarterly throughout the preceding license term.

Given the significant number of items that must be included in a station's public file over the course of an eight-year license renewal period, many licensees have complained that the FCC cannot possibly expect stations to certify to one hundred percent compliance with the public file rules for all times during the renewal period. Unfortunately for such stations, that is ***exactly*** what the FCC expects.

The FCC recently emphasized this point in a letter ruling issued to Radio One, Inc. In its license renewal applications for its Ohio stations, Radio One responded "yes" to the renewal application's inquiry as to whether each station had placed all required materials in the public file at the appropriate times. In fact, however, three of the four stations had failed to file issues/programs lists for various periods between 1999 and 2001. These oversights were discovered in 2002 and the missing issues/programs lists were placed in the public files at that time.

When the license renewals were filed in 2004, Radio One answered the question regarding its public file in the affirmative, but then included an exhibit with the following caveat: "[Licensee] has answered Section III, Question 3 of this renewal application in the affirmative upon the belief that the station's public file currently contains all documents for which [Licensee] is responsible as the licensee."

Wrong answer, according to the FCC.

Although the FCC concluded that the licensee did not intentionally attempt to deceive the FCC, it admonished Radio One for answering "yes" when it knew that some of the station's issues/programs lists had not been filed on time. "A 'no' response is required to this question," the FCC warned, "when the licensee knows or has a reasonable belief that required material(s) had not been placed in the public file at the appropriate

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**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

***Exhibit at NAB Trade Show gets Fined*** - Among the many vendors in the aisles of the NAB trade show last year was a British company promoting its CellComm Digital Wireless Intercom. The wireless intercom system had been authorized in Europe and could be modified to operate only on specific frequencies in the United States. To coordinate with its appearance at the NAB show, the British company also placed advertisements in the April issue of *Broadcast Engineering*. However, the one item that the company forgot to coordinate with its advertising campaign was getting the equipment certified for use in the United States.

The Communications Act and FCC rules prohibit manufacturers from advertising equipment that has not been properly authorized by the FCC. Such equipment *can* be displayed – but the display must be accompanied by a prominent disclaimer notice clearly alerting the public that the equipment is ***not*** for sale and has ***not*** been authorized by the FCC.

Armed with photos of the British equipment from the NAB show as well as the advertisement from the magazine, the FCC notified the company that they were going to be fined. In response, the company immediately had the equipment certified and denied that they were marketing the equipment. The FCC took another look at the photos and the magazine and decided that, sure enough, the company unquestionably was marketing the equipment in the United States without the required disclaimer.

The intercom system in question includes two components, so – wouldn't you know it – the FCC fined the company $7,000 for each of the components. As a result, the company got tagged for a $14,000 fine for showing up and advertising at NAB and in the magazine. Readers – particularly those of you who attend trade shows – are reminded that the FCC sends staff to the shows, too. At presentations and in displays, readers should always be aware that the FCC may be diligently taking notes (or photos).

***Contest Costs Station a Car and $4,000*** - The July 2005 installment of this column reported about several contests which ended unhappily for broadcasters, who were forced to pay the FCC fines for failing to follow contest rules. As happened in those cases – and as might be expected to happen anytime the hopes and dreams of contestants smash into the brick wall of reality – losers tend to complain, and if they complain to the FCC stations, their unhappiness may end up rubbing off on the broadcaster *even if* the broadcaster does its best to make the complainant happy.

A Florida Clear Channel television station advertised that viewers could go to any of 15 area Dodge dealers and sign up for a chance to win either a car or one of fifteen tickets to a theme park. An early version of the contest rules limited entries to one per person, but that rule was abandoned before the contest was conducted. As a result, the official rules provided that you could enter as many times as you wanted. The rules also required a winner to be present in order to win.

The station's staff who conducted the contest, however, had a less than complete and accurate grasp of final official rules.

When the drawing occurred, the staff had entries from only nine of the fifteen local dealerships. Undaunted by this significant deviation from the rules – and perhaps not even aware that there was a deviation – the staff then sifted through the entries they did have on hand and decided to eliminate multiple entries, thus allowing only one entry per person. Finally, when it came time to draw the names of the fifteen ticket winners, the staff decided that the requirement that a contestant must be present to win meant that there would be only one name drawn for each prize, and if the contestant whose name was drawn did not happen to be on the premises, then that prize would not be awarded. The staff drew fifteen names for the theme park tickets, none of the fifteen people were there, so the staff did not give any of the tickets away. The staff treated the automobile differently and kept drawing names until someone in attendance won. The staff rolled up the carpet and went home.

Not surprisingly, this did not please the attendees. Even less surprisingly, contest participants complained. One of the losers fired off an e-mail to the FCC to report the problem. The station, sensing an unpleasant confrontation in the offing, tried to head things off at the pass by repeating the drawing and giving away a second car and the park tickets.

The station notified all would-be participants from the first drawing that a second drawing would be held and that the previously-announced rules would be enforced. The station did indeed conduct the contest again and gave away all 15 tickets and the second car.

However, as any FCC lawyer would advise, re-running the

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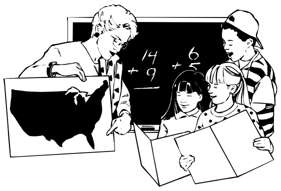


*Arbitron's changes effective only after two-year wait*

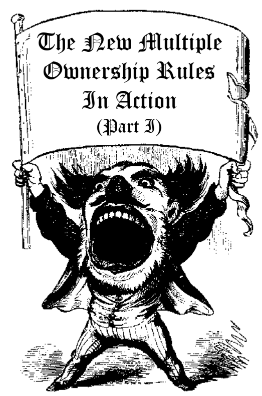
# FCC Sticks To Geographic Radio Market Definitions

## But still grants waiver in light of unique circumstances

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

In a recent decision approving the purchase of a radio station in Burlington, Vermont, the FCC again strongly reaffirmed its commitment to its new method of using Arbitron geographic markets and BIA station data to determine the number of radio stations "in" a market for purposes of the FCC's multiple ownership rules.

However, in a rare deviation from its strict (at least thus far) adherence to that Arbitron market/BIA station data method, the FCC granted the buyer a waiver of the two-year waiting period which must elapse before a change in an Arbitron market's boundaries or a change in the BIA stations in a market may be taken into account under the multiple ownership rules. In doing so, however, the FCC strongly emphasized that it was a one-time waiver granted in unique circumstances resulting directly from the FCC's transition to the new method. Importantly, the FCC made clear that it does not anticipate granting similar waivers in the future.




The problem confronting the applicants and the Commission here arose from the implementation of the Commission's "new" multiple ownership rules. Those rules are hardly "new", since they were first adopted by the FCC in June, 2003, almost three years ago. But then there was that pesky appeal, and the resulting remand of the case to the Commission by the U.S. Court of Appeals for the Third Circuit, which put the brakes on implementation of the new rules. As a result, the effective date of this particular aspect of the rules was delayed until September, 2004.

And therein lay much of the problem.

The buyer already owned nine radio stations in the Burlington area and was requesting approval to purchase a tenth. Under the FCC's multiple ownership rules, an individual or company could own no more than seven stations in a market the size of Burlington. But wait, you say, how could they own nine already, if the limit was seven? Under the old way of calculating stations in a market – the way which was abandoned by the Commission in its June, 2003 decision, at least with respect to Arbitron-designated markets – it was possible to achieve such a result because "markets" were defined by the overlap of contours of the stations which were proposed to be commonly owned. As a result, stations which, from a practical perspective, clearly served the same general "market" might be deemed ***not*** to be in the same market for multiple ownership purposes because their contours did not happen to overlap.

The new rules sought to impose a greater measure of objectivity by relying instead on Arbitron's market definitions (although stations in areas not including in Arbitron's market designations are still, for the time being, subject to the contour-overlap approach). Under the "new" Arbitron market approach – which is also based on BIA-generated station data to determine exactly which stations happen to be in any particular Arbitron market – all nine of the buyer's existing stations were in the Burlington market, as was the tenth station it wanted to purchase. While the FCC was willing to grandfather the licensee's ownership of the nine stations it had owned before the new rules kicked in, it did not look good for acquisition of a tenth station under the circumstances.

Undaunted by the facts, the buyer pointed to Arbitron's August, 2004 creation of two new radio markets in what previously had been a portion of the Burlington market: Montpelier-Barre-Waterbury (St. Johnsbury), VT and Lebanon-Rutland-White River Junction, NH-VT. The buyer explained that creation of the new markets had removed four of the buyer's existing stations from the Burlington market in August, 2004, before the new method went into effect on September 3, 2004. Thus, the buyer claimed, it owned only five stations in the Burlington market and could acquire a sixth without violating the multiple ownership rules.

The FCC wasn't persuaded, pointing out instead that, despite Arbitron's August, 2004 change in the Burlington market boundaries, the BIA station data which happened to be in effect on September 3, 2004 still listed all nine of the buyer's existing stations as being in the Burlington market. The FCC again took the opportunity to emphasize that when it adopted Arbitron radio market boundaries for its multiple ownership rules, the FCC had specifically chosen to rely on BIA station data in lieu of Arbitron station data to determine the number of radio stations "in"

*(Continued on page 5)*

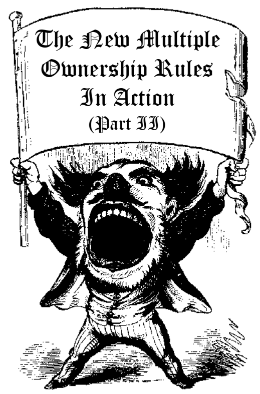
*FCC nixes "change" that isn't really a change*

# Ownership Limits Put Kibosh On Previously-Approved City of License Change

*By: Howard M. Weiss*
*703-812-0414*
*weiss@fhhlaw.com*

Another recent FCC staff decision further illustrates again how rigorously and literally the staff interprets the Commission's radio ownership rules. (*See* related article on Page 4.)

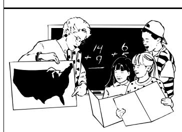
A New York broadcaster had petitioned to change the FM table of allotments to specify a different community of license for its station. That change was approved by the Commission in 2001 – long before the "new" ownership rules were adopted and still longer before they became effective. The licensee then sought to implement the changes, which included a new community of license which was, nevertheless, still in the established Arbitron market of the station. That is, while the station would be getting a new city of license, the station would still be in the same market.




Even though the minor mod application merely sought to do what the modified FCC allotments table contemplated and the unchanged nine-station combination at issue would have complied with the FCC rules ***prior*** to the 2004 revisions in those rules, the staff rejected the application.

The denial was premised on Note 4 to the multiple ownership rule in which the FCC states that it will not "grandfather" pre-rule combinations when a licensee files an application for a minor change to an existing station that implements an approved change in an FM station's community of license. The staff concluded that it could not waive this explicit provision without a showing of special circumstances. It is hard to argue with that reasoning, although the reality is that the "change" here is no change – before the proposed change the licensee had nine stations in the market, and after the change he will ***still*** have nine stations there.

The circumstances here epitomize the perverse effect of the radio rules and their effect on competition. The broadcaster who was denied relief here is a local broadcaster whose combo competes head-to-head with Clear Channel and Citadel. His audience share and revenues are dwarfed by theirs. He has a larger ***quantity*** of stations, but his weaker signals, transmitted from more remote communities, leave him at a distinct disadvantage. The FCC's rules lock this handicap into place in perpetuity. Is this competition or government-franchised monopoly?



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an Arbitron geographic market. Thus, the BIA station data in effect on September 3, 2004 established the number of stations in the Burlington market and subsequent changes made by BIA (presumably to bring the BIA market definition into conformity with Arbitron's definition) to the number of stations in the market would ***not*** be taken into account until a two-year waiting period had elapsed on September 3, 2006 (*i.e.*, two years after the effectiveness of the rules).

But let's not accuse the Commission of being too hard-hearted – they managed to find it in their bureaucratic heart to waive the two-year waiting period.

According to the FCC, a waiver was warranted by the unique circumstances related to the FCC's transition to the new Arbitron boundaries/BIA station data method of determining the number of radio stations in a market. The FCC explained that it established the two-year waiting period because Arbitron occasionally modifies market boundaries and/or Arbitron station market data in response to a station owner's request, and the FCC wanted to deter station owners from manipulating Arbitron data to avoid complying with the multiple ownership rules.

Still, the FCC pointed out, BIA also eventually followed Arbitron's lead and redesignated the same four of the buyer's nine existing stations from the Burlington market to the two new markets. That confirmed (in the FCC's view, at least) that Arbitron's August 2004 market modification had been based on market realities. Since the BIA station data upon which the FCC had chosen to rely to safeguard its multiple ownership rules had confirmed the reliability of the Arbitron market modification, and since the issue had arisen under the unique circumstances

*(Continued on page 10)*


*You'll never work in this town again!*

# Non-Competes 101

## Part 2: Keeping Your Staff From The Competition's Payroll

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

In last month's *Memorandum to Clients*, we discussed non-compete agreements in connection with a sale of broadcast stations. We concluded that such agreements, in which the seller agrees not to compete with the buyer after closing, are an exception to the general laws that forbid businesses from agreeing not to compete with each other. We suggested that, to maximize the chance of successful enforcement by the courts, non-competition agreements between buyers and sellers be limited to the minimum acceptable scope, area of coverage, and duration upon which the parties can agree. We also reminded you that the FCC has policies which apply to such agreements.

> *It is important to consult a lawyer qualified to practice in the state that governs the agreement before signing it. Some states have specific statutes prohibiting or invalidating non-competition agreements for on-air employees.*

This month we will cover a different type of non-compete agreement – contracts between employers and employees. The various types of employees covered by such agreements can be managers, sales staff, or "on-the-air" talent. Usually, the non-compete becomes effective after an employee quits or is terminated. It prevents him or her from working for a competitor in the same market. It might be prudent (particularly in light of recent developments in the area of nationwide morning drive-time personalities, as one example) to include provisions which explicitly prevent competition during the employment period as well.

Frequently, non-compete agreements are components of written employment agreements, and are negotiated as part of the overall agreements *gestalt* of the employment arrangement. The employee's salary earned and/or any severance payments upon his or her termination are the compensation for the employee agreeing not to compete after the relationship ends. It is possible, however, to create separate non-compete agreements between employer and employees who do not otherwise have written employment agreements. Perhaps the offer of employment or continued employment ("sign this or your fired") is sufficient to compensate the employee for agreeing not to compete after employment ends. The less compensation paid to an employee, however, the less likely that a court will enforce a non-compete agreement against him or her.

But before we get too far into the details, a cautionary note: Enforcement and interpretation of non-competition agreements with employees are governed by state and local laws, which vary considerably from jurisdiction to jurisdiction. It is important to consult a lawyer qualified to practice in the state that governs the agreement before signing it. Keep in mind that some states have specific statutes on the books that prohibit or invalidate non-competition agreements for on-air employees. According to the website of the American Federation of Television and Radio Artists (AFTRA), that organization has successfully lobbied in four states – Arizona, Illinois, Massachusetts and Maine, and the District of Columbia – for enactment of laws that ban employer/employee non-competition agreements with broadcasters. New York is apparently now considering a similar law, but in New Jersey a few years ago AFTRA failed to muster enough support to pass its proposed legislation.

The California Business and Professions Code states that "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." In 1999, a California court awarded a woman $1.2 million when her employer fired her for refusing to sign an "illegal" non-compete agreement. Even in states that don't expressly proscribe such agreements, courts tend to favor a former-employee if he or she would be deprived of the ability to earn a living due to enforcement of a non-competition agreement against him or her. So, it is important to get the advice of a good local lawyer familiar with local laws and precedents before entering into any type of employer/employee non-compete.

Which brings up the first substantive issue to consider – which state's laws apply to the agreement? With most types of contracts, it is usually a good idea for the parties to choose a specific state's laws and write that choice

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into the document. This eliminates guesswork later about which state's laws should be used to interpret the contract. Agreed upon "choice of law" provisions in contracts between two sophisticated parties are usually honored by courts. However, non-compete agreements between employers and employees raise public policy issues that may cause courts to disregard the chosen state's law.

If, for example, a station group owner with headquarters in Texas hires a general manager to work at one of the owner's stations in Ohio and gets the manager to sign a non-competition agreement that contains a Texas choice of law provision, courts in Ohio might ignore the choice of law provision and instead apply Ohio law to the agreement on the grounds that the overarching public policy of Ohio is to protect its citizens. Thus, special attention should be paid to such agreements because, if and when push comes to shove, the law of the state in which the person is employed may likely be applied to the agreement regardless of whether the contract specifies the laws of another jurisdiction.

*What happens when the employee is forced to "walk the plank" involuntarily? Since it is the employer's choice to kick the employee back out into the job market, should the non-compete obligation still apply?*

The next issues to consider are the basic "who, what, when, where and how much" questions. Who are the parties to the non-competition agreement? You might not want to bother getting the accounting clerk or receptionist to sign a non-competition agreement, but if you are pouring money into promoting a new on-air personality and show, a non-competition agreement to prevent him or her from jumping ship to your across-town competitor would be in order.

What are the types of competition covered? If you are a television station owner employing an evening news anchor, do you want to prevent him or her from working as a talk-show host for a radio station in the same market after leaving your station? When, or how long, should the period of non-competition last? Typically agreements are for one-year, but shorter or longer terms may fit the circumstances. If you give an employee six months' pay as severance, trying to enforce a non-compete for two years might not fly.

The "where" question is usually controlled by the market. Unlike the non-competition agreements in connection with the sale of a station that we discussed in last month's issue, the FCC does ***not*** have any restrictions that we are aware of on the geographic scope of non-competes between employers and employees. The question of how far such an agreement should reach is a difficult one to answer. Non-competition agreements that are supported by only a continued offer of employment have been enforced in some circumstances, although enforceability is far from a sure thing. As a practical matter, the more money a person is paid, either as a bonus at the start of employment, or in the form of extra salary that is tied directly to negotiation of a non-complete agreement, the more likely the agreement is to be enforceable.

One item to consider when drafting a non-compete is the "trigger" for activating the non-competition obligation. If, for example, an employee voluntarily "jumps ship" or is fired "for cause", then it is clear these acts should start the period during which he or she is obligated not to compete with the now-former employer. But what happens when the employee is forced to "walk the plank" involuntarily (fired for no reason)? Since it is the employer's choice to kick the employee back out into the job market, should the non-compete obligation still apply? It is a good idea to think through all of the possible scenarios for the end of the employment relationship when deciding how the non-compete obligation will be triggered.

As we discussed last month, it is also a good idea to add a "savings" clause to non-competition agreements that specifies any provision deemed to be invalid or unenforceable will not invalidate or make unenforceable the remaining provisions of the contract. Also, it is often prudent to insert a clause allowing a court to modify any offending provisions of the agreement to the extent necessary to make the provisions valid and enforceable.

Other related issues, ones that are not strictly "non-compete" but are similar, are confidentiality and non-solicitation. The former protects confidential information of the employer from disclosure by the employee during and after employment. Note, however, that because of the nature of the broadcast business, there is not much information that is confidential (*e.g.,* the station's advertisers and music play list can both be readily discerned by anyone in the audience). A non-solicitation agreement prevents an employee who leaves from luring his or her former colleagues to go work at his or her new place of employment. Both of these related concepts can be useful as supplements to the basic non-compete agreement between an employer and employee.

*Lee Petro– "Lee-gally" speaking*

# Wireless Cable Rules Tweaked

## Years in the making, new rules may arrive before Godot

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

Much like a track race where the starter's pistol is not loaded, the wireless cable industry (formerly ITFS and MDS, now EBS and BRS) has been poised at the starting line waiting, waiting and waiting.

Over the past eight years, the Commission has adopted three sets of rules regarding this service, taking it from analog service, to one-way digital service, and finally to two-way fixed and mobile service. One component of the most recently adopted version of the rules would have BRS and EBS licensees transition to a new band arrangement that would eliminate the inter-leaved nature of their assigned spectrum. This new band plan permits the consolidation of a licensee's spectrum in a contiguous block intended to permit, at least in theory, more efficient and robust use of the spectrum.

*The Commission has reconsidered the MEA rule, and now will permit the transition to occur by Basic Trading Areas.*

The Commission authorized the two-way digital service in July 2004, almost two years ago. But since then, the industry has been kept at a standstill, stranded at the starting line while the Commission reconsidered a number of its rules. The rules under reconsideration are central to the build-out of the service and, thus, the operators waited.

Their wait may have finally ended…

On April 12, 2006, the Commission adopted an order resolving the various petitions for reconsideration filed in 2004. While the text of the order has yet to be released, we do know that many of the concerns raised by operators may have been answered. First, while the Commission originally adopted rules requiring the transition to a new band-plan based on the Major Economic Area (MEA), the Commission has reconsidered this rule, and now will permit the transition to occur by Basic Trading Areas. If the MEA approach had been affirmed, the transition would have been slowed considerably, since most MEAs involved many states (*i.e.*, New Mexico to Mississippi). Additionally, the Commission has announced that it will permit EBS operators to enter into ***30-year*** lease agreements with commercial operators. The increase in permissible lease terms is intended to provide a more stable environment, which should facilitate the development of reliable business plans for financing purposes. Finally, the Commission will permit licensees to transition to the new band plan on an individual basis, should it become apparent that no other party would move to the new band plan.

Because the full text of the Commission's decision has not yet been released, it remains to be seen what other changes may have been made in the details of the new rules. Once the full order is released, we will provide you with more details. In the meantime, the Commission will be loading its starter's pistol.

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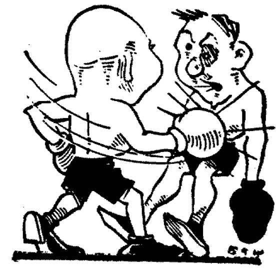
contest does nothing to make the FCC any happier. The FCC duly acknowledged that a second contest was conducted and that the rules were applied to the second contest, ***but*** the FCC hit the station with a $4,000 fine for not conducting the contest as advertised the first time. Readers are strongly encouraged to be meticulous about their contest rules and to run contests correctly the first time around.

***Former Owner Tells FCC he no Longer Owns the Station*** - The FCC fined a Montana AM station $7,000 for failing to maintain a meaningful managerial and staff presence at its main studio. The company fought the fine, but also told the FCC that it had sold the AM station and all that was left of the company was "a shell entity without any assets or cash". The FCC was unmoved, finding that it had no evidence indicating that this claim was true. The Commission let the fine stand. It is not clear how the FCC intends to pursue this claim if the company that once held the station is in fact now empty. Nonetheless, the FCC filled four pages of an order with a detailed discussion of the main studio rule and the former licensee's liability.

*Latest focus: should OET-69 apply or not?*

# MSTV, Qualcomm Slugfest Over MediaFLO Service on Channel 55 Continues



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

The ongoing war between the Association for Maximum Service Television (MSTV) and Qualcomm over the launch of Qualcomm's MediaFLO mediacasting service continues.

For those Luddites among you who may not be familiar with Qualcomm's bleeding edge technology, MediaFLO is described by Qualcomm as "a comprehensive, end-to-end solution designed specifically to address the inherent challenges of efficiently and cost-effectively distributing mass volumes of high-quality mobile multimedia to wireless subscribers." So, basically, it will supposedly let you carry your TV, computer, phone, calculator and other paraphernalia around on your belt.

Back in 2003, Qualcomm, a producer of digital wireless technology, bid in Auction 49 and won five Economic Area Grouping licenses in the Lower 700 MHz band, regulated under Part 27 of the FCC's rules. It subsequently acquired a sixth license by assignment. Qualcomm intends to use these licenses to deliver its MediaFLO service on the eventually-to-be-vacated TV Channel 55.

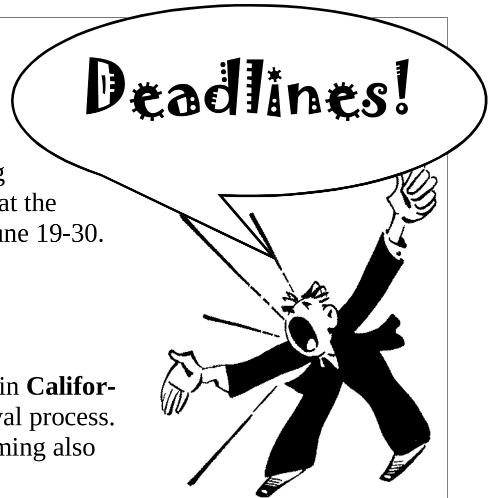
*MSTV maintains that the OET-69 model will **not** adequately measure the interference caused by the MediaFLO service, which could operate with multiple transmitters on a single channel.*

The problem is that, in certain markets, analog TV and DTV stations will be operating on co- and adjacent channels until the end of the DTV transition in 2009, giving rise to the very real possibility of interference from MediaFLO in the meantime. Qualcomm successfully negotiated interference-acceptance agreements with stations operating on those channels in a few markets, and, in one instance, compensated a station in New York an undisclosed sum for its flash-cut abandonment of Channel 55. However, it has also encountered significant reluctance from many other stations that stand to be adversely affected by the new service.

In order to ensure that MediaFLO has the widest reach possible, Qualcomm petitioned the FCC in January 2005, requesting a declaratory ruling that use of the methodology established in OET Bulletin No. 69 ("OET-69") be accepted to demonstrate compliance with the TV/DTV interference criteria set forth in Part 27 and that a 2% threshold be set as the *de minimis* amount of interference. MSTV and other parties concerned about the potential harm to broadcasters have staunchly opposed this petition, maintaining that the OET-69 model will ***not*** adequately measure the interference caused by the MediaFLO service, which could operate with multiple transmitters on a single channel. A series of filings and *ex parte* notices have followed, with each side reasserting these same basic arguments, albeit with various forms of new support.

The most recent filings occurred on April 18th, with Qualcomm providing notice of an *ex parte* meeting with Chairman Martin's office in which the company pressed its readiness to launch, emphasizing that the pending petition constituted the sole remaining obstacle. But a Commission decision may not come as speedily as Qualcomm would like. On the same day, MSTV filed a letter referencing new software that would implement an alternate engineering methodology to measure potential interference. MSTV's letter notes that, because Qualcomm has not disclosed its proposed transmitter locations, MSTV has not been able actually to make the interference calculations using the software and urges the Commission to require such disclosure from Qualcomm, "to allow the proceeding to move forward on the basis of science and facts rather than spurious lawyers' arguments."

AMST is rightly concerned about maintaining the integrity of the over-the-air television service in the vicinity of Channel 55 for the next three years. For its part, Qualcomm is obviously anxious to get its new technology to market before it becomes old technology. The Commission, caught between the immovable object and the irresistible force, may have to reach a decision on this at some point – unless it elects to use bureaucratic inaction to drive the adverse private parties to some mutually acceptable negotiated resolution. Stay tuned.




**May 1-May 12, 2006**

***LPTV/Class A Television/Television Translator Filing Window – POSTPONED UNTIL JUNE 19-30*** - *LPTV*, *Class A television*, and *television translator* stations may file applications for digital companion channels during this filing window in connection with the digital television transition. Note that the filing window, originally scheduled for May 1-12, has been postponed until June 19-30.

**June 1, 2006**

***Television Renewal Pre-Filing Announcements*** - *Television* stations located in **California** must begin pre-filing announcements in connection with the license renewal process. **California** *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 **Arizona**, **Idaho**, **Nevada**, **New Mexico**, **Utah**, and **Wyoming** must file their license renewal applications.

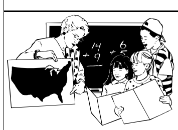
***Television Renewal Post-Filing Announcements*** - All *television* stations located in **Arizona**, **Idaho**, **Nevada**, **New Mexico**, **Utah**, and **Wyoming** must begin their post-filing announcements in connection with the license renewal process, and continue such announcements on June 1 and 16, July 1 and 16, and August 1 and 16.

***EEO Public File Reports*** - All *radio* and *television* stations with more than five (5) full-time employees located in **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **Michigan**, **Ohio**, **Nevada**, **New Mexico**, **Utah**, **Virginia**, **West Virginia**, and **Wyoming** 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 **Michigan** and **Ohio** must file a biennial Ownership Report (FCC Form 323 for commercial sations or Form 323-E for noncommercial stations). All *television* stations located in **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **Nevada**, **New Mexico**, **Utah**, **Virginia**, **West Virginia**, and **Wyoming** must also file a biennial Ownership Report. All reports filed on FCC Form 323 or 323-E must be filed electronically.

**July 1, 2006**

***Digital Television Stations*** - All *television* stations must complete construction of and begin operation with their full replication or maximization facilities or face the loss of interference protection beyond the signal contours of the facilities actually in operation as of that date. If a station is unable to meet this deadline, it musts file a waiver request prior to or on July 1.



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of the FCC's transition to the new "method" of determining the number of radio stations in a market, the FCC decided that requiring a two-year waiting period was not necessary in this case. Granting the buyer a waiver of the two-year waiting period, the FCC found that the buyer owned only five stations under more recent BIA date and, thus, could purchase a fifth in compliance with the multiple ownership rules.

This case demonstrates that the new market definition approach can be subject to manipulation by affected private parties. That is, if a multiple owner finds itself maxed out in a particular market, that owner might seek relief ***not*** by asking the FCC for a waiver, but rather by asking Arbitron simply to re-define its markets in a way which eliminates the problem. But this case also reconfirms that the FCC is aware of that potential and that the FCC will not be inclined to cut much slack for those who try that particular gambit. It appears for the time being that the two-year waiting period will be enforced stringently on a going-forward basis.

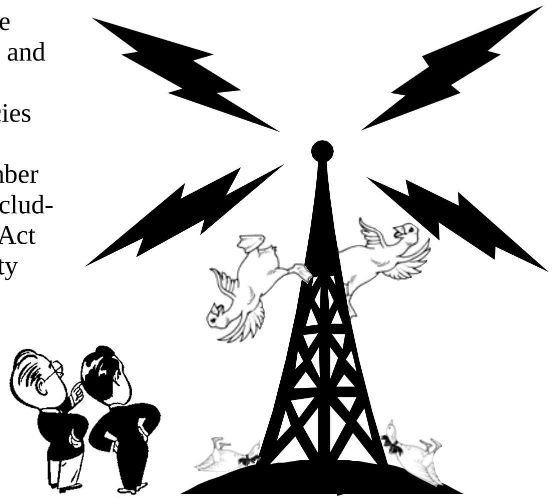
*FCC finds petition lays an egg*

# Petitions Against Gulf Coast Towers Rejected

By: *Harry F. Cole*
*703-812-0483*
*cole@fhhlaw.com*

The Commission has rejected an August, 2002, petition filed by various nature-oriented groups who sought detailed environmental analysis of just about every communications tower in the Gulf Coast Region.

The petitioners included the Forest Conservation Council, the American Bird Conservancy and Friends of the Earth. They claimed that the FCC's policies regarding towers in the Gulf Coast Region violated a number of environmental statutes, including the Endangered Species Act and the Migratory Bird Treaty Act.



The relief sought was – how shall we say this delicately? – a bit extreme. The petitioners wanted the Commission to require tower owners to prepare environmental assessments for almost 6,000 tower ***that had already been constructed***, and to submit supplements to environmental assessments for nearly 100 other towers which had also already been built. Oh yeah, they also wanted the Commission to prepare an Environmental Impact Statement evaluating the effects of ***all*** antenna structure registrations in the Gulf Coast region, and to impose a moratorium on registration of any new towers in the region until environmental review is completed. And they wanted the Commission to adopt new measures to reduce or eliminate the intentional or unintentional killing of migratory birds.

The Commission concluded that the petitioners hadn't made any specific allegations about any particular towers, so the requests for the zillion or so environmental assessments went nowhere. The Commission similarly found the remainder of the requests were not adequately supported, so it dismissed them. However, in so doing the FCC observed that it does have a proceeding, commenced nearly three years ago, in which it is examining the effects of towers on migratory birds. (*See* the September, 2003 Memo to Clients for more information.) Way back in 2003 the Commission opened an inquiry into questions relative to migratory birds and towers. According to the Commission now, a notice of proposed rulemaking may be issued in that matter "in the near future".

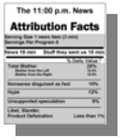
## FHH - On the Job, On the Go

**Jim Riley** will be attending the Louisiana Association of Broadcasters Annual Convention in New Orleans on June 3, where he will be giving a presentation.

**Jeff Gee** spoke at the Communications Law and Policy Society Spring Symposium at the Syracuse University College of Law.

**Gene Lawson** recently participated in the 36th Annual Advanced Business Law Seminar at The Boar's Head Inn in Charlottesville, Virginia. This year's major topics of interest to our clients focused on enforcement of letters of intent and other informal agreements. Additional topics included the duties of board members when exiting a private company and an innovative new insurance product to insure representations and warranties to allow sellers to truly cut their ties and walk away to retirement or other endeavors. If you have any questions about these or other business law matters, Gene can be reached at 703-812-0404 or lawson@fhhlaw.com.

Media Darling **Harry Cole** was quoted in the *Los Angeles Times* (in an article about payola) and appeared on the CNBC program "On the Money" discussing the appeals of the FCC's recent indecency rulings.

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tions named by the activists' report. CBS told Reuters that it is reinforcing its policy requiring disclosure of VNR material included in news content and is investigating to determine if additional action is needed.

An FCC spokesman also says the Commission is investigating. Last spring, the FCC suggested that it could enforce good journalism practices through Commission rules requiring disclosure of sponsorship and similar financial interests. The theory apparently is that somebody, somewhere, presumably paid good money to have the VNR produced, the goal being that it would ultimately be broadcast. The sponsorship identification rules clearly require that, where a station receives consideration for the broadcast of any material, or where a station has knowledge indicating that consideration was paid somewhere along the line in order to get the material broadcast, then the station has an obligation to disclose that to its audience. Following on that logic, the Commission seemed to suggest in its April, 2005 notice that stations which accept and air VNRs should be extra cautious in checking upstream to try to identify the source of any consideration which may have been paid (and, of course, by whom) in connection with the production and distribution of the material.

> *Payola/sponsorship ID/ VNR issues are not going away in the near future. As a result, all broadcasters would be well-advised to take a good close look at their own internal policies relating to compliance with the sponsorship ID rules.*

Of course, as the Commission acknowledged in that same notice, the Communications Act provides generally that, where the station hasn't received any consideration for the broadcast and where the station has no information that any consideration changed hands in connection with the broadcast, then no sponsorship identification is necessary with regard to material that is furnished to the licensee "without charge or at a nominal charge".

The Radio-Television News Directors Association – RTNDA – has responded to the latest VNR allegations by reiterating guidelines released when the VNR flap first broke last year. They seem simple enough – disclose so the audience knows when someone with an interest might be trying to sway public opinion.

Certainly, licensees have an interest in doing the right thing and maintaining credibility. But another, more practical reason for assuring compliance with the sponsorship ID rules has cropped up.

As we have previously reported, the Attorney General of New York has been on a crusade against what he perceives to be "payola" practices on the part of major record companies and radio licensees. He has entered into multi-million dollar settlements with at least two record giants, and has filed a lawsuit against Entercom. All the while, he has baited the FCC for not enforcing the payola (*i.e.*, sponsorship ID) rules.

It looks like the NYAG's barbs hit a nerve at some point. It was disclosed this past month that the Commission has sent letters of inquiry to four broadcast groups, seeking information concerning their relationships with record companies and record promoters. While solid, reliable information is sketchy at this point, published reports suggest that the four radio groups have been negotiating with the FCC for at least several weeks to try to reach a consent agreement pursuant to which the groups would make a "voluntary" contribution to the U.S. Treasury and possibly agree to adopt certain procedures and policies aimed at preventing sponsorship ID violations. In return, so the story goes, the FCC would not find that they had violated the rules. Obviously, a win-win situation.

But reports indicate that the deal cratered because the FCC and the licensees were way far apart on the amount to be paid – the licensees were supposedly offering to pay somewhere in the neighborhood of $1,000,000, while the FCC was looking for something more in the range of, oh, say, $10,000,000.

Whatever the nature of the negotiations, the issuance of letters of inquiry ratchets up the pressure on the particular licensees, and on the radio industry as a whole. If the licensees don't reach a settlement before their responses are due – and there's no reason to believe that they are likely to reach such a settlement – the FCC is likely to receive in those responses a boatload more internal information which may shed a lot of light on the stations' music promotion practices. The NYAG's investigation turned up a large number of very interesting, at least potentially inculpatory documents (emails, in particular), and the FCC presumably expects that its net will come back to the boat with the same haul.

All of which is to say that the payola/sponsorship ID/ VNR issue is not going away in the near future. As a result, all broadcasters would be well-advised to take a good close look at their own internal policies relating to compliance with the sponsorship ID rules, just to make

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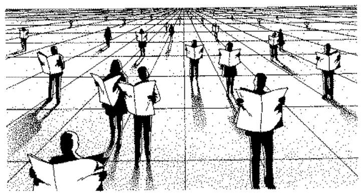
*Stuff you may have read about before is back again . . .*

# Updates on the News

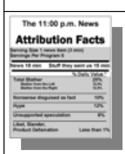
***"Once more into the breach"*** – President Bush has nominated Chairman Martin for another five-year term. Since Martin served his first stint without a full five-member Commission to chair, this seems only fair. But it may turn out that the second verse will be the same as the first – check out the next squib.

***"They also serve who only stand and wait"*** – Robert McDowell, the Republican cavalry which was supposedly charging in to save the Commission from the 2-2 stalemate situation which has reportedly hamstrung much of its decisionmaking for the last year or so, has gotten waylaid on his way to the Portals. It appears that at least one senator is putting a hold on McDowell's nomination to fill the fifth seat until adequate provision is made for funding for Hurricane Katrina relief. This is somewhat reminiscent of the treatment which befell Commissioner Adelstein's nomination several years ago. Obviously, we'll let you know when Number 5 finally gets the nod.



***"Answering to a higher authority?"*** – The Commission's recent indecency decisions (*see* last month's *MTC*) have been appealed. CBS and Fox have taken the case to the U.S. Court of Appeals for the Second Circuit, in New York, while ABC/Disney and Hearst have appealed to the U.S. Court of Appeals for the District of Columbia Circuit. NBC, along with CBS and Fox affiliates, filed to intervene in the Second Circuit action on behalf of CBS and Fox. While there appeared to have been at least some coordination among the parties in the filing of the appeals, eyebrows were raised at the fact that appeals were lodged in two different courts. Few observers expressed surprise that CBS and Fox would look outside of DC for a sympathetic court – the DC Circuit has seemed generally tolerant of the FCC's approach to indecency the few times that that court has taken a look at it over the last 10-15 years, so it would make sense to look elsewhere, much like the appellants in the multiple ownership case did, with great success, in 2003. But why ABC and Hearst would lob their appeal to the DC Circuit is anybody's guess. At least some optimistic players think that the two separate appeals will ultimately be consolidated into a single proceeding to be heard by the Second Circuit, but as far as we can tell, there are no guarantees on that. If you're concerned about whether these appeals might disrupt your vacation plans this summer, don't worry – generally, it takes 12-18 months to go from the filing of an appeal to the issuance of a decision by the court, and that assumes that things go smoothly all along the way. So we're probably looking at a decision in mid-2007. Of course, that would merely be a court of appeals decision – good to have, but not the last word. Whether either or both cases might ultimately end up before the Supremes is a whole other story, one which can't even be roughly predicted until we see the court of appeals decision(s). So sit tight, keep your fingers crossed, and don't forget to turn on the five-second delay in the meantime.

***"New" rules now available*** – If you like to keep a hard copy of the FCC's rules handy – and that's always a good idea – the Commission has announced that the latest edition of its rules has now been published by the Government Printing Office. You can order by phone (using a credit card) by calling 202-512-1800. The volume containing the broadcast rules – *i.e.*, Part 73 – costs $61.00. We'd like to call that a steal at twice the price, but it's really not. In fact, because of the lag-time inherent in the publication process (not to mention the government bureaucracy attendant thereto), the just-released rules are current only through September 30, 2005. That's right, they don't include any rule changes that may have been adopted in the last five months or so. If you want to be truly *au courant*, go to http://ecfr.gpoaccess.gov, where the government is running a beta test site featuring FCC rules updated to within the previous 24-48 hours. To get to the FCC's rules, select Title 47 in the Browse menu in the middle of the page, and then select Parts 70-79 when you get to Title 47. The broadcasting rules are mainly in Part 73.

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sure that there are no unpleasant surprises should the FCC come to call.

Also, if the FCC does take enforcement action, fines could amount to tens of thousands of dollars or even dramatically more. The FCC could also refer cases to the Justice Department for criminal prosecution, although the practical likelihood of that happening is probably close to zero.

Still, there's the very real possibility that this kind of thing could give a local political official an opportunity to garner a few headlines. After filing suit in March against Entercom alleging radio payola, you never know where New York's Attorney General and gubernatorial hopeful, Eliot Spitzer, might next turn his attentions.

## FM Allotments Proposed –3/22/06-4/19/06

| State | Community | Approximate Location | Channel | Docket No. | Deadlines for Comments | Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal) |
|---|---|---|---|---|---|---|
| **KS** | Ashland | 163 miles W of Wichita, KS | 288C3 | 06-65 | Comnt: 5/22/06 Reply: 6/6/06 | Drop-in |
| **TX** | Normangee | 132 miles NE of Austin, TX | 299A | 06-66 | Comnt: 5/22/06 Reply: 6/6/06 | Drop-in |
| **OR** | Boardman | 164 miles E of Portland, OR | 231C3 | 06-72 | Comnt: 5/22/06 Reply: 6/6/06 | Drop-in |
| **KY** | Hodgenville | 98 miles SW of Frankfort, KY | 297A | 06-77 | Comnt: 5/30/06 Reply: 6/13/06 | Section 1.420(i) |
| **KY** | Horse Cave | 124 miles SW of Frankfort, KY | 293A | 06-77 | Cmnt: 5/30/06 Reply: 6/13/06 | Section 1.420(i) |
| **KY** | Lebanon Junction | 75 miles SW of Frankfort, KY | 257A | 06-77 | Cmnt: 5/30/06 Reply: 6/13/06 | Section 1.420(i) |
| **KY** | New Haven | 68 miles SW of Frankfort, KY | 274A | 06-77 | Cmnt: 5/30/06 Reply: 6/13/06 | Section 1.420(i) |
| **KY** | Springfield | 51 miles S of Frankfort, KY | 265A | 06-77 | Cmnt: 5/30/06 Reply: 6/13/06 | Section 1.420(i) |
| **TN** | Belle Meade | 9 miles SW of Frankfort, KY | 246C2 | 06-77 | Cmnt: 5/30/06 Reply: 6/13/06 | Section 1.420(i) |
| **TN** | Goodlettsville | 14 miles S of Nashville, YN | 221A | 06-77 | Cmnt: 5/30/06 Reply: 6/13/06 | Section 1.420(i) |
| **TN** | Hendersonville | 18 miles NE of Nashville, TN | 259C0 | 06-77 | Cmnt: 5/30/06 Reply: 6/13/06 | Section 1.420(i) |
| **TN** | Millersville | 17 miles Nof Nashville, TN | 294C3 | 06-77 | Cmnt: 5/30/06 Reply: 6/13/06 | Section 1.420(i) |
| **MN** | Eagle Lake | 91 miles S of St. Paul, MN | 231A | 06-83 | Cmnt: 6/6/06 Reply: 6/20/06 | Section 1.420(i) |

## 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.*

## FM ALLOTMENTS ADOPTED –3/22/06-4/19/06

| State | Community | Approximate Location | Channel | Docket or Ref. No. | Availability for Filing |
|---|---|---|---|---|---|
| **TX** | Paint Rock | 181 miles NW of Austin, TX | 296C3 | 05-31 | TBA |
| **LA** | Addis | 11 miles SW of Baton Rouge, LA | 288A | 05-291 | None |
| **WI** | Stoughton | 18 miles SE of Madison, WI | 240A | 04-239 | None |
| **OK** | Coalgate | 116 miles SE of Oklahoma City, OK | 242A | 05-274 | TBA |
| **FL** | Silver Springs Shores | 71 miles NW of Orlando, FL | 259A | 05-275 | TBA |
| **KS** | Burlingame | 30 miles S of Topeka, KS | 253C1 | 05-133 | None |
| **OH** | North Canton | 54 miles S of Cleveland | 269A | 04-377 | None |

*A word to the wise from Joe Di Scipio*

# Our Networks, Our Friends? Not Always

### Take a careful look at proposed network-affiliate deals

From time to time in this corner of "wisdom" we like to remind affiliates to watch their collective backs. Over the last month, ABC has announced that it will offer streaming episodes of *Desperate Housewives, Lost*, and *Commander in Chief* the day after the initial broadcast airings. Of course, the affiliates will not share in any revenue generated from the streaming. Fox, on the other hand, has announced that it will include its affiliates on revenues that may be generated from broadband or video-on-demand showings of its programming (but Fox apparently has the right to offer 100% of the network lineup over alternative platforms in the 3rd year of the deal). In addition, heads up to all you ABC affiliates – ABC has proposed a number of significant changes to the NewsOne Agreement, the worst of which gives ABC the exclusive right to use any of the material affiliates send to ABC on any platform, but gives affiliates the right to use the ABC provided material only in over-the-air broadcasts and only in news programs. We think this is a bad deal for affiliates and urge affiliates to negotiate better terms with ABC.

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times(s)." The FCC also fined Radio One $12,000 for the late-filed issues/programs lists.

Thus, the FCC makes clear, stations will be held accountable not only for what items are placed in the public file, but also for ***when*** such items are placed in the public file. All stations therefore should make public file compliance a matter of day-to-day concern for their responsible personnel. To avoid problems (and fines) at renewal time, every station should have a clear understanding of what must be placed in the public file, when it must be placed there, and who is responsible for placing it there. This last point is often overlooked but many, if not most, public file problems result from the departure of a staff member responsible for the public file without a clear set of directives to that staff member's replacement. Such lapses in 2006 will likely cost several thousand dollars in 2014. If you have any questions regarding the FCC's public inspection file requirements, please call your ever-helpful communications attorney.