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

Memorandum to Clients

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

E pluribus unum, v.2.0

Ownershipalooza 2006

It's the same old song, but a different feeling after three-year hiatus

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

The Carousel is spinning again. The FCC, for the however many-eth time, is considering revision of its media ownership rules. If it seems like the FCC has become the poster child for the old French *bon mot – plus ça change, plus c'est la même chose* – it's not for wont of trying.

You'll no doubt remember how in 2003, an activist group got a Philadelphia-based federal appeals court that doesn't usually hear FCC cases to torpedo much of the Commission's last multi-year attempt to modernize rules governing who can own how many stations in what places. Known as the Prometheus Case (for the activist coalition that named itself after the mythic rebel god whom the ancient Greeks believed provided mortals with the secret of firemaking), it torched what was expected to be a big season of broadcast deal-making.

On a pure party-line vote earlier in 2003, the three Republican FCC Commissioners (led by then-Chairman Michael Powell) loosened ownership restrictions with the Democrats dissenting – only to have the judiciary step in and keep many of the rules from taking effect.

Anti-consolidation activists continue to be guided by notions born in the pre-Internet era that avenues of communication are scarce.

The makeup of the FCC today portends a similar FCC voting bloc. The GOP now has a 3-2 majority since the last Commissioner's slot has been filled by Robert MacDowell, whose résumé includes a stint as legal counsel to the Bush-Cheney campaign Florida recount team after the 2000 election.

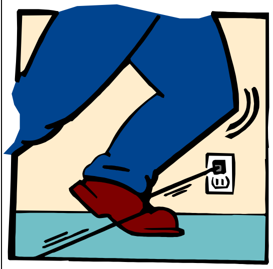
But some things have changed. Notably, the economic climate in the media business. Many of the big old powerhouse players who would have jumped into the expected buying frenzy if the last ownership rule makeover had not been cut-down in court, could well be sitting on the sidelines this time. Where synergy was the buzzword at the start of the millennium, survivalist caution appears be the watchword these days. How much difference half a decade makes!

More may not necessarily be better in the today's media marketplace. Fox-parent Newscorp is expected to cull its herd or stations, following the lead of competitor, CBS. Tribune Company – whose newspaper and broadcasting portfolios were once seen as a model of "synergy" at work, has proven that it ain't necessarily so. Many analysts point out that the combination of New York's Newsday newspaper and the Big Apple's WB affiliate, Channel 11, has not done all that much for the Tribune's bottom line.

On the other hand, same-medium duopolies do seem to cut costs and bring about coordinated sales synergies. In many instances, a stable of same-market stations has been a good economic bet. But it is no longer axiomatic that consolida-

(Continued on page 9)

The Scoop Inside

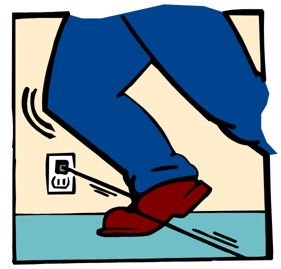


Not so fast . . .

Multichannel Must-Carry Yanked From Agenda

Controversial topic tabled temporarily

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



In a move possibly signaling a lack of support from his fellow Commissioners, Chairman Martin cancelled the much-anticipated vote on multicast must-carry three days before its scheduled June 21st date.

The issue of whether cable operators should be required to carry the multiple programming streams offered by a digital broadcast television signal has been a source of controversy and commentary since DTV's multichannel potential became apparent. The FCC's 2001 Report and Order did ***not*** require cable providers to carry more than one programming stream from a single digital broadcaster. The Second Report and Order and First Order on Reconsideration, released in February, 2005, reaffirmed that finding. In reaching its conclusion, the Commission conceded that the statutory use of the term "primary" to specify programming entitled to must-carry privileges was ambiguous, but that First Amendment considerations of free speech necessitated limiting the burden on cable operators.

Since both the 2001 and 2005 decisions went cable's way – by limiting cable must-carry obligations to a single channel per broadcast station – and since the 2005 decision passed with just a single dissent in favor of broadcasters, the outlook for broadcasters in this area has been decidedly not brilliant. But – and this is obviously an important but – the single dissent back in 2005 was none other than then-Commissioner (now Chairman) Martin, and what a difference a year and a Chairmanship can make.

Since that decision last year, broadcasters have loudly voiced their opposition to the FCC's 2005 decision, pushing for reconsideration. And so the Commission's announced intention to take up the issue at its June meeting was greeted with more than a little excitement. That meeting was the first following the confirmation of Commissioner Robert McDowell, meaning that Chairman Martin finally had a Republican majority (consisting of himself and Commissioners Tate and McDowell). The conventional wisdom had it that the Chairman was prepared to reverse the Commission's earlier decisions and impose some form of multichannel must-carry obligation on the cable industry.

Not so fast. At the last minute the item was pulled from the agenda, without explanation. During the weeks leading up to the scheduled meeting, various members of Congress had been heard – both in public statements and in messages sent to the Commission – about the issue, a factor which might have had some effect. But since the Commission does not officially explain the deletion of agenda items, we are left to guess.

Of course, while the unexpected postponement of the vote is certainly a disappointment to broadcasters who may have been expecting the proverbial last-minute telephone call from the governor, the postponement is not necessarily the death knell of broadcasters' hopes.

Should broadcasters' dreams come true, of course, final victory would still be a ways off in the future. Cable interests would appeal the decision, presumably up to and including the Supremes, if necessary. Cable-telecommunications companies would undoubtedly raise previous First Amendment claims, and they might also advance Fifth Amendment assertions that multicast must-carry amounts to a "taking", both in the physical sense (forced sharing of cable channel space) and in the regulatory sense (by excessively encumbering a cable carrier's free use of its property). Broadcast industry

(Continued on page 9)

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

Supervisory Member
Vincent J. Curtis, Jr.

Co-Editors
Howard M. Weiss
Harry F. Cole

Contributing Writers
Ann Bavender, Sima Chowdhury, Anne Goodwin Crump, Jeffrey J. Gee, R.J. Quianzon and Michael Richards

Print Journeyman
Wiley Cole

Focus on FCC Fines

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

Clear Channel pays FCC $6,000 for a $1,000 "contest" – Some morning DJs at a Clear Channel station played a prank on their rival station and announced to listeners that a contest winner would make $1,000. The problem with the contest, the FCC found, was that there was no prize at the end of the contest. However, the story is a bit more complicated.

The morning personalities at a Florida Clear Channel station announced to their listeners that they would conduct a contest and give the 100th caller a $1,000 cash prize. All that the caller would have to do is to call in and state the name of the show. The Clear Channel personalities provided listeners with two phone numbers to call and qualify as listener number 100. But the Clear Channel radio hosts gave listeners the phone numbers of their rival station.

Not surprisingly, shortly after the Clear Channel team gave out the phone numbers and the promise of $1,000, the rival station was inundated with calls from listeners announcing the name of the Clear Channel show. According to the rival station, callers became irate when they were told that there was no contest and no money was being awarded. Further, the Clear Channel personalities apparently kept announcing the contest for two hours until the end of their show. At the end of the show, the Clear Channel team broke the news to its viewers that the contest was a prank. Four days later, the station that had to deal with all of the "contest" calls sent a complaint to the FCC about the Clear Channel antics.

The FCC focused upon the fact that Clear Channel had announced a contest for $1,000 which nobody could win. There was no way for listeners to call in and be the 100th caller – as the telephone numbers were for another station – so the Clear Channel station did not award the $1,000 prize.

Clear Channel's defense to the FCC was that their guys had simply engaged in a prank and that this incident was not a bona fide contest. The FCC did not take that call and instead fined Clear Channel $6,000 for telling its listeners – for almost two hours – about a contest that did not exist which they could not win.

Class A's are stations too – Class A television stations often look just like full power television stations to viewers, and the FCC requires the stations to behave like full power stations in many respects, too. In keeping with the requirement to act like full power stations, the FCC applies many of the broadcast rules even-handedly to full and Class A stations, notwithstanding the substantial differences in their respective operating powers. Part of that even-handedness is FCC field agent inspections. Two Utah stations found this out the hard way in April.

Two Class A stations were the targets of a visit from an FCC inspector who reviewed the station public files. The FCC agent noted that three items were missing from the public files and has asked the stations to respond. The agent did not find a contour map for either station. There were no ownership reports or copies of The Public and Broadcasting in the public files either. The stations have until the end of June to advise the FCC why they should not be penalized.

Readers who are subject to the local public inspection file rules are strongly urged to check their public files frequently to ensure that they are properly maintained.

AM station faces $4,000 fine for failing to power down – Based upon a complaint, an FCC field agent from Denver traveled to South Dakota to check out an AM station's power levels. The FCC agent set up an analyzer a little more than a half mile from the station's transmitter and took readings on a Wednesday night after sunset. The agent returned on Thursday night to take a couple more readings, including some at 9 p.m. that night. Bright and early on Friday, the agent took readings again at 5:45 in the morning. Armed with data, the agent visited the station and announced that he took readings which indicated a failure to power down.

The station admitted to the FCC that they had been having problems with their remote control of the transmitter and power. Changeovers required a manual adjustment at the tower and the station had not been diligent in completing the adjustments. The FCC proposed hitting the station with a $4,000 fine.

ATTENTION SALES DEPARTMENT: The FCC directed almost all of its fines this month to businesses that send out unsolicited faxes and use pre-recorded phone calls. Stations should ensure their marketing and sales departments do not send out unsolicited faxes or use pre-recorded phone calls. Unsolicited faxes are advertisements sent to a person without that person's express invitation. However, FCC rules do consider an established business relationship between a fax sender and recipient to constitute prior express invitation or

(Continued on page 7)

Speed bumps in orbit

Houston, we have a problem (or two)

XM and Sirius experiencing regulatory problems

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

XM Terminates Deal To Acquire Terrestrial Wireless Frequencies

On May 22, 2006, XM Satellite Radio (XM) announced that it would not go through with its deal to acquire terrestrial Wireless Communications Service (WCS) frequencies due to failure to obtain FCC approval of the purchase. Traditional radio broadcasters have fought for several years to try to stop XM from adding localized terrestrial radio service to its national satellite radio service. The fact that XM has thrown in the towel on this latest attempt to acquire terrestrial capacity to supplement its satellite-delivered service marks a set-back for XM.

Initially, XM sought to construct terrestrial repeaters for its national satellite signal. Traditional radio broadcasters strongly opposed granting XM authorization for terrestrial repeaters, fearing that XM would use them to offer local programming to its national satellite radio subscribers. As has repeatedly been noted in these pages and elsewhere, perhaps the most distinguishing quality of conventional radio broadcasting is its capacity for ***local*** programming directed to the immediate needs and interests of the ***local*** audience. Satellite-delivered radio service, by contrast, reaches a nationwide audience, which makes it far less adaptable for local service. That, however, has not stopped the satellite services from trying to fashion ways to provide at least quasi-local programming.

Recognizing the harm that an XM local radio service could have on traditional local radio stations, in 2001 the FCC granted XM special temporary authority for the repeaters with the condition that the repeaters be used only for simultaneous retransmission of XM's national satellite programming. In July, 2005, XM applied for FCC consent to acquire the terrestrial WCS frequencies from a company which obtained the frequencies in an FCC spectrum auction in 1997; despite the intervening eight years, that company had not initiated any type of service on the frequencies.

The WCS frequencies reach 163 million people in the U.S., including 15 of the top 20 markets in the country. The deal was strongly opposed by the National Association of Broadcasters (NAB) and XM's competitor, Sirius Satellite Radio. The NAB argued that XM could use the frequencies to provide local radio programming and other services which could differ from market to market and be sold to subscribers together with XM's national satellite radio service. The NAB insisted that, before approving the purchase, the FCC must consider the harm that XM could cause to traditional local radio stations by using the WCS frequencies for a new local radio service. With the pleading cycle complete, the matter then sat at the Commission for the better part of a year with no agency action. With no FCC approval in sight, XM backed out of the deal.

FCC Questions XM Radio Receivers Compliance With Emission Standards

XM was forced to ask suppliers of some XM receiver models to suspend shipment in May after the FCC found the receivers were not in compliance with emission limits. Many XM and Sirius satellite radio receivers contain mini-FM radio transmitters which transmit satellite radio programming to traditional radios over FM channels. XM determined that a small ferrite clip costing 25 cents could be added to an antenna wire to minimize the FM signal transmission from the XM receivers to traditional radios. In mid-June, the FCC found several XM modified satellite radio receiver models were in compliance with emission standards and shipment of the receivers resumed.

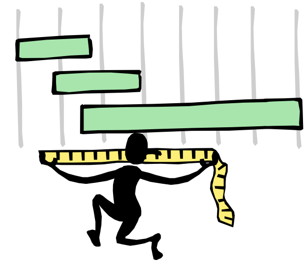
NAB Asks FCC To Investigate XM And Sirius Providing Satellite Radio Programming For Free

On June 5, the NAB wrote to FCC Chairman Kevin Martin urging the FCC to open an investigation into free access to satellite radio programming, and to consider whether the FCC's unequal regulatory treatment of satellite and traditional broadcast radio should be changed. The NAB pointed to several methods by which XM and

(Continued on page 8)

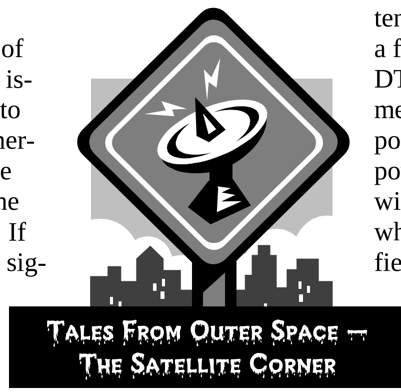
Spawn of SHVERA

FCC Proposes Procedures for Satellite Importation of Digital Distant TV Signals



By: Paul J. Feldman
703-812-0403
feldman@fhhlaw.com

In December 2004, Congress enacted the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA) to further aid the competitiveness of satellite TV carriers and expand program offerings for their subscribers. Among other things, SHVERA amended Section 339 of the Communications Act to permit satellite carriers to import to their subscribers ***distant digital network*** TV signals under certain circumstances. In two recent Orders, the FCC has begun to address some of the regulatory logistics associated with satellite importation of such signals.



As is the case with satellite importation of ***analog*** distant network signals, one key issue is whether the subscriber is eligible to receive such a service. Eligibility is generally based on the question of whether the subscriber is "served" by the signal of the ***local*** affiliate of the particular network. If the subscriber already receives the local signal, then ordinarily the subscriber would not be eligible to insist on delivery of a distant network signal.

The initial evaluation of whether a particular customer is already served is based on the ***predicted*** contours of the local affiliate's signal. If the customer is within the local affiliate's predicted contour, the satellite carrier generally may not provide distant signal service, and in order to receive such service, the customer (or the carrier on behalf of the customer) must seek a waiver from the local affiliate.

If the local affiliate refuses to grant such a waiver, then the customer (or the carrier on behalf of the customer) may request signal testing to see if the ***actual signal*** of the local affiliate covers the subscriber's location. If such testing shows that the subscriber does ***not*** receive the local affiliate's signal, then the subscriber may receive distant signal service from the satellite carrier. In the case of a subscriber seeking importation of a distant ***digital*** signal, the testing would be to determine if the actual over-the-air ***digital*** signal of the local network station meets digital signal intensity standard in Section 73.622(e)(1) of the FCC's rules. A subscriber may request such a test beginning April 30, 2006, if the local network station is within the top 100 television markets, or beginning July 15, 2007, for any other full power local network affiliate.

In a recent Notice of Proposed Rulemaking (NPRM), the FCC proposed rules to be used in taking measurements of digital TV signals at a subscriber's location for the purpose of determining eligibility to receive satellite imported distant digital signals. The proposed rules are similar to those used for measurement of analog TV signals, with minor differences. For example, the NPRM seeks comments on whether the receive antenna should be a standard one, or one with a front-to-back gain ration consistent with DTV planning factors. With respect to measurement procedures, the NPRM proposes measuring the integrated average power over the signal's entire 6 MHz bandwidth. The NPRM also seeks comments on what to do about a possible lack of qualified, independent testers to perform signal strength tests. The date for comments in this proceeding had not been established as of press time; please contact us if you are interested in participating in this proceeding.

In addition to the NPRM, the FCC also recently released an Order addressing requests from stations for waivers that would prohibit satellite subscribers from receiving or conducting a digital signal strength test in order to qualify to receive distant digital network signals. Local stations in the top 100 markets had to file such waiver requests by April 30th of this year, while other stations have until *February 15, 2007* to file such waiver requests, if they desire to do so. The idea behind this process is that stations which are not transmitting their digital signal at full power, primarily due to causes that are not the station's fault, would receive a six-month reprieve from the obligation to (a) participate in signal tests or (b) allow local viewers to receive imported digital signals from an affiliate of the same network. The waiver request is renewable upon a further showing.

Under SHVERA, a waiver request must provide clear and convincing evidence that the station's digital signal coverage is limited due to the irremediable presence of

(Continued on page 8)

And you thought it was expensive to pay lawyers by the word . . .

Indecency Ante Upped

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

Being indecent just became obscenely expensive. On June 15th, President Bush signed the Broadcast Decency Enforcement Act, which raised potential fines for the broadcast of indecent material from $32,500 per violation to $325,000 per violation up to a limit of $3 million per day. This ten-fold increase in potential fines, coupled with the aggressive (and unpredictable) enforcement stance of the current FCC, should cause every broadcaster to review its programming and operations policies with an eye toward minimizing the risk that a stray off-color remark might paint their balance sheet red.

Ironically, the stunning increase in forfeiture limits is good news in comparison with the legislation the House of Representatives wanted. The House version of the Act would have increased fines to half a million dollars per violation, which would have been bad enough. But the House also would have (a) authorized the FCC to require offending broadcasters to air educational PSAs, (b) required license revocation proceedings after three indecency violations, and (c) imposed potential liability on individual performers.

(Apparently recognizing that such an ambitious approach was probably not going to get out of the starting gate, and faced with the Senate's adoption of the more streamlined increase in fines, and presumably eager in this election year to create the impression that they are cracking down on the potty-mouths and pornographers who are eroding the bedrock of American culture, the House happily abandoned Plan A and embraced the Senate's approach.)

Meanwhile, "indecency hawks" now appear to have a solid majority on the FCC, with Republican Commissioner Deborah Taylor Tate quoted in several publications as calling for more legislation and regulation to reduce inappropriate content and promote quality children's programming. Reflecting the FCC's no-nonsense posture on indecency, the Commission wasted no time in flatly denying CBS's appeal of the Super Bowl/Janet Jackson fines – the FCC's order was adopted and released barely a month after CBS filed its petition for reconsideration.

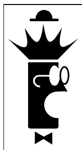
Taken together with the FCC's pronouncements on the CBS program "Without a Trace" and half a dozen other programs in mid-March, these developments unquestionably place broadcasters on notice that the FCC will not hesitate to use its new power to impose six figure fines. In fact, as Chairman Martin has long advocated fining stations for each separate utterance of a profanity, fines could quickly hit the million dollar mark for a single broadcast.

Various FCC decisions have criticized stations for not employing available technology to delay, dump, bleep or otherwise delete offensive material.

These developments leave broadcasters scrambling for ways to protect themselves from potentially devastating liability. Unfortunately, there is no one simple answer. Although the politicians and "family-values" activists would tell broadcasters to "just say no" to indecent programming, local broadcasters know that, for many reasons, it's just not that easy. The FCC's decisions over the past two years have made it extraordinarily difficult for broadcasters to determine the line between merely distasteful and legally indecent. While Oprah may be allowed to have a discussion of teen sex games on her program, we would not advise a morning radio DJ to do the same, nor (in light of the "Without A Trace" decision) should dramatizations of such goings-on be televised in prime time. Further complicating the already-complicated problem, network programming and "live" syndicated programming are typically received without an opportunity to pre-screen or edit out potentially indecent material. Live news and sports reporting presents the risk that interview subjects, members of a crowd or even random passers-by may utter an actionable indecency or profanity.

As a result, local broadcasters should give serious consideration to taking a multi-tiered approach to avoiding indecency fines. For starters, live broadcasts of any kind should be avoided wherever possible. Various FCC decisions have criticized stations for not employing available technology to delay, dump, bleep or otherwise delete offensive material. Radio stations in particular

(Continued on page 7)



(Continued from page 6)

should seriously consider instituting a delay on all live programming, particularly call-in and talk programs. While no particular amount of delay is required by the FCC, the delay should be sufficient to allow a responsible station employee to adequately consider the programming segment and take whatever action may be necessary.

And we should be clear that the action which may be necessary may simply be dumping the programming altogether. While "bleeping" or "digitally obscuring" (*e.g.*, "pixilating") offensive visuals may suffice in some cases, neither is a cure-all. The FCC has fined stations when the "bleep" did not completely eliminate an offending word and, in more than one case, the FCC has found that pixilating or otherwise obscuring nude body parts does not insulate stations from liability if viewers can determine that a performer has exposed himself or herself in a sexually provocative way. "Dumping" suspect programming in its entirety is a surer fix, although a far more disruptive one for audience and staff alike.

Station managers need to develop a formal policy on programming and ensure that every employee with any connection to programming fully understands that policy.

With respect to programming provided by broadcast networks, syndicators or other third parties, it is important for stations to carefully review their contracts in order to understand who will bear the risk for indecent programming. Ideally, programming contracts should specifically state that the programming will not include any material that violates FCC rules, and even more ideally any such provision should make clear that the FCC rules encompassed by the "no-violation" language includes indecency restrictions. Moreover, broadcasters should seek contract provisions that require the programmer to indemnify the broadcaster for any liabilities for indecent material in the programming – that is, the programmer should be made responsible for paying any fines and other costs that result from its programming.

Unfortunately, if a programming agreement already in place does not make such indemnification responsibility clear, it may be difficult, if not impossible, to convince the program supplier to enter into an amendment or clarification of the agreement. In such a case the program supplier probably has little or no incentive to put itself expressly on the hook for such liability if its existing agreement does not do so already. Still, if the station has any leverage, it may be worth a try to get such a supplemental agreement clarifying the parties' respective indemnification responsibilities.

If the programmer cannot be made responsible for its programming, a broadcaster's options for shifting liability away from itself are very limited. General liability insurance almost certainly will not cover FCC fines. Moreover, despite what some stations may believe, it does not appear that general "errors & omissions" coverage carried by most broadcasters will cover losses incurred due to FCC fines for indecent programming. Station managers should carefully review their insurance policies to understand what is and is not covered under their current policies and discuss the possibility of additional coverage with their insurance agents.

Finally, station managers need to develop a formal policy on programming and ensure that every employee with any connection to programming fully understands that policy. This policy should include a description of the FCC's indecency standards, along with examples to illustrate the kind of material that will be unacceptable. The policy also should make clear the station's technical and operational procedures for screening and editing potentially indecent programming. Finally, each employee should have a clear understanding of his or her responsibilities with respect to such policy. To reinforce this understanding, some stations have their employees sign statements that they have read and understand the station's policy on indecent programming. Certainly, to the extent stations have contracts with their on-air talent, such contracts should include specific provisions that the on-air talent will not violate the FCC's rules or the station's policies with respect to indecent programming.

While indecency restrictions have always been a fact of life for broadcasters, increased enforcement actions and vastly increased fines should give even experienced broadcasters pause. If you have not recently reviewed your policies with your staff, now would be a good time to do so. If you have any questions regarding the FCC's indecency policies, please call your ever-helpful communications attorney.

(Continued from page 3)

permission to send a facsimile advertisement. It is not acceptable for a business to send faxes to fax numbers gleaned from local chambers of commerce guides, phone books or other directories. In order to try to obtain business by fax, the sender must have the express permission or an established business relationship with the recipient.

(Continued from page 4)

Sirius make satellite radio programming available to nonsubscribers, including members of the public who object to receiving sexually explicit and profane satellite content on their traditional broadcast receivers.

As we reported in our last issue, in recent months numerous reports have been documented of satellite radio receivers causing "bleed through" so that nonsubscribers listening to traditional FM radio receive satellite radio programming on FM frequencies. This unwanted receipt of satellite radio programming occurs particularly in cars, with reports of car radios being affected up to one quarter mile or more from the satellite radio device. Listeners tuned in to National Public Radio and Christian programming on noncommercial stations at the lower end of the FM dial have been particularly subject to the unwelcome satellite programming. The NAB reported that traditional radio stations have forwarded to the FCC numerous complaints received from listeners upset that the programming of their choice is being interrupted and even more upset when the satellite programming is sexually explicit or contains profane language. The NAB stated that some listeners have reported that they are no longer listening to the FM stations of their choice when children are in their cars due to potential of receiving unwanted satellite programming.

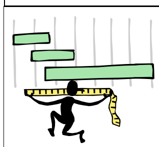
> *Listeners tuned in to NPR and Christian programming on non-commercial stations at the lower end of the FM dial have been particularly subject to the unwelcome satellite programming.*

In addition, the NAB pointed to satellite radio programming being made to nonsubscribers in other ways. Satellite radios are available in many cars from major rental car companies. Satellite radios are installed in numerous manufacturers' new cars, with purchasers of the cars receiving satellite radio programming for months without subscribing. The NAB argued that the provision of satellite radio free to nonsubscribers undermines the argument that satellite radio should be regulated differently than traditional radio because satellite radio is supposedly a subscription service. The NAB pointed out that traditional broadcast content regulation has been justified by protecting listeners from unexpected program content, especially when children are involved.

While XM, as reported above, says it has modified the mini-FM transmitters in its satellite receivers to minimize the FM signal transmission from its satellite receivers to traditional radio receivers, time will tell whether the modification has solved the "bleed through" problem. Meanwhile, no word has come from Sirius as to how it plans to address the "bleed through" problem. Sirius's CEO, who also owns 6.5 million share of Sirius stock, was quoted in a published interview as refusing even to acknowledge the "bleed through" problem.

FTC Launches Probe Into XM Marketing Activities

The FCC isn't the only federal agency looking at satellite radio. XM recently reported receiving a letter from the Federal Trade Commission ("FTC") in April advising that the FTC is investigating whether XM's marketing activities, including billing and rebates, comply with federal laws, including the Telemarketing Sales Rule and the Truth In Lending Act.



(Continued from page 5)

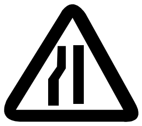
one or more of the following criteria:

- the need for international coordination or approvals;
- clear zoning or environmental legal impediments;
- force majeure;
- the station experiences a substantial decrease in its digital signal coverage area due to the necessity of using a side-mounted antenna;
- substantial technical problems that result in a station experiencing a substantial decrease in its coverage area solely due to measures taken to avoid interference with emergency response providers; or
- no satellite carrier is providing the retransmission of the analog signals of local network stations under Section 338 in the local market.

SHVERA further provides that under ***no*** circumstances may such a waiver be based upon financial exigency.

In its Order, the FCC granted half of the already-pending waiver requests, based on detailed and specific showings of facts under the first three criteria listed above. Almost all of the waiver requests that the FCC denied were those filed under the fourth criterion listed above (*i.e.*, station's digital signal coverage is decreased because of side-mounted antenna). In these cases, the FCC found that the licensees had failed to demonstrate by clear and convincing evidence that the use of a side-mounted antenna was the cause or resulted in substantial decrease in the station's digital signal coverage area.

Network affiliate full power TV licensees in markets outside of the top 100 should consider whether they have a basis and need to file such waiver requests by February 15, 2007. If you have any questions on this or other SHVERA issues, please contact us.



(Continued from page 1)

tion leads to better bottom line performance. The business culture in the media world appears to be changing from quantity to quality of assets.

Of course, these currents may not alter the debate ahead very much. Most media businesses moguls, like executive classes everywhere, would rather let market forces have their way rather than have government limit options. Anti-consolidation activists continue to be guided by notions born in the pre-Internet era that avenues of communication are scarce and that government intervention is the best way to ensure greater diversity of ideas and expression.

Just how scarce, of course, is the core of the argument today – even more than it was in 2003. Newspaper circulation is way down. Web pages views are way up. Personal digital music on iPods and MP3 players are making it harder for radio stations to draw audiences. On-demand personal video is getting hot. And the blogosphere is starting to challenge talk radio as the crucible of political passion.

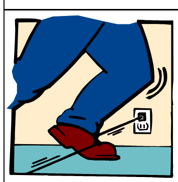
Broadcasters will get a chance to make their views known in the weeks ahead. The FCC is leaving more time than usual for comments and replies. The Commission plans an extra-long period of public comment. The record, once opened (and there is no set date yet) will remain open for public input for about four months or more. Broadly speaking, the FCC seeks comments on the following:

L Local Television Ownership Limit
L Local Radio Ownership Limit
L Newspaper Broadcast Cross-ownership Ban
L Radio Television Cross-ownership Limit
L Dual Network Ban
L UHF discount on the National Television Ownership Limit

Analytic eggheads will also get a chance to weigh in for a number of studies. The FCC has set aside $200,000 for research to determine such things as:

X How people get news and information
X Competition within types of media and across media platforms
X Marketplace changes since the Commission last reviewed its ownership rules
X Localism
X Minority participation in today's media environment
X Independent and diverse programming in today's media environment
X The impact of ownership on the production of children's and family-friendly programming

And don't miss the road show! The FCC plans six – count 'em, six – public hearings in different venues around the country. Watch these pages for updates. Or go to the FCC's official website www.fcc.gov. The Commission promises to provide a dedicated ownership hyperlink to hook you up with all things ownership. Stay tuned.



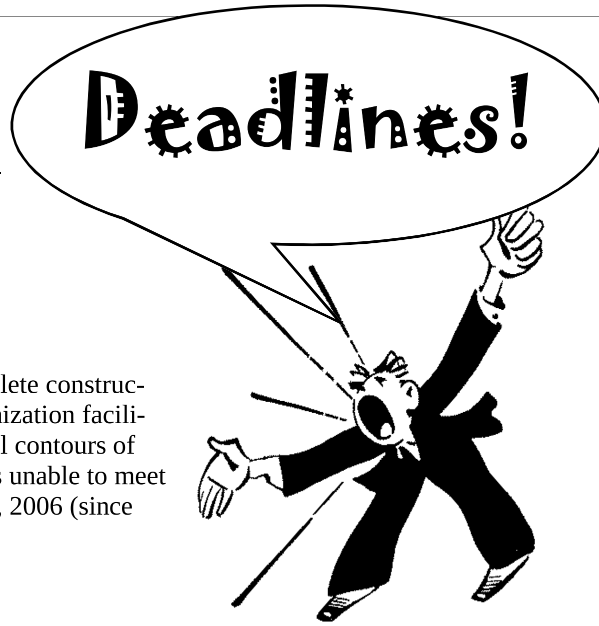
(Continued from page 2)

spokespersons have responded to such ideas skeptically, pointing out that highly-regulated industries like cable have historically found little traction in court with takings-based arguments and that the true nature of the cable companies is anti-competitive.

For many Commission watchers, one of the more interesting aspects of the postponement of the multicast must-carry item is what that postponement may mean about the solidity of Chairman Martin's newly-acquired Republican majority. For the first year or more of his tenure as Chairman Martin has lacked such a majority. Many observers have concluded that Martin's unwillingness to bring up contentious issues (such as multicast must-carry or broadcast ownership) arose from his inability to control the outcome through a solid majority. With the long-delayed arrival of Commissioner McDowell earlier this month, it appeared that Martin was finally starting to take on those controversial issues.

The postponement of this item could suggest some flaws in that theory.

It is possible, for example, that Commissioner McDowell expressed reservations towards this multicast item, leading the Chairman to drop the item from the June 21 agenda. In the aftermath, press speculation has focused on whether McDowell's presumed dissent resulted from political pressure, or whether it indicates a genuine distaste for must-carry regulations, or whether it signals an unexpected (and, to the Chairman, no doubt unattractive) rebellious streak in the new Commissioner. But since Commissioner McDowell moved into the Portals only a week or two before the meeting, any reluctance on his part to jump on the multicast bandwagon may be completely understandable: even if he is generally pre-disposed to the Chairman's position, this issue has been so voluminously briefed and argued by the interested parties that he might understandably prefer to take an extra couple of weeks to familiarize himself with the nitty-gritty of the matter before voting on it. Time will tell.



June 19-June 30, 2006

LPTV/Class A Television/Television Translator Filing Window - *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.

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 must file a waiver request prior to or on July 3, 2006 (since July 1 is a Saturday).

July 10, 2006

Children's Television Programming Reports - For all *commercial television* stations, the reports on FCC Form 398 must be filed electronically with the Commission, and a copy must be placed in each station's local public inspection file.

Commercial Compliance Certifications - For all *commercial television* stations, a certification of compliance with the limits on commercials during programming for children ages 12 and under must be placed in the public inspection file.

Issues/Programs Lists - For all *radio*, *television*, and *Class A television* stations, a listing of each station's most significant treatment of community issues must be placed in the station's local public inspection file. The list should include a brief narrative describing the issues covered and the programs which provided the coverage, with information concerning the time, date, duration, and title of each program.

August 1, 2006

Television Renewal Pre-Filing Announcements - *Television* stations located in **Alaska**, **American Samoa**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, and **Washington** must begin pre-filing announcements in connection with the license renewal process. **Alaska**, **American Samoa**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, and **Washington** *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 California must file their license renewal applications.

Television Renewal Post-Filing Announcements - All television stations located in **California** must begin their post-filing announcements in connection with the license renewal process, and continue such announcements on August 16, September 1 and 16, and October 1 and 16.

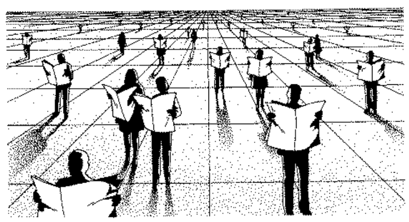
EEO Public File Reports - All *radio* and *television* stations with five (5) or more full-time employees located in **California**, **Illinois**, **North Carolina**, **South Carolina**, and **Wisconsin** must place EEO Public File Reports in their public inspection files. For all stations with websites, 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.

(Continued on page 11)

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

Updates on the News

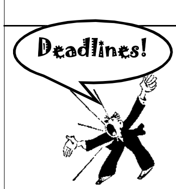
Another one bites the dust **–** In his continuing efforts to rid the radio industry of Demon Payola, New York Attorney General Eliot Spitzer has scored another coup. In June he brought EMI Music North America to its knees . . . or, at least, to the negotiating table, from which EMI walked away $3.5 million dollars poorer. In return for the cash, EMI pockets a Get Out Of Payola Jail Free card (as long as it complies with the various other terms of the settlement agreement with the NYAG). While $3.5 mil is nothing to sneeze at, we should point out that EMI is getting off the hook far more cheaply than Universal and SONY, who ponied up $12 million and $10 million, respectively, for similar settlements. It's even cheaper than the $5 million which Warner coughed up. Meanwhile, the one radio licensee which Spitzer has set its sights on, Entercom, continues to litigate rather than settle. As reported in last month's *Memo to Clients*, Entercom has moved to dismiss Spitzer's suit against it. The NYAG has since responded to Entercom's motion and Entercom has replied, so the issue is now teed up before the trial judge. Stay tuned for further developments.



Third adjacent LPFM protection back on the chopping block **–** In the on-again-off-again struggle to decide whether full service FM stations are entitled to protection from third adjacent interference from LPFM stations, the Munchkins are back. This particular soap opera has been playing out for years, with each side sometimes seeming to make progress and sometimes seeming to lose ground. Most recently, the full service folks have enjoyed the upper hand. But look out, because here comes long-time LPFM booster Sen. John McCain with a proposed amendment to the telecom rewrite that is working its way through Congress. McCain's amendment – which he has dubbed "the Local Community Radio Act of 2006" – would statutorily eliminate third adjacent protection. If that were to become law, the FM spectrum would be able to accommodate considerably more cute little LPFM stations hither and yon, a result which Sen. McCain and the LPFM industry would celebrate. Full service broadcasters, on the other hand, have long been convinced that third adjacent interference would seriously erode the level of service which they have been providing to their audiences for decades. Not surprisingly, in response to McCain's amendment, the NAB has come out swinging, distributing a recording of how third adjacent interference can reduce an otherwise listenable signal to mostly static.

The prospects for this provision actually making it into law are far from clear. The telecom rewrite presently under consideration already is expected to include some controversial provisions (*e.g.*, net neutrality), and the more such provisions that get thrown into the mix, the iffier become the chances of passage. Still, if you happen to feel strongly about the third adjacent interference question, now might be a good time to make those feelings known to your elected representatives in Washington.

Who remembers the 2003 public interest proceeding? **–** Back in 2003, when the Commissioner under then-Chairman Michael Powell was gearing up to loosen ownership restrictions, a number of critics complained that the Commission should consider more carefully the likely impact of such relaxation on the level of local public service being provided by broadcasters. In an effort to shunt such complaints out of the way of the ownership juggernaut, Powell asserted that such public interest questions were best considered in their own, separate, stand-alone proceeding. So sure enough they opened such a proceeding in 2003. As far as we know, that proceeding has made no progress at all, and many folks may have forgotten about it entirely. Not, however, Senators Byron Dorgan and Trent Lott. They wrote to Chairman Martin recently, asking that the Commission complete work on the 2003 inquiry before jumping back into the ownership fracas. Since (as reported at page 1 of this month's issue) the Commission has indeed already jumped back into that fracas, and since we still haven't heard about any movement on the public interest proceeding, we think it's safe to conclude that Martin was not favorably disposed to the suggestion.



(Continued from page 10)

Radio and Television Ownership Reports - All *radio* stations located in **Illinois** and **Wisconsin** must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All *television* stations located in **California**, **North Carolina**, and **South Carolina** must also file a biennial Ownership Report. All reports filed on FCC Form 323 or 323-E must be filed electronically.

FM ALLOTMENTS ADOPTED –5/19/06-6/19/06

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
AR	Cherokee Village	135 miles NW of Memphis, TN	222C2	05-104	None
AR	Black Rock	101 miles NW of Memphis, TN	252C2	05-104	None
AR	Little Rock		253C0	05-104	Accommodation Re-classification
MS	Hattiesburg	100 miles NW of Mobile, AL	279C0	06-19	Accommodation Re-classification
MS	Sumrall	118 miles NW of Mobile, AL	226C3	06-19	None
MA	Andover	24 miles N of Boston, MA	223B	05-108	None
AR	Gravette	106 miles E of Tulsa, OK	262A	06-59	None
MD	Myersville	73 miles SW of Harrisburg, PA	295B	05-4	None
AL	Frisco City	79 miles NE of Mobile, AL	278A	06-51	TBA
TX	Garwood	78 miles W of Houston, TX	247A	05-304	TBA
NM	Portales	109 miles NW of Lubbock, TX	290C1	04-361	None

FM ALLOTMENTS PROPOSED –5/19/06-6/19/06

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
MO	Boonville	58 miles NW of Jefferson City, MO	226C3	06-88	Comt: 7/31/06 Reply: 8/15/06	Section 1.420
MO	Wheatland	97 miles SW of Jefferson City, MO	272A	06-88	Comt: 7/31/06 Reply: 8/15/06	Accommodation Substitution

Notice Concerning Listings of FM Allotments

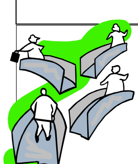
Consistent with our past practice, Fletcher, Heald & Hildreth PLC provides these advisories on a periodic basis to alert clients both to FM channels for which applications may eventually be filed, and also to changes (both proposed and adopted) in the FM Table of Allotments which might present opportunities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

Fletcher, Heald & Hildreth, P.L.C.
11th Floor
1300 North 17th Street
Arlington, Virginia 22209

First Class

Coming Attractions

Next month, we'll look at a new FAA proposal that could mean significantly greater hassles for folks proposing to build new towers . . . And we'll also look at the results of an NAB study of Part 15 FM modulator devices, the mini-transmitters used with satellite radio and MP3 players that have been creating havoc with FM service in many areas.



FHH - On the Job, On the Go

Joe Di Scipio has been elected Chair of the FCBA Foundation Board of Trustees ***and*** President of the Syracuse University Law Alumni.

Lee Petro has been elected Treasurer of the FCBA Foundation.