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

Memorandum to Clients

August, 2006 | *News and Analysis of Recent Events in the Field of Communications* | No. 06-08

FM translators– pet rock or panacea?

NAB Weighs In With Proposal To Open FM Translator Service To AM Licensees

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FM Translators have become the latest fad for petitioners, offering (in the eyes of many) a low-power solution to a wide range of woes. In July, the National Association of Broadcasters (NAB) filed a petition with the Commission seeking a rulemaking looking to amend the Commission's rules to allow AM stations to use FM translators. As the NAB observed (and as just about any AM licensee can corroborate), potential nighttime interference unique to the AM band forces many AM stations to reduce power or cease operations between sunrise and sunset. That problem, together with the increasing number of external factors contributing to the existence of coverage gaps for AM stations, imposes burdens on the AM industry that arguably warrant FCC intervention.

The proposal would allow daytime-only stations to operate on the FM band at night, avoiding the creation of harmful interference resulting from skywave propagation.

In the NAB's view, FM translators could provide the answer to these AM coverage problems. The NAB is asking that the Commission allow the use of FM translators to provide fill-in service for AM stations, with the translator signal limited to the lesser of the 2 mV/m daytime contour of the AM station it rebroadcasts or a circle with a 25 mile radius surrounding the AM station. The petition submits that retransmission of AM stations by FM translators presents a "technically feasible, pro-competitive, and pro-public interest" solution to the interference and signal loss problems. It would allow daytime-only stations to operate on the FM band at night, avoiding the creation of harmful interference resulting from skywave propagation. It would also improve daytime service, as FM translators would help overcome intervening terrain barriers and distance issues that diminish the primary AM station's signal.

The NAB's petition – and the FCC's reaction to it – may legitimately raise a few eyebrows. Recall that the NAB *opposed* a similar proposal made by the American Community AM Broadcasters Association in 1997, a proposal which was similarly based on the need for FM translators to overcome nighttime disruption of AM service. What a difference nine years make! NAB now asserts that "continued pressures on AM radio" and the need for "another boost to enhance AM stations' ability to serve audiences and compete in the ever-changing media marketplace" have ripened the issue for reexamination. A footnote in the petition fleshes out this general rationale, stating that "AM stations are encountering ever more interference problems as a result of an increase in ambient noise."

NAB does not specify the source(s) of that perceived increase in ambient noise, but one possible source that comes to mind is In-Band On-Channel ("IBOC") digital radio operation. Hybrid analog/digital AM operation requires a great deal more bandwidth than analog alone, which in turn

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The Scoop Inside

E pluribus unum, v.2.0 - some smoke, little light

FCC Releases Text Of Ownership Inquiry

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At long last the text of the FCC's *Further Notice of Proposed Rule Making* (*FNPRM)* with regard to the broadcast ownership rules has been released. Those of you who were anxiously expecting to gain clear insight into the Comission's intended direction on the subject will, however, be disappointed: the FNPRM provides little guidance as to where the Commission may be heading. Instead, the *FNPRM* consists largely of a recitation of the history of the previous multiple ownership rule making proceeding and a posing for public comment of the questions raised by the Third Circuit Court of Appeals in its remand of the proceeding.

The first issue raised relates to the proposals championed by the Minority Media and Telecommunications Counsel (MMTC) for advancing media ownership by minorities. The Commission had previously stated that it would take up those proposals in a separate proceeding at a later date, but the Court of Appeals directed that the Commission should consider them at the same time that it responded to th(t)-e Court's remand order. Accordingly, the Commission has asked whether th(t)-e MMTC's proposals would be effective and practical ways of advancing minority ownership and whether the Commission has the statutory or constitutional authority to adopt such proposals.

The *FNPRM* also treats localism as a focal point of its consideratio It ntes thhere is a substantial record on this topic, compiled from testimony at the various public hearinld aroun the country anther presen tations, and states that the Media Bureau is compiling a summary of all of the comments to be submitted in the new ownership proceeding.

The comments on localism clearly will come into play in the re-examination of th(t)-e lin its imposed by the local television ownership rule. The Commission has askeh for additional evidence to support the more relaxed rules that it previously adopted and for comments as to whether those limits should be revised. It also has sought evidence to support fluidity of television market shares and requested comment on whether the ownership limits should vary with the size of the market. In addition, in situations in which a waiver is requested because a station is in distress, the Commission has asked whether it should reinstate the requirement that the applicants demonstrate that there is no other out-of-market buyer.

Similarly, with regard to the local radio ownership rule, the Commission is seeking comment as to whether the current numerical limits should be changed, either by adding more ownership ti otherwie. It also ha whethe should retai the subcaps based on numbers of stations owned in a particular service (AM or FM). As an even broader question, the *FNPRM* asks whether the current rule is even necessary to serve the public interest in light of existing competition in the radio marketplace.

With regard to broadcast/newspaper crossoe Comss ion found that the "Diversity Index" which it had previously adopted to evaluate the likely impact of such crossownership was, in fact, an inaccurate tool for measuring diversity. Accordingly, the FCC is seeking new methods of determining whether a newspaper/broadcast station combination would serve the public interest. In particular, the Commission has asked whether limits should vary depending upon the characteristics of markets. It also hs asked whether there should be different limits for newspaper/television combinations as opposed to newspaper/radio combinations.

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Focus on FCC Fines

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FCC targets college during summer break – The FCC's Boston office chose summer break to conduct an inspection of a college radio station. The FCC discovered during its mid-July inspection that the school's radio station had neither designated a chief operator nor posted the name of the chief operator. The station, operated from the campus of Connecticut College, coincidentally was given until the first day of classes to respond to the FCC agent's findings.

FCC rules require FM stations to designate someone as a chief operator and to post that designation in writing with the station license. When the FCC agent arrived on campus during the summer hiatus, the station manager admitted to the FCC that the school had not designated a chief operator. It therefore wasn't much of a surprise to find that no designation had been posted (since there hadn't been any designation to post). The station was given 20 days to explain this failure as well as another failure to maintain station logs.

FCC targets the Commonwealth of Massachusetts – Lest readers think that the FCC's Boston office is picking only on colleges, it has also set the Commonwealth of Massachusetts in its sites. More specifically, the FCC notified the Massachusetts Highway Department that one of their antenna structures did not meet FCC specs. The potholes that the FCC found in the Highway Department's operations were failures to register the antenna and to paint proper lines on its antennas (presumably the state was focused on a more core task, like painting lines on the road). The Highway Department also has 20 days to respond to the FCC before the agency decides what toll to charge the Highway Department.

From Massachusetts to Hawaii – The FCC has field offices all over the country, including Hawaii. The Hawaii office listened to a Honolulu AM station on the first days of May and June to make sure that Emergency Alert System tests were being properly relayed. According to the Feds, the station failed to conduct tests on either day. So the agents paid a visit to station to investigate the problem. Upon arrival, the FCC found that the station: was unable to conduct a manually-initiated test; had failed to maintain necessary logs and printouts; and didn't even have its equipment properly plugged – in fact, the gear did not appear to be functional.

The FCC has proposed hitting the station with an $8,000 fine. While this column frequently reminds readers that FCC agents need do very little in order to determine if a station's tower is properly illuminated, painted and enclosed, the FCC has to do even less to find EAS problems. This is the second case in the past several years from Hawaii where the FCC agents had to do nothing more than turn on a radio or television to determine if a station was complying with EAS relay requirements. The FCC's job could not be easier than in this case; they simply determine when the state civil defense office will be issuing a test and then listen for the right noise to come out of their radio. The wrong noise can mean a big fine.

Conduct Contests as Advertised – A South Carolina FM station faces a $4,000 fine for conducting a contest an hour too soon. This case involves a station, a motorcycle shop and a local rescue squad working together to promote a concert. The concert featured an opening band and another band to follow. The station announced that they would be giving a $35,000 motorcycle away during intermission between the two band performances.

Thirty-five listeners qualified to have a try at winning the motorcycle. The lucky folks were told by the station to arrive at the concert by 7:00 so that they could compete with one another during the 7:30 intermission. However, a scheduling problem arose. It appears that, according to the contract between the concert promoters and the second band, there was to be no intervening activity on the stage between the performances of the first and second band. The second band insisted that that provision be enforced, which meant that the promoters would not allow the station to conduct the contest on stage during the intermission between bands.

Confronted with this unexpected situation, the station decided to conduct the contest about an hour earlier than planned – even though at that time only thirty of the thirty-five qualifying contestants had shown up. And here's a big surprise – one of those five absent qualifiers complained to the Commission. It was no surprise that the FCC listened.

The FCC determined that the station failed to conduct the contest as announced. When the station conducted the contest before the first act (6:45) rather than in between acts (7:30) it failed to follow its rules. For practical purposes, it was the fact that several contestants were excluded from the contest rather than the timing that irked the losing contestants and spurred the complaint. The station has been hit with a $4,000 fine for its decision.

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The Commission has announced that the deadline for the filing of 2006 regulatory fees is ***September 19, 2006***. All licensees should mark that date on their calendars and do whatever it might take to assure that their payments are submitted by that deadline. ***Failure to make timely payment of reg fees results in a 25% late-penalty penalty.*** Additionally, such failure can cause the licensee to be "red-lighted", a condition which may lead to the dismissal of any applications the licensee may have pending. As we have noted in previous *Memos to Clients*, the Commission has designed its regulatory fee collection process with powerful incentives for prompt payment.

9/19/06: REG FEE D-DAY

The Commission has also sent out postcards reminding licensees of their reg fee obligations. Those postcards were addressed to licensees directly (or, in some instances, to the contact person associated with each licensee's FCC Registration Number). If you have not received a postcard, it's possible that the reminder was sent to the attorney who works with you at FHH. Feel free to check with us if you have any questions.

In any event, be forewarned that the reg fee listed on the postcards is ***not*** necessarily the total fee owed. The postcards list merely the fee attributable to the primary station listed on the card. The cards do ***not*** include any auxiliary licenses (for example, remote pickups, STL's, etc.) which the licensee may also hold. While the fees for such secondary authorizations are relatively small, they need to be paid by the deadline as well. If you have any question about whether you hold auxiliary licenses for which additional fees may be due, we can help you make that determination.

Finally, the fees can be paid by check shipped to the FCC's Pittsburgh address, or they can be paid on-line through the "fee-filer" program at the Commission's website. Paper filings must include a completed Fee Remittance Advice (FCC Form 159) along with the check. The Form 159 is automatically generated for on-line filers.

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This incident underscores the importance of thorough planning of all contests. While a station has considerable ability to control all aspects of on-air/in-studio contests (*e.g.*, tenth caller wins a t-shirt), the potential for the unexpected increases exponentially when other parties come into play. Here, for example, while the station presumably thought that it had a handle on all the details, it apparently overlooked the fact that at least one of the band's contracts limited the station's ability to take the stage at the time the station had announced for the contest.

When such situations arise – and they will occasionally arise despite the best-laid plans – it is important not to panic. Of course, the goal at all times should be to conduct the contest in accordance with the contest rules as they have previously been announced. If circumstances prevent that from happening, then the contest should be conducted as closely to those rules as possible – and in a way which assures that no contestant is excluded from competing or improperly prejudiced in the competition. In this reported case, for example, the re-scheduling of the contest prevented five contestants from competing, which turned out to be a recipe for disaster.

FCC to licensee: "Oops, never mind" – Last month we reported on a case involving a Kansas FM licensee which had been hit with a $10,000 fine, of which $7,000 was for a main studio violation and the remaining $3,000 was for a failure to completely respond to the FCC's inquiry about that violation. As you will recall, the Commission canceled the $7,000 component when the licensee pointed out that the Commission had issued that fine too late. Still, the FCC was sticking to its guns on the $3,000 – and stick to those guns it did, for about a month. In late July the Commission canceled that part of the fine as well.

In the initial assessment of the fine, the Commission went on at great length about how the licensee knew or should have known that the FCC expected a complete response to all nine categories of questions which the FCC had posed to the licensee. According to the Commission back in June, the licensee "unilaterally ignored" the FCC's inquiry in seven of the nine categories "with no explanation for not responding to the other categories." By July, however, the Commission had changed its tune. Now the Commission found that the licensee had responded promptly to the letter of inquiry and had invited the Commission to contact it if further clarification were required. Most importantly, the Commission has now concluded that there was "no evidence that [the licensee] intentionally did not respond fully". While the FCC's latest decision here provides very little insight into (a) how the FCC could have been so wrong to begin with or (b) how the licensee was able to convince the FCC of the error of the first fine, the bottomline is still clear – the $3,000 fine was canceled.

Wilkommen, Bienvenu, Welcome

Kevin Goldberg Joins FHH as Senior Counsel

FHH is pleased to announce that Kevin Goldberg has joined the firm as Special Counsel.

Kevin is a recognized expert on First Amendment issues, with particular emphasis on newspaper and Internet publishing. His work includes representation of press organizations in lobbying efforts and in the protection of the rights and privileges of reporters. He also reviews news stories before broadcast by radio and television stations in order to identify and (if possible) avoid possible legal problems.

A 1992 graduate (*magna cum laude*, thank you very much) of James Madison University, Kevin received his law degree (with high honors, if you please) from George Washington University in 1995. He also won the prestigious Imogene Williford Constitutional Law Award for exemplary achievements in constitution law while a law student.

No stranger to FCC practice, Kevin interned at the Mass Media Bureau during his third year of law school, working on a number of far-reaching rulemaking proceedings.

Kevin is currently licensed to practice law in Maryland and the District of Columbia. He is a member of the Federal Communications Bar Association, the ABA's Forum on Communications Law, the Computer Law Association and the Virginia Coalition for Open Government. And how's this for an item on your résumé – he is the youngest of person to have been inducted into the National Freedom of Information Hall of Fame, an honor bestowed on him for his continued and superlative service in pursuit of open government.

Over and above his law practice, Kevin has been a prolific writer and commentator on First Amendment issues and the media. And in his spare time, he is an avid soccer player (and licensed referee), as well as a hiker, runner, cycler and golfer.

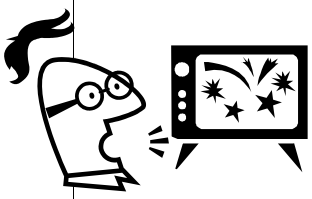
Wilkommen, Bienvenu, Welcome – Part Deux

Meet New Arrivals Patrick Murck and Ron Whitworth

FHH is also pleased to announce the imminent arrival of two new members of our legal team. Ron Whitworth and Patrick Murck, both recent graduates of the Columbus School of Law of the Catholic University of America, are scheduled to start work with FHH immediately after Labor Day. Ron received his bachelor's degree from Indiana University; Patrick received his from American University. Both have taken the Virginia Bar exam and are currently awaiting the results.

The respective backgrounds of Patrick and Ron are strikingly similar in a number of ways, not the least being the levels of excellence each has attained. Both were editors of law school publications, both participated in the National Telecommunications Moot Court competition, both have pre-law school experience in journalism, both have authored numerous articles on various topics related to communications law, and both have worked at the Commission as part of the law school curriculum. Ron served as a Special Assistant to Commissioner Adelstein, and Patrick interned in the Media Bureau.

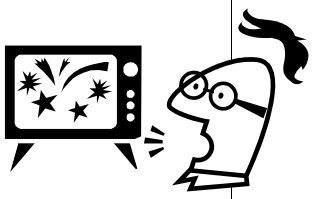
FHH is confident that you will find Ron and Patrick to be valuable additions to our team. Ron can be reached at whitworth@fhhlaw.com; Patrick can be reached at murck@fhhlaw.com.



The Indecency Follies head to another court

Janet Jackson In Philadelphia

CBS appeals indecency ruling to Third Circuit



By: Jeffrey J. Gee
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In the latest chapter of the epic saga of Ms. Janet Jackson's right breast, CBS Corp. has paid the $550,000 forfeiture imposed by the FCC. CBS then immediately filed an appeal of the fine. While it may seem odd to both pay and appeal a fine, this is merely the required procedure for filing an appeal with the federal courts. The FCC has vowed to "vigorously defend" its decision to penalize CBS for airing the 2004 Wardrobe Malfunction.

As our faithful readers will recall, the FCC's 2004 Notice of Apparent Liability (NAL) found that the twenty CBS owned and operated stations were "apparently liable" for forfeitures of the then-maximum $27,500 each for airing Ms. Jackson's scandalous half-time show. After considering CBS's response for a year and a half, the FCC's March 2006 Forfeiture Order found that CBS was definitely liable for the full $550,000 forfeiture. CBS asked the FCC to reconsider its decision, which the FCC flatly (and quickly) refused to do in May, 2006.

At least one Commissioner has started publicly expressing concern about the direction the FCC's recent indecency decisions have taken.

Thus, the matter now moves to the U.S. Court of Appeals for the Third Circuit in Philadelphia (the same Court that tore apart the FCC's new media ownership rules in 2003). Observant readers will note that this makes three separate but concurrent challenges involving the FCC's indecency rules. The U.S. Court of Appeals for the Second Circuit in New York is currently considering whether to review the FCC's "omnibus" indecency decision (which covered, among other things, decisions against NYPD Blue, the Billboard Music Awards, and the Early Show) or return it to the FCC for further consideration.

At the same time, CBS has a challenge before the FCC that notes that virtually none of the people that filed complaints about its "Without a Trace" program actually claim to have seen the show when it aired.

Now the Third Circuit will get a swing. The Court has already ruled against the FCC once on a preliminary scheduling matter in the CBS/Janet Jackson case, setting a lengthier briefing schedule than the FCC wanted. Oral argument in the case may be held by the end of November.

Meanwhile, at least one Commissioner has – in an apparently about-face from his earlier-stated positions –started publicly expressing concern about the direction the FCC's recent indecency decisions have taken. Speaking to the Progress and Freedom Foundation, Commissioner Adelstein cautioned that those decisions "dangerously expand" the scope of indecency/profanity laws "without first attempting to determine whether [the Commission is] applying the appropriate contemporary community standards."

Of particular note was the following assertion by Adelstein: "I don't believe the Commission has provided broadcasters a coherent and principled framework that is rooted in commonsense and sound constitutional grounds. While we often spend most of our time ta[l]king about economic freedom, freedom from governmental intrusion into speech is just as important."

In the "omnibus" indecency order from last March, Adelstein partially dissented, expressing his disagreement with several of the indecency determinations reached by his colleagues. His discomfort with the Commission's indecency policy is therefore not especially surprising – but if he really does not believe that the FCC's indecency policy embodies a coherent and principled framework rooted in commonsense and sound constitutional grounds, it is not clear how he could have supported ***any*** aspect of that earlier decision.

For the time being, though, the views of Adelstein (or any of his colleagues, for that matter), while interesting, still pale in significance in comparison with what the courts will say – and the courts' opinions could start coming out as early as the first several months of next year. Stay tuned.

Remnants and discards on the auction block, all priced to move

Auction 68: Nine Slightly-Tarnished FM Channels Up For Bids

By: R. J. Quianzon
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The FCC has announced that, to kick off the upcoming new year in style, it will try to auction off nine FM permits that did not sell in previous auctions. Four of these permits (Tecopa, CA; Kihei, HI; Outlook, MT; and Parowan, UT) are two-time losers, having already been put on the auction block twice before but, at the end of each auction, having attracted no winning bids. Three of the permits (Covelo, CA; Ocracoke, NC; and Meyersdale, PA) have been to the dance only once before, but they went home alone. The remaining two permits (Cedar Key and Perry, FL) are foreclosures of sorts: the winning bidders from previous auctions didn't pony up their bid when it came time to pay for the permits.

The auction is presently scheduled to start on January 10, 2007.

The FCC has also proposed to tweak its rules a bit in connection with this auction and to cut prices to move these beauties off the lot. In previous auctions, bidders have had the opportunity to reconsider and withdraw their bids with little or no penalty before the auction ended. This time around, the FCC is proposing to impose a "Hey, pal - you break it, you bought it" policy. There would be no opportunity to withdraw a bid during this auction. The FCC justified this proposal by pointing out that withdrawals from previous auctions are the reason that some of these permits remain unsold. In addition, for a few of these permits, the FCC has lowered the opening bid, presumably to attract more bidders.

Federal law requires the FCC to provide bidders with an "adequate period" to comment on these proposals. The FCC has determined that 13 days – including the Labor Day holiday – should be "adequate" enough for bidders to comment. The proposals were announced on August 24, and comments are due on September 6 with replies due a week later on September 13. The permits available (and the required minimum bid for each) are listed in the accompanying box.

Gone once? Gone Twice?

Here's what you can bid on in January.

CA	**Covelo**	**A**	**$7,500**
CA	**Tecopa**	**A**	**$1,500**
FL	**Cedar Key**	**A**	**$1,500**
FL	**Perry**	**A**	**$15,000**
HI	**Kihei**	**C2**	**$90,000**
MT	**Outlook**	**C**	**$10,000**
NC	**Ocracoke**	**C1**	**$150,000**
PA	**Meyersdale**	**A**	**$90,000**
UT	**Parowan**	**C2**	**$15,000**

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Finally, the *FNPRM* also seeks comments on whether the Commission should retain the dual network rule (which prohibits mergers among any of the top four networks) or the UHF discount (which reduces the number used in calculating a UHF station's audience reach under the national TV cap).

Comments are due on September 22, 2006, and reply comments are due on November 21, 2006.

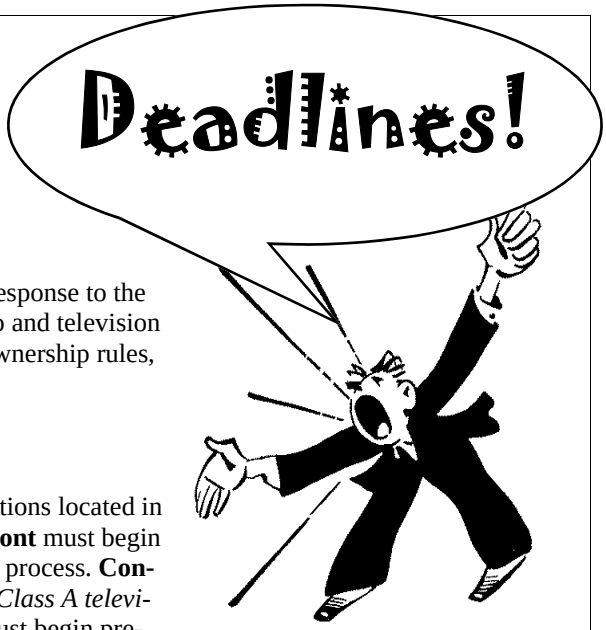
FHH - On the Job, On the Go

Gene Lawson has been elected to the Board of Governors, Business Law Section of the Virginia State Bar.

If it's September, it must be time for the NAB Radio Show. This year the FHH contingent in Dallas will include the two **Franks (Jazzo and Montero)**, **Jim Riley, Harry Martin, Kathleen Victory, Howard Weiss, Scott Johnson, Lee Petro** and **Joe Di Scipio**. **Joe** will be appearing on a panel about "FCC Rule Compliances from Indecency to Public File". Check him out on September 22 from 9:00-10:15 a.m. On the lighter side, **Frank M** will be co-hosting a meeting of and reception for the Independent Spanish Broadcasters Association. The FHH squad will be staying at the Hilton Anatole.

And how about the *Media Darlings of the Month*? This issue the *MDM* spotlight shines on **Jeff Gee** and **Harry Cole**, who co-authored an article on indecency that graced the pages of *Radio World*.

September 6-September 19, 2006



Annual Regulatory Fees - All broadcast stations must pay their annual regulatory fees to the FCC in Pittsburgh by 11:59 p.m. on September 19 to avoid a 25% late payment charge.

September 22, 2006

Review of Broadcast Ownership Rules - Comments are due in response to the *Further Notice of Proposed Rule Making* with regard to the radio and television local multiple ownership rules, the broadcast/newspaper cross-ownership rules, the dual network rule and the UHF discount.

October 1, 2006

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

Television Renewal Post-Filing Announcements - All *television* stations located in **Alaska**, **American Samoa**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, and **Washington** must begin their post-filing announcements in connection with the license renewal process, and continue such announcements on October 16, November 1 and 16, and December 1 and 16.

EEO Public File Reports - All *radio* and *television* stations with five (5) or more full-time employees located in **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Iowa**, **Mariana Islands**, **Missouri**, **Oregon**, **Puerto Rico**, the **Virgin Islands**, and **Washington** must place EEO Public File Reports in their public inspection files. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

Radio and Television Ownership Reports - All *radio* stations located in **Iowa** and **Missouri** must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All *television* stations located in **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, **Puerto Rico**, the **Virgin Islands**, and **Washington** must also file a biennial Ownership Report. All reports filed on FCC Form 323 or 323-E must be filed electronically.

October 10, 2006

Children's Television Programming Reports - For all *commercial television* and *Class A 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* and *Class A 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 informa-

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increases the potential for adjacent channel interference. Indeed, hybrid AM operations are currently permitted only during the day, due to concerns about adjacent channel interference at night. But in June, 2004, the NAB itself recommended that the FCC authorize hybrid AM operation at night, a recommendation which would seem to invite an increase in potential AM interference problems, and a consequent decrease in overall reliability of AM nighttime operation.

Significantly, the June, 2004 proposal seemed finally to have made it onto the FCC's radar screen in July, 2006 – some two years after the NAB's June, 2004, proposal was filed, it appeared to be among the items that the Commission was scheduled to consider in its July, 2006, open meeting. But lo and behold, the Commission dropped that item (which included a range of digital radio issues) from its agenda, just a day before the NAB filed its petition. This sequence of events suggests that the proposal for FM translator use by AMers may have been conceived as a means to guard against more interference if the Commission were in fact to permit hybrid AM operation at night. That might account for the somewhat urgent tone of the NAB's translator petition.

Thus, the NAB's seeming about-face on the issue of FM translators for AM stations may be understandable as an element in an overall push to secure nighttime digital AM operation.

What is far less clear is why the FCC has put the latest NAB proposal on an apparently fast track. The mere fact that a party chooses to file a petition for rule making does *not* normally guarantee that the FCC will pay any attention to it. Some petitioners struggle hard to get the FCC to give their petitions a formal rule making file number and put them out for public comment; at least one petition we know of never even got that far, despite repeated efforts by the petitioner to get the Commission's attention.

And yet the NAB's translator proposal was placed on a public notice (meaning initial public comments on it were invited) in a matter of a couple of weeks. Of course, the NAB has a very effective legal team which interacts well with the Commission. But why would the Commission be interested in encouraging additional translator use, when just last year the Commission imposed a freeze on new and modified FM translator applications out of concern for the impact of such applications on the nascent LPFM industry? (Check out the March, 2005 *Memo to Clients* for an article about that freeze.) The freeze, originally set to expire in six months (*i.e.*, in September, 2005) is still effectively in place almost a year after that initial expiration point.

So if the FCC really is concerned about the potential impact of FM translators on LPFM service, why would the Commission be attracted to the NAB proposal which would substantially increase the number of FM translators? In fact, to the extent that the NAB's proposal seems to contemplate allowing mere daytime-only AM stations to use FM translators full-time, the NAB seems to be advocating that translators be used for at least some program origination, a step which the Commission has long resisted. The FCC's speedy advancement of the NAB's proposal through the bureaucratic maze suggests a form of regulatory schizophrenia when viewed against the historical backdrop of the 18-month (and counting) translator freeze and the Commission's even longer standing resistance to program origination on translators.

Of course, there may be a method to the Commission's seeming madness. The Commission may, for example, already have a long-range plan for FM translators under consideration, a plan which somehow will accommodate increased translator use (for both AM and FM stations) *and* protection of LPFM service. Thus, the NAB proposal may be just a step in that direction. Alternatively, the agency's invitation for comments on the NAB proposal may turn out to be a head-fake. Just because the Commission asks for comments does not necessarily mean that the Commission intends to act on the proposal any time soon. In that scenario, the invitation for comments could be just a cosmetic effort to create the impression that action is imminent, when in fact the proposal is destined for the back regulatory burner once the comments have been filed.

We confess that we don't know what the Commission has up its sleeve on this – we'll just have to wait and see.

(Continued from page 8)

tion concerning the time, date, duration, and title of each program.

November 21, 2006

Review of Broadcast Ownership Rules - Reply Comments are due in response to the *Further Notice of Proposed Rule Making* with regard to the radio and television local multiple ownership rules, the broadcast/newspaper cross-ownership rules, the dual network rule, and the UHF discount.

Paying the piper or the pipe-ee?

Digital/Internet Transmission Spawns Copyright Liability Issues

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In the past, the daily lives of broadcasters were not directly affected by the copyright laws. So long as the broadcasters made their royalty payments to ASCAP, SESAC and BMI, they could afford not to stay current with copyright-related regulatory and legislative developments in Washington, because frankly, there weren't many that directly affected broadcasters. However, with advent of the Internet and the over-the-air transmission of digital signals, broadcasters must be aware of new legal issues and potential traps that could snare broadcasters as they navigate the information superhighway.

The most likely scenario arises when a radio broadcaster seeks to stream its audio signal on the station's website. The courts have ruled that the mere act of streaming the audio signal on the Internet creates two sources of copyright liability. First, the composers of any copyrighted songs – normally represented by ASCAP, SESAC and BMI – must be paid for this Internet-based distribution of the song. Second, broadcasters must pay a performance royalty to the performers of the music as well. This performance royalty payment is submitted to a company called SoundExchange under a compulsory license. (Historically, broadcasters have not been required to pay a performance royalty for music broadcast over the air. That is because it has been felt that the publicity which such broadcasts lend to the music effectively compensates the performers for any copyright claim they might have. Broadcasters have not, however, been able to convince the relevant authorities that that theory can be carried over to internet streaming.)

Under a compulsory license, the broadcaster is free to air the performance on the Internet, but it must: (1) register with the Copyright Office, (2) conform to certain guidelines established by Congress and the Copyright Office; and (3) submit royalty payments based on a schedule of fees which are to be determined on a biennial basis. The first schedule of fees was set to expire at the end of 2004, but no new fees have yet to be established. However, even though no new rates have been set yet for the post-2004 royalties, broadcasters must continue to make royalty payments to SoundExchange based on the 2004 schedule.

Legislation has been introduced in Congress to attempt to centralize and simplify the licensing and payment of these royalties.

While these fees may be onerous enough to broadcasters, a new party is attempting to stick its nose into this copyright business. Currently, there is a compulsory license for making a mechanical copy of a particular musical work. The royalty is paid to the author of the original work. While the Harry Fox Agency serves as the main collection agency for the receipt and distribution of royalties, the agency represents only approximately 50% of music authors. As a result, it is very difficult for the likes of iTunes and Rhapsody to properly license the music in their libraries. Legislation has been introduced in Congress to attempt to centralize and simplify the licensing and payment of these royalties. Also, this legislation would attempt to clarify the legal status of temporary copies of songs that are necessary for online distribution. As broadcasters evolve into online distribution sources, resolution of these issues will be vital to ensure that broadcasters do not incur substantial royalty payments.

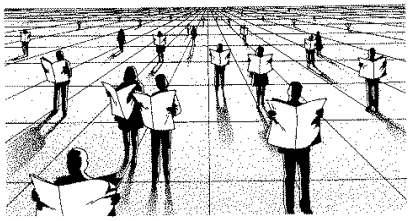
Finally, in April legislation was introduced which may affect the future of free Internet streaming by broadcasters. The bill was introduced purportedly as an effort to reconcile the copyright licensing rules for the distribution of radio over the internet. However, several large broadcasting companies (Clear Channel, Salem, Cumulus and Emmis to name a few) have gone on record opposing the legislation as introduced. Moreover, these parties have urged Congress to hold off on processing the legislation until pending litigation between XM Radio and the RIAA is resolved. That litigation stems from the introduction of consumer equipment that permits the recording and rearranging of music that the recording industry believes to provide to listeners certain rights to music that were not previously purchased. Some reports have indicated that the recording industry has demanded that XM Radio pay $150,000 for each song recorded.

Clearly, there are significant issues involved with the distribution of digital music, either over-the-air, or on the Internet. Central to these issues is the development and sale of consumer equipment that gives consumers unheard of power and control over the music. We will continue to monitor these events, and keep you apprised of new developments.

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

Updates on the News

Ready or not, here they come – That's right, this is an election year, and your friendly political advertisers are right now brainstorming about the unbelievably persuasive advertising campaigns they'll be launching soon. And "soon" in this context probably means on or after ***September 8***, which is when the 60-day lowest unit charge (LUC) period begins this year, leading up to the general election in November. Once the LUC period starts, stations are subject to a variety of additional regulations and restrictions. If you have not already calculated the applicable LUC for all dayparts and classes of time on your station, you'd better hop to it.



Oh yeah, September 8 is also the first day of the "electioneering communications" window, the 60-day period leading up to an election during which "electioneering communications" may not be financed by corporations or unions. The term "electioneering communications" refers to any broadcast, cable or satellite communication that: (a) refers to a clearly identifiable candidate for federal office; (b) is made within 60 days of a general election (or 30 days of a primary); and (c) is targeted to the relevant electorate. News stories and commentary or editorial material broadcast by a station don't count, unless the station is owned or controlled by a political party, political committee or candidate. Thanks to a court ruling we reported on last January, PSA's may now be included in the broad definition of "electioneering communications". As a result, if a station airs a PSA falling within the three-part definition outlined above, the station may be in violation of the McCain/Feingold Act.

Main studio rule waived – The main studio rule is nothing if not elastic. A recent decision demonstrates this. The rule requires that a station's main studio be located either: (a) within the station's city-grade contour; or (b) within the contour of any other broadcast station licensed to the community; or (c) within 25 miles of the center of the community. The licensee of a Hatteras, North Carolina FM station convinced the Commission that the rule could and should be waived to permit it to locate its studio 8.3 miles outside the station's city-grade contour because that proposed site would be effectively ***closer*** to the community than the station's current site, which does not require any waiver. That current site is within the station's city-grade contour, a mere 28 miles away from the community of license. But as it turns out, those 28 miles are open water – a part of the Pamlico Sound. So to drive from Hatteras to the main studio, a non-seafaring member of the public would have to drive a total of about 108 miles. While the proposed site doesn't satisfy any of the three options provided by the rules, the total driving distance to that site from Hatteras would be a relatively paltry 63 miles involving no need to cross to the mainland. The Commission agreed that the greater convenience and accessibility of the proposed studio site warranted a waiver. While the FCC's decision seems reasonable, it underscores the fact that the main studio rule as it presently stands really does little to assure that a station's studio will be truly and immediately accessible to residents of the community of license. Here, those residents would have had to drive 108 miles – and the main studio site was nevertheless in compliance with the rules. And even if Pamlico Sound were to be paved over someday, residents would ***still*** have to drive approximately 30 miles to get there. While that would technically be more accessible than a 108-mile trip, it hardly reflects the level of accessibility which the Commission historically expected of main studios. It may be that the Commission will be forced to come up with a new definition of "local", if the Commission ever gets around to completing the inquiry into "localism" which it began with some fanfare three years ago.

Still steering clear of program regulation – Last month in this column we called your attention to a couple of cases in which the FCC declined the opportunity to penalize licensees who had, according to various malcontent objectors, failed to provide enough of the right kind of programming. The Commission has since stuck to its guns. In opposing the renewal of a Brockton, Massachusetts AM station, one objector expressed dissatisfaction with the quantity, quality, and content of the station's local coverage. In response, the FCC expressed appreciation for the objector's interest, but held that agency action would not be taken based upon "the subjective determination of a listener or group of listeners as to what constitutes appropriate programming." Objection rejected. Ditto in the case of a Virgin Islands FM renewal situation, where an objector complained that the station had "failed to present local news and public affairs programming tailored to the native West Indian population." The Commission blew that claim off by observing that licensees "have substantial discretion to determine issues of interest to their communities."

FM ALLOTMENTS ADOPTED –7/20/06-8/18/06

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
GA	Homerville	104 miles NW of Jacksonville, FL	246A	05-32	TBA
FL	Jacksonville	164 miles E of Tallahassee, FL	245C0	05-32	Accommodation Reclassification
KS	Atwood	258 miles E of Denver, CO	292C0	05-45	TBA
NE	Ogallala	167 miles E of Cheyenne, WY	294C1	05-45	TBA (Accommodation Substitution)
MO	Huntsville	74 miles N of Jefferson City, MO	278C2	04-115	NCE Reservation
CA	Campo	50 miles E of San Diego, CA	241B1	05-219	None
OK	Savanna	135 miles SE of Oklahoma City, OK	275A	05-297	TBA
TX	Lometa	93 miles NW of Austin, TX	253A	05-305	TBA
TX	Richland Springs	122 miles NW of Austin, TX	235A	05-305	TBA (Accommodation Substitution)
TX	San Angelo	217 miles NNW of San Antonio	254C0	05-305	Accommodation Reclassification
TX	Luling	58 miles ENE of San Antonio	234C0	05-305	Accommodation Reclassification

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.

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