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Memorandum to Clients

September, 2006 | *News and Analysis of Recent Events in the Field of Communications* | No. 06-09

60 days and a stay

Fleeting Indecency Question Goes Back To The FCC

. . . but just for a while

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

The federal appeals court reviewing the FCC's "omnibus" indecency order (issued last March) has agreed to give the FCC 60 days to re-examine its decisions concerning four television programs. In addition to returning (or "remanding") the cases to the FCC, the U.S. Court of Appeals for the Second Circuit in New York also ordered a stay of the enforcement of the parts of the Omnibus Order that applied the "Golden Globe" standard to the four cases in question. While this action clearly is a very significant development, it is far less clear what the ultimate effect may be.

The court's order explicitly stated that on day sixty-one the case automatically returns to the Second Circuit and continues on an expedited basis.

As our faithful readers will recall, when the FCC first decided these cases last March, it determined that the material in the four programs violated ***both*** the FCC's indecency standards ***and*** the FCC's newly-revised profanity standards. (*See* the March, 2006, *Memo to Clients*.) The programs at issue included an episode of *NYPD Blue* (which included the word "bullshit"), two *Billboard Music Awards* shows (in which raconteurs Cher and Nicole Richie used "fuck," "fucking," and "shit"), and a broadcast of *The Early Show* (in which a *Survivor* contestant called another contestant a "bullshitter").

Despite that conclusion, however, the FCC did not whack any of the broadcasters with a fine. The FCC noted, instead, that at the time the broadcasts were made, stations were not on notice that isolated or fleeting expletives would be subject to enforcement action. Thus, the FCC chose not to fine the stations in question and promised not to hold the violations against them at renewal time.

Because the FCC did not issue Notices of Apparent Liability to the stations in question (no fine, no NAL), the stations never had the opportunity to follow the normal appeal process within the FCC. That did not mean, however, that the indecency/profanity standard articulated in the Omnibus Order was immune from appeal. After all, that standard supposedly laid down the law for broadcasters starting as of that date and, as such, it imposed on broadcasters the type of injury which is subject to appeal.

And, of course, multiple appeals were taken. But after the appeals were filed, the FCC claimed that it wanted the cases remanded to correct this procedural error and give the stations the opportunity to plead their cases before the FCC before going back to court.

On September 7th, the Second Circuit granted the FCC's request, giving the FCC 60 days to review and potentially revise its decisions. The FCC, for its part, wasted no time

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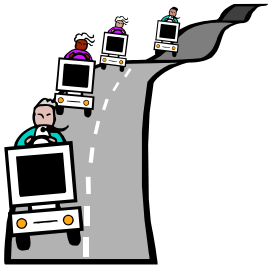
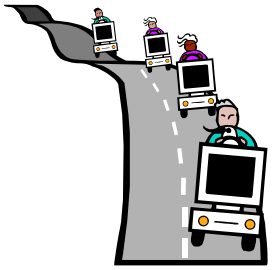
The Scoop Inside



Lending new meaning to the term "filler up"



Truck Stop TV

Proposal would deliver travelers' eyes to targeted spots, and vice versa

By: Ron Whitworth
703-813-0478
whitworth@fhhlaw.com

The Flying J Travel Plaza is not your grandfather's truck stop.

The Flying J operation has been traditionally known as a nationwide string of full-service centers where long-haul drivers and other highway denizens could kick back, fuel up their vehicles, grab a bite to eat and get a good night's sleep before heading back on the road. (Interesting Flying J factoid: Washington State Men's Basketball Coach Dick Bennett has even used Flying J as his team's headquarters on the road because he believes it serves "the best coconut cream pie in the world.") These gas stations on steroids are modern-day oases on the asphalt desert that is our highway system.

So how come Flying J suddenly finds itself embroiled in, of all things, a major-league FCC-related controversy? After being sued by all four major networks and several cable channels in May, Flying J is looking for regulatory relief in the shape of a waiver from the Commission which would enable Flying J to distribute its own low power, multi-channel digital television service.

Flying J's problems arise from the fact that, as an amenity in its restaurant lounges and other high-traffic areas, it offers programming received through Echostar's Dish Network. There's probably no problem with that. But it is alleged by an all-star line-up of programmers – including (in addition to the four major TV networks) Spelling TV and Universal Network, as well as several Turner cable properties – that Flying J went a crucial step further. According to those complainants, Flying J replaced national ads on the networks with its own advertising sold privately through its "Plaza TV" service. To accomplish this, Flying J allegedly used a third-party, ad-insertion technology called segOne to detect commercial breaks and replace national ads with its own content. Flying J sells ads for up to $31,000 for a 30-second spot, labeling its service "the most innovative advertising tool" in the transportation industry.

In the eyes of the complainants, this unauthorized substitution of program content (even if it was just commercial content) amounted to copyright infringement and unfair competition. Next stop, federal court in New York, where last April the complainants filed a lawsuit seeking $150,000 compensation for each copyright violation, plus undisclosed damages.

Possibly prodded by the threat of a damage award running well into the multi-millions, Flying J seems to be looking for a Plan B which will permit it to continue to provide both programming and, perhaps as importantly, its "Plaza TV" advertising service. That's where the FCC comes into play.

Clarity Media Systems, LLC – of which Flying J is a wholly-owned subsidiary – has filed applications for authorizations to distribute television programming via a low power, multichannel digital television distribution service at ten of its plazas (although Clarity's plans envision expanding the service to more than 250 locations nationwide). The service would use spectrum in the 2025-2100 MHz band dedicated to the Cable Television Relay service (CARS). The channels in question are currently reserved for Broadcast Auxiliary Service (BAS) purposes and are used extensively for electronic news gathering (ENG) by broadcasters. Other users of the channels include mobile CARS stations. Favorable action on Flying J's applications would require waivers of

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Fletcher, Heald & Hildreth
A Professional Limited Liability Company

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

Supervisory Member
Vincent J. Curtis, Jr.

Co-Editors
Howard M. Weiss
Harry F. Cole

Contributing Writers
Ann Bavender, Anne Goodwin Crump, Joseph Di Scipio, Jeffrey J. Gee, Patrick P. Murck, Lee G. Petro, R.J. Quianzon, Michael Richards and Ron P. Whitworth

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Focus on FCC Fines

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

FCC taking licenses away – This column ususally describes fines and admonitions that the FCC doles out to licensees for failing to abide by the rules. In most cases, the licensee is hit with a fine, contests it, pays it and eventually goes along its way with no threat to its license or the indefinite renewal of its license. Not so this month – the FCC has set its sights on yanking two licenses.

The Communications Act authorizes the FCC to deny (whether by revocation during the course of a license term, or by denying a renewal application at the end of a term) a license for any number of reasons. One such reason is when the FCC becomes aware of conditions which would have prevented it from granting the license in the first place. Recently, the FCC found that two of its licensees are convicted felons. In each case, the FCC has taken the most aggressive action it can against such licensees: it has designated them for a hearing, before an administrative law judge within the FCC, to determine whether or not the license should be denied. While the felony conviction in each case is certainly a factor to be considered, each also presents other factors that contribute to the licensee's problems before the agency. (In both cases, the FCC has made clear that the judges are not going to reconsider the merits of the felony conviction, but rather determine whether the felons have the character to be FCC licensees.)

One of the cases involves the licensee of an FM station in Texas. In an interesting twist that likely has stoked plenty of hometown gossip, an official of a local economic development council sent an e-mail to the FCC hotline complaining about the licensee. The complainant alerted the FCC to the fact (among others) that the owner of the station had been convicted of felony theft. It appears that the owner of the station was improperly altering and personally cashing checks.

However, the felony conviction does not stand alone as the reason that the FCC is considering the denial of the license. The station license came up for renewal a couple of years after the conviction and – as readers who are current licensees should be aware – one of the questions posed by the renewal application form is whether or not the licensee (or any of its principals) has been convicted of a felony. The station owner told the FCC that there was no felony conviction. That arguably constituted misrepresentation to the Commission, giving the FCC a second factor weighing against renewal.

And that's still not all. Among the other charges, the FCC claims that the station was being operated from an antenna in someone's backyard more than five miles from the authorized site. The power, antenna height and antenna were all different from those specified in the station's license. In addition, the FCC is not too pleased that several letters and inquiries that it sent to the owner have gone unanswered.

In another case of the FCC flexing its license-denying muscles, an Indiana (non-broadcast) licensee is being targeted by the FCC for controlled substance violations and for a fifteen-year-old cable descrambler violation. The man risks losing his licenses for mobile radio systems, amateur radio and radio telephone operator.

As in the Texas case, the FCC has sent the matter to a judge within the FCC who will examine the licensee and determine if his licenses should be denied. What the man will have to explain to the FCC judge is why he should continue to be a licensee even though he has been convicted of felonies and, perhaps more importantly, why he failed to disclose them to the FCC at renewal time. The lessons of Watergate live on: often the big problem is not the crime but the cover-up.

Missouri AM operated out of Econo Lodge – A Kansas City FCC agent received a report that an AM station in Springfield was not powering down at night. The agent then inspected the station and found many more problems other than power issues.

The power issues were there, to be sure. The G-man monitored the power and found no decrease at night, when there should have been a sharp reduction. But the agent's trek had only just began.

The agent called the station numerous times but the phone went unanswered. Nevertheless, he was able to track down another phone number for the owner, which enabled him to reach the owner's assistant. The assistant advised the FCC rep that there was no studio for the Missouri station and that all programming was transmitted from California. The assistant suggested that the G-man visit an Econo Lodge motel in Springfield.

At the Econo Lodge, the FCC rep found the station's telephone at the front desk, unplugged. The telephone line worked, but only if the phone was plugged in – which it

(Continued on page 6)

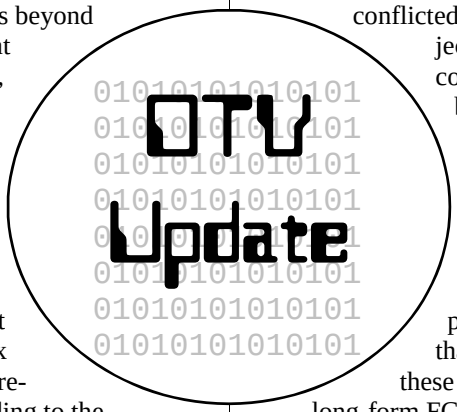
Coming soon?

Final Table of DTV Allotments In The Works

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

With the leaves slowing turning colors, the children returning to school, and the NFL dominating water cooler conversation, we are in that familiar seasonal transition from Summer to Fall – and it's time for an update on another transition, namely the transition of full service television stations to digital service.

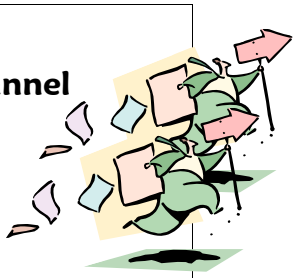
As we last reported, licensees were required to build out their digital facilities by July 1, 2006, or else submit a request for waiver due to circumstances beyond their control. Press reports indicate that more than 100 such waivers were filed, and the Commission is in the process of reviewing them. At the same time, the Commission is working feverously to finalize the DTV Table of Allotments. In late August, the Commission released a public notice announcing the end of the Third DTV Election Round. The good news is that the FCC reported that there are only six stations in the country which have not received a final DTV Allotment. According to the Commission, these stations will receive their DTV allotments in a subsequent proceeding.



That subsequent proceeding will likely involve a Notice of Proposed Rulemaking which will include the FCC's contemplated final version of the DTV Table of Allotments. The NPRM would invite parties to review that draft Table and submit comments on it. The NPRM is expected to be released in the next two months, and will include the technical specifications of every DTV allotment. The Commission will seek any final comments on these allotments, and will likely discuss the final steps in the DTV transition, including the procedures for those stations that are flash-cutting on their existing analog channel.

If this plays out as contemplated by the Conventional Wisdom, we may indeed be approaching the Digital Promised Land which has been on the distant horizon for more than a decade. We will keep you updated when the Notice is released.

Next step, Form 346



LPTV/Class A Companion Channel Singletons Move Forward

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

In June, 2006, the Commission opened a limited window for existing licensees of Class A, Low Power TV (LPTV), and TV Translator stations to file applications for a second, digital channel. The window permitted parties to submit engineering proposals for new, secondary stations on which to construct their digital facility. The submissions were to be analyzed by the Commission for potential conflicts with one another. Applications that were mutually-exclusive, *i.e.*, those which conflicted with other submissions, will be subject to an auction in the future, with the coveted channel going to the highest bidder. But applications that were *not* mutually exclusive could continue to be processed and, ideally, granted without resort to the auction process.

The Commission's staff has now analyzed the proposals, and released a public notice listing those applications that were not mutually-exclusive. For these applications, parties must submit a long-form FCC Form 346 application, which provides the detailed legal and engineering qualifications of the applicant, ***no later than October 30, 2006***. Those applicants whose proposals have been found to be mutually-exclusive with other pending applications will need to wait until a future public notice, which will open a limited window for submitting settlement proposals to eliminate mutual-exclusivity among applicants.

Another option that is available for applicants with mutually-exclusive applications involves dismissing their pending companion channel application, and filing to convert to digital operation on their existing analog channel. The submission of a "flash-cut" application stands a greater chance of being processed and granted, and will permit the licensee to convert to digital operations within three years of the grant of the application.

We will keep you updated when the Commission releases the public notice listing the mutually-exclusive applications and the opening of the settlement window.

From the mountains to the valleys . . .

FCC Blesses Limited Use of Terrain Data In NCE FM Channel Reservations

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

Proving the old adage that it never hurts to ask, the Audio Division recently reversed itself, thereby opening up the possible use of actual terrain data in petitions to reserve FM allotments for noncommercial use.

By way of background, in November, 2003, the Commission opened a window for noncommercial entities to "reserve" for noncommercial use vacant FM allotments that had previously been set aside for auction. Since newly allotted FM channel in the commercial portion of the band are subject to auction, and since noncommercial applicants are exempt from having to participate in auction proceedings, the Commission had to come up with a way by which commercial channels might, in some very limited circumstances, be reserved for noncommercial use and thereby be removed from the auction process.

To that end, the Commission adopted standards by which parties could petition the FCC to convert commercial FM allotments for noncommercial use so long as certain threshold qualifications were met. In particular, the resulting rules require that a petitioner demonstrate that: (i) there are no channels available in the reserved portion of the FM band (Channels 201 through 220) on which an application for a new noncommercial FM station could be filed for the community the petitioner wishes to serve; (ii) the proposed facility would provide either first or second local service to at least 10% of the population within the proposed facility's 60 dBu contour, and (iii) the population receiving first or second local service would exceed 2,000 persons.

Two petitioners submitted proposals that appeared to qualify under the reservation process. However, both proposals were dismissed by the Commission's staff because the petitioners used engineering studies that took into account the actual terrain data within the proposed service areas to determine the population that would receive first and second local service. The use of actual terrain in determining population typically increases the population proposed to be served. However, historically the Commission has declined to rely on terrain data in its FM channel allotment process because such data tend to be derived from a specific assumed transmitter site, and in most FM allotment proceedings the successful applicant does not have a final transmitter site in mind at the allotment stage. Moreover, even if a channel proponent does have a specific site in mind, many parties change their transmitter site before it comes time to file for a construction permit. As a result, any hypothetical gains made at the rulemaking stage would not be realized in the final, constructed facility.

From here on out, petitioners proposing to reserve FM allotments for noncommercial use will be able to use actual terrain data to show compliance with the first and second local service requirement in certain limited situations.

On reconsideration, however, the staff re-thought its position and reinstated the proposals. In so doing the staff created a limited exception applicable to noncommercial FM reservation petitions. From here on out, petitioners proposing to reserve FM allotments for noncommercial use will be able to use actual terrain data to show compliance with the first and second local service requirement, as long as they certify that (a) they have reasonable assurance of the transmitter site specified in the petition ***and*** (b) they have received FAA approval for the proposed construction at the site. Finally, the petitioner will need to submit an application that meets the requisite level of first and second local service.

In light of the freeze on FM allotment proceedings, and the Commission's pending consideration of rules that could drastically modify the FM allotment procedures, the overall impact of this ruling is unclear. For the time being, of course, the ruling is very limited in reach. But the new approach could – at least conceptually – be extended to *commercial* proposals as well, in which case parties seeking to add or modify channels could enjoy considerably greater flexibility. But that greater flexibility would likely carry with it a potentially substantial cost in increased processing time at the Commission, and that may be reason enough for the Commission to try to hold the noncommercial line it has already drawn. Time will tell.

Picking up the pace

(White) Space Race?

FCC announces tentative timetable for TV "white space" proceeding

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

As we reported in our March, 2006 issue of the *Memo to Clients*, the Commission initiated a rulemaking in 2004 to develop rules to permit unlicensed, Part 15 devices to operate in the TV band. Comments were submitted in response to a Notice of Inquiry, and the Commission followed up with a Notice of Proposed Rulemaking (NPRM).

The NPRM outlined three possible alternative approaches to permit unlicensed devices in the TV band. First, the Commission proposed that fixed unlicensed devices would be professionally installed, and would be connected to a database that would provide updated information as to the available TV channels in each particular area. Second, the FCC proposed that technical standards be developed to permit unlicensed devices to be able to "sense" a control signal that, in turn, would continuously broadcast a list of the available TV channels in a particular area. The third alternative involved the adoption of technical standards that would permit the unlicensed devices to "sense" the "interference temperature" in a particular area and automatically broadcast on a channel deemed to be available.

Since the "record before the Commission does not contain sufficient information to adopt final technical rules for operation of unlicensed devices in the TV bands", it is unclear what rules might be included in the anticipated October, 2006 order.

Here's a surprise: broadcasters and other users of the TV spectrum (wireless microphone manufacturers in particular) were *not* in favor of any of these proposals, and the NPRM languished at the FCC for nearly two years. In the meantime, late last year, legislation was introduced in Congress that would require the FCC to adopt minimal technical standards to permit the "sensing" of the available TV channels by the unlicensed devices. That legislation has now been wrapped into the larger telecommunications reform bill, which, at press time, did not have the necessary votes to move forward.

However, the Commission released a Public Notice on September 11, 2006, providing an update on the status of the proceeding and a tentative schedule for its resolution. This public notice is highly unusual in the normal course of events, but may be tied to the fact that Chairman Martin was due on Capitol Hill to face questioning relating to his re-nomination as the Chairman of the FCC. Given the pending legislation (which happens to be pending before the Committee doing the questioning), it is possible, just possible, that he wanted to be seen as being pro-active on this matter. We're just saying . . .

Speculation aside, the tentative schedule released on September 11 indicates that a First Report and Order and Further Notice of Proposed Rule Making (FNPRM) will be released in October, 2006. The fact that the document will (supposedly) be entitled "Report and Order" indicates that, in that document, the Commission expects to be adopting some rules. This is very interesting, since the Public Notice also notes that the "record before the Commission does not contain sufficient information to adopt final technical rules for operation of unlicensed devices in the TV bands." Thus, it is unclear what rules might be included in the "First Report and Order" portion of the anticipated October, 2006 order.

In its public notice this month the Commission also noted that the FCC Laboratory will be conducting measurement tests on the interference rejection capabilities of DTV receivers, and urged third parties to prepare their own tests, the results of which they will be able to submit in connection with the FNPRM.

We will let you know when the October, 2006 order is released. However, it is not too soon to consider whether to submit comments and/or the preparation of tests to demonstrate the impact of unlicensed devices operating in the TV band.

(Continued from page 3)

wasn't. The agent was led to a back room in the Econo Lodge, where he found two computers plugged into a telephone jack. The computers controlled the programming and power for the transmitter.

None of the requirements for a main studio were found in the Econo Lodge. The FCC fined the station $16,800 for a laundry list of main studio violations including failure to have a meaningful staff presence, failure to maintain a public file and failure to maintain a main studio.

Up, up and away!

FCC Inflates Application Fees

New fees take effect October 16

By: *Patrick A. Murck*
703-812-0476
murck@fhhlaw.com

The Commission has adjusted its Schedule of Application Fees to reflect the inflationary trend in the Consumer Price Index (CPI). These new fees will go into effect on October 16, 2006.

The FCC is a self-funding agency. To help recoup the costs of regulating, the Commission charges applicants a fee. Congress requires that the Commission review and adjust its fees in relation to the CPI every two years so that the fee structure keeps pace with inflation.

There is an obvious incentive for applicants to be aware of the application fee due for any application they may file – and to pay it promptly.

And don't think too long and hard about staging some kind of protest against the fees by, say, withholding payment. The Commission has a swell enforcement mechanism which discourages non-payment and effectively eliminates delinquent debts: if the fee for an application is not paid within 10 days of the filing of the application, then the application will be dismissed without further consideration. So there is an obvious incentive for applicants to be aware of the fee and to pay it promptly.

Fees can be paid either by check, or electronically by credit card. (Note that the FCC's CDBS electronic filing system, which is the *de rigueur* filing method for most broadcast applications, provides a none-too-subtle reminder of the fee requirement once the "submit" button has been hit, and it also provides a relatively simple on-line way of making the payment by credit card right then and there.)

Fees were revised upward by 7.7% in line with the increase in the CPI from 2003 to 2005. This 7.7% increase applied across the board. As a result, fees for broadcast license renewals jump $10 (the FCC rounded down slightly, for which we can presumably thank them) from $150 to $160. Some other notable increases are for short form assignment or transfer application fees, which also increased by $10 to $130 (here the Commission rounded up just a tad). The fees for long form assignment or transfer applications increased by $65 to $895. Biennial Ownership Report filings will now cost $60.

A complete listing of revised Application Fees is available on the FCC's website at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-131A1.pdf.

(Continued from page 2)

a laundry list of rules governing the use of the requested frequencies.

According to Clarity's waiver request, Clarity's system is not designed to maximize signal coverage – it would deliver up to 70 channels of digital television programming, but only on a "strictly non-harmful interference/non-protected basis" designed to prevent harm to the other licensed users of the band. The service would enable truck drivers to receive programming directly in their parked trucks or RVs. Clarity's proposal also includes emergency procedures to shut down Clarity's service in the event of conflict with BAS services.

Clarity contends that its proposed system would serve "a community of over 2.5 million people who lack regular and dependable television service", a community which includes 1.6 million professional long-haul truck drivers. The request states that by enhancing the quality of life of truck drivers on the road, public safety and national commerce would be promoted. Clarity highlighted similar efforts that have led to the enhanced recruitment and retention of qualified drivers, such as the availability of Wi-Fi and computer access.

The Commission has taken the Clarity proposal (and associated waiver requests) under advisement, and has sought comments from interested parties. The comment period for Clarity's waiver petition expired on Sept. 22, and reply comments are due on Oct. 23.

All killer, no filler

On The Auction Block: 124 Primo FM's

Mark your calendars: March 7, 2007

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

The FCC has announced that its next auction of never-before-available FM permits will begin on March 7, 2007. The auction of 124 FM permits will feature a few technical changes but will broadly follow the rules of previous FCC auctions. The permits cover markets from Maine to Hawaii and have starting bids ranging from $1,500 to $200,000.

The newly-announced March auction is separate from an auction of nine "pre-auctioned" permits slated for January, about which we reported in the August *Memo to Clients*. The 124 permits in the March auction have never been on the auction block.

In an effort to prevent the new permits from ending up unsold, the FCC has tinkered with one of its auction rules. In auctions past, bidders have been allowed to bid upon a permit but then back out of the bid (called a "withdrawal") before the end of the auction. Previously, a bidder who withdrew a bid had to put down a 3% deposit (called an "interim payment") until the permit eventually was resold. A similar penalty (called a "default payment") exists for bidders who do not pay for their permits after winning them at auction.

The FCC believes that it has detected an indication that (you should be sitting down for this one) broadcasters are competitive with one another—to the point that some bidders may engage in dubious practices intended to reduce the threat of new stations in their markets. Specifically, the FCC has determined that "some bidders have been placing and then withdrawing bids primarily to discourage potential or existing market competitors from seeking to acquire licenses." This is based on observations made over the past few auctions in which certain broadcasters are alleged to have bid on permits simply to drive up the market price and thereby prevent (or at least discourage) other bidders from obtaining the license; those inflated bids were then withdrawn at the last minute. As noted above, the FCC's current options in such cases are either to require a deposit of 3% or to impose a penalty of 3% in addition to the difference in prices should the license ever be re-auctioned – possibly, at least in the eyes of some, an acceptable price to pay to keep the competition out.

To put an end to this practice, the FCC has proposed that withdrawals be abolished in broadcast auctions. As an alternative to abolishing withdrawals, the FCC has suggested raising the deposit amount to 20%. For those bidders who default on their payment and simply bid but do not pay, the FCC has proposed raising the penalty from 3% to 20%. The FCC is realizing that not all of the rules which apply to the auction of cell phone licenses apply in the very different industry of broadcasting. Comments addressing the FCC's proposals are due October 5.

To discourage auction gamesmanship, the FCC has proposed that withdrawals be abolished in broadcast auctions, or, alternatively, that the required withdrawal deposit be increased more than six-fold, from 3% to 20%.

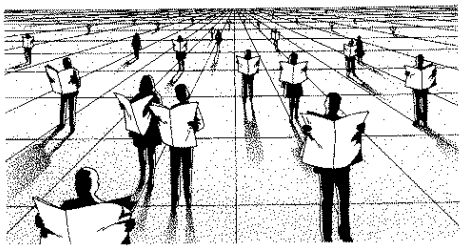
Looking beyond the policies and FCC regulations for the auction, readers are encouraged to review the FCC's list of 124 permits to be auctioned. The complete list may be found at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-06-1810A2.pdf All but nine of the permits have starting bid prices of less than $100,000. The vast majority of permits are Class A stations, but there are several Cs, C1s, C2s and C3s. The FCC likely will finalize the list of auction permits in November. The public may comment on the list, the prices and the procedures until October 5; reply comments may be submitted until October 13.

In keeping with procedures established in past auctions, clients who would like our assistance in the auction process must provide us with a signed auction representation agreement confirming, among other things, the channels and markets which you intend to bid on. The purpose of this agreement is to assure the avoidance of conflicts in the auction process. If you would like a copy of the agreement to review and sign, or if you have any questions about our representation, you should discuss it with the FHH attorney with whom you normally work.

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

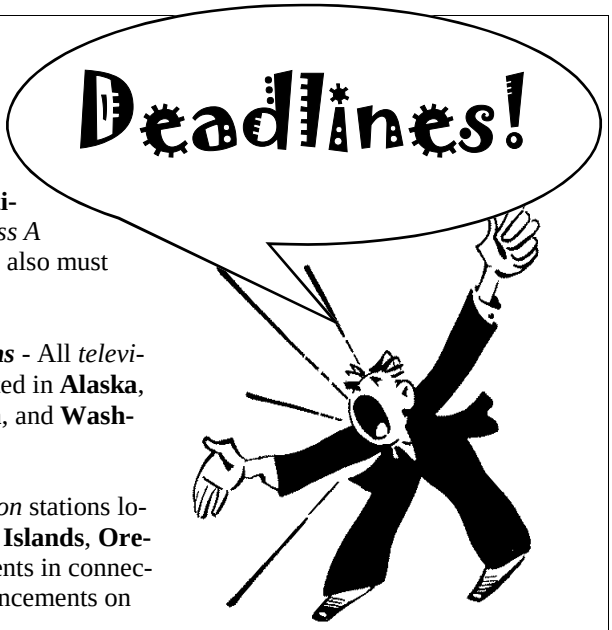
Updates on the News

HD channels: commercial-free or free for commercials? Those of you radio licensees who have jumped on the IBOC/HD radio bandwagon may have hesitated at placing commercials (or, for you noncoms, underwriting announcements) on your HD channels because of some fine print hidden away in the experimental license authorizing those channels. The Commission has tried to jump-start the HD radio service by by-passing the usual formulation of top-to-bottom rules and licensing processes. Instead, the FCC has elected to use its established "experimental license" process to cover HD operation. Under that process, a would-be HDer merely files a letter request to operate with "experimental" facilities and, bingo, an "experiemental license" is issued. That gets the licensee up and digitally running, pronto. But since most traditional "experimental" licenses issued by the FCC involve, um, er, *experimental* operations aimed at obtaining data to be analyzed relative to innovative spectrum uses before those uses are formally blessed by the Commission, the standard form "experimental license" used by the Commission includes language prohibiting use of the license "for commercial purposes". So if you happened to get an HD radio "experimental license" and if you also happened to get out your electron microscope so that you could read the fine print and if you then took that fine print seriously, you might reasonably have concluded that you could ***not*** broadcast spots of any kind on your HD channel(s). Tut tut, we are now advised, nothing could have been further from the FCC's mind. According to Audio Division Chief Peter Doyle, speaking at the NAB Radio Show, "there is no Commission pushback on either commercials or underwriting on these digital channels". That, of course, makes sense, since the Commission has been urging broadcasters to include their standard analog programming – which naturally includes commercials – as one of its HD offerings. So if you have been holding off on putting spots on the HD channels, you're clean and green to do so now.



Rulemaking for the birds? Rumor has it that we may be seeing a new Notice of Proposed Rulemaking out in the foreseeable future seeking comment on the on-going question of the extent to which radio towers (and, in this case, cell towers) lead to bird deaths. Egged on by a group of bird fanciers (whose most recent proposal was rejected by the FCC last April), the Commission is apparently hatching an NPRM which will ask lots of questions. Birders have historically charged that our fine-feathered friends get rooked when towers are built in their migratory paths. Tower owners and users counter that tens of millions birds die every year, the vast majority of them as a result of non-tower causes. (Some observers have identified house cats as the biggest bird killers; no response on that yet from the cat-owners lobby.) The issue of birds and towers has been around for years, and the Commission has never seemed especially enthusiastic about resolving it. The issuance of an NPRM asking for a wide range of information will likely enable the Commission to keep the issue up in the air for years more to come.

The FCC's public address system. In September the Commission issued two decisions which restore our faith in the ultimate silliness of bureaucracy. Both cases involved FM allotment proceedings in which parties had submitted counterproposals. In both cases the staff dismissed the counterproposals. Why? Because they were not addressed to Office of the Secretary of the Commission. To be sure, one was addressed to the Media Bureau, and the other was addressed to the Audio Division of the Media Bureau. Both were supposedly delivered to the FCC's offices on or before the applicable deadline. But the failure to include the magic words "To the Secretary" (or at least words to that effect) convinced the Commission that it could simply throw out both submissions. The lesson, of course, is simple enough: if you file anything with the FCC, you should be sure to address it to the Commission's Secretary (whose name is Marlene Dortch). You can also indicate that you would like Ms. Dortch to forward your submission to one or another person or office within the Commission, but in the FCC's view it is apparently critical that the submission be expressly directed to the Secretary. This truly picayune requirement is one of a number of wrinkles adopted in the wake of the 9/11 attacks and the 2001 anthrax scare. Precisely how the FCC's insistence on this point might advance any actual security interest is not clear, but it is clear from the two recent dismissals that the FCC means business, so be sure to revise your filing templates to include Madame Secretary as the addressee of your Commission filings.



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

October 23, 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. The Commission extended this deadline from September 22, 2006.

(Continued on page 11)

(Continued from page 10)

December 1, 2006

DTV Ancillary Services Statements - All *DTV licensees* (not permittees) must file a report on FCC Form 317 stating whether they have offered any ancillary or supplementary services together with its broadcast service during the previous fiscal year. If a station has offered such services, and has charged a fee for them, then it must separately submit a payment equal to five percent of the gross revenues received and an FCC Remittance Advice (Form 159) to the Commission. The report on Form 317 specifically asks for a list of any ancillary services, whether a fee was charged, and the gross amount of revenue derived from those services.

Television Renewal Pre-Filing Announcements - *Television* stations located in **New Jersey** and **New York** must begin pre-filing announcements in connection with the license renewal process. **New Jersey** and **New York** *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 **Connecticut**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island**, and **Vermont** must file their license renewal applications.

Television Renewal Post-Filing Announcements - All *television* stations located in **Connecticut**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island**, and **Vermont** must begin their post-filing announcements in connection with the license renewal process, and continue such announcements on December 1 and 16, January 1 and 16, and February 1 and 16.

EEO Public File Reports - All *radio* and *television* stations with five (5) or more full-time employees located in **Alabama**, **Colorado**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **Rhode Island**, **Minnesota**, **Montana**, **New Hampshire**, **North Dakota**, **South Dakota**, and **Vermont** must place EEO Public File Reports in their public inspection files. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

Radio Ownership Reports - All *radio* stations located in **Colorado**, **Minnesota**, **Montana**, **North Dakota**, and **South Dakota** must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All reports must be filed electronically.

Television Ownership Reports - All *television* stations located in **Alabama**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island**, and **Vermont** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323 or 323-E.

December 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. This deadline was extended from November 21, 2006.

FHH - On the Job, On the Go

Frank Montero will speak at the Telecom Forum at the Congressional Hispanic Caucus Institute in Washington, D.C. on October 3.

Kevin Goldberg appeared on a panel entitled "Branching Out - Congress and the Courts Have Their Say" at the American Society of Access Professionals Annual Symposium and Training Conference in Washington, D.C. in late September. He will also be speaking on defamation and newsgathering issues at the International Center for Journalist as part of their Editor's Exchange program on October 9. And completing the trifecta in international style, **Kevin** will be traveling to Anatalya, Turkey, in November as a member of the U.S. delegation to the ITU Plenipotentiary Conference.

(Continued from page 1)

in issuing a Public Notice announcing that it would accept public comments until September 21, 2006. Under terms of the Second Circuit's remand order, the FCC has until November 6 to review the evidence and make a decision. In theory, the FCC could reconsider its rationale and reverse its rulings. On the other hand, the FCC could use the opportunity to strengthen its arguments and impose the fines and penalties it forgave in the prior cases.

More likely, the result will be somewhere between these two points. The FCC almost certainly will confirm that the material violated the rules. At the same time, it is almost as certain that the FCC will revise its profanity standards again. Regardless, unless the FCC dismisses the cases entirely, the fight is far from over. The court's order explicitly stated that on day sixty-one the case automatically returns to the Second Circuit and continues on an expedited basis.

In addition to returning the case to the FCC, the Second Circuit stayed any enforcement of that part of the Omnibus Order that applied the "Golden Globe" standard to the cases in question. This part of the court's order has sparked some debate in legal circles as to exactly what is being "stayed." Prior to the Golden Globe case – the, er, seminal ruling involving rock-legend-cum-international-economist Bono's description of his award as "fucking brilliant" – isolated or fleeting utterances of four-letter terminology generally were forgiven. In the Golden Globe case, however, the FCC changed course, declaring that the fact that an utterance was isolated or fleeting would no longer be a defense against an indecency complaint. The Golden Globe case also marked the FCC's first attempt in several years to define "profanity" as a separate and independent violation of the FCC's rules.

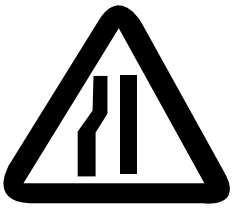
The $325,000 question is, what, exactly, does the court's stay order mean for broadcasters? Some commentators have opined that the court's order amounts to a general stay of the Golden Globe standard. That is, broadcasters should be free to assert that isolating or fleeting utterances are not actionable. Certainly, any CBS stations that air the much-heralded 9/11 documentary (which reportedly includes more than one forbidden expletive) appear to be taking that slant on the court's stay order.

The FCC, unsurprisingly, appears to be taking the position that the stay is far narrower. In the FCC's view, the enforcement of the Golden Globe standard is ***not*** stayed; rather, all that has been stayed is the application of the Golden Globe standard as put forth in the Omnibus Order. That is, isolated or fleeting uses of the word "fuck" or "fucking" will still get you fined, but in issuing such a fine, the FCC just can't use the March, 2006 Omnibus Order as justification. Interestingly enough, when the FCC argued against the stay of enforcement, it stated that any such stay would amount to a "two-month free pass" for broadcasters to broadcast profanity, so long as they could argue that the profanity was not repetitive.

While we would love to see which of these views would prevail in a court challenge, we don't know many broadcasters that would enjoy being test cases. With Congress's recent 10-fold increase in the maximum fine for indecency/profanity violations, the potential downside if one were to try, and fail, to challenge the Commission's policy is daunting. In the meantime, stations that wish to avoid complaints and potential fines would be well advised to continue to avoid all uses and variants of the "f-word" and the "s-word." As our readers may remember, the Second Circuit appeal is just one of three concurrent proceedings regarding the FCC's indecency rules – in the other two, the FCC is still reviewing the *Without a Trace* case and the Third Circuit Court of Appeals will be considering the Janet Jackson/Super Bowl case. Thus, no matter what the FCC does with its second shot at its profanity rulings, a quick and final resolution remains virtually unthinkable.

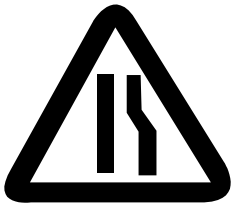
While we would love to see which of these views would prevail in a court challenge, we don't know many broadcasters that would enjoy being test cases.

Meanwhile, Commissioners Adelstein and McDowell contributed to the confused state of indecency law when they appeared recently at the NAB's Radio Show in Dallas. Both candidly acknowledged that they could not say precisely what constitutes indecency under the Commission's current policy. One published report had McDowell saying that "basically, you have 40% of the FCC saying, essentially, I don't know". But if the Commissioners themselves can't understand and apply the "test" which they themselves have supposedly adopted, how can the folks who are expected to comply with that test? The Commissioners' candor may be of more than passing interest to some or all of the judges who will be taking a look at the indecency rat's nest.



Stay of execution for some JSA's

Multiple Ownership Waivers Sought As Ownership Rulemaking Creeps Along



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

With the recent jumbled history of the multiple ownership rules still tumbling toward some possible resolution at some indeterminate future point, it is not surprising that a number of licensees have begun to seek waivers of the rules to permit some ownership situations which might not otherwise fly. And, perhaps significantly, the Commission has granted a couple of those waivers.

As you know, the FCC adopted major changes to its multiple ownership rules in June, 2003, only to have those rules stayed by a court in September, 2003, and then shipped back by the same court for further consideration a year later. Some of the rules were allowed to go into effect along the way, but others weren't. Further complicating the situation, the FCC declined to do anything in response to the court's remand until a couple of months ago, at which point the Commission issued a vague Notice of Proposed Rulemaking. With the number of comments in response to that Notice already reaching well into six figures (and with the comment deadline still at least a month away), it seems clear that the issues raised in the Notice are not likely to be resolved soon.

Which is why it may make sense for some broadcasters to seek interim relief by way of waiver.

For example, the Commission recently granted two waivers of its rules relative to radio joint sales agreements (JSAs). The rules require that certain JSAs which commenced prior to the FCC's 2003 local radio multiple ownership rule revisions, but which don't comply with those rules as revised back then, must be terminated by September 3, 2006. But to the extent that the Commission may ultimately change those rules as part of its on-going deliberations, parties to such JSAs might justifiably wonder whether they should be required to terminate agreements now. Moreover, since existing ownership combinations which are inconsistent with the new rules have been permitted to stay in place until final action in the remand proceeding, it seems unfair to require JSAs not to enjoy the same "grandfathered" status.

One of the waiver requests came in from the Fargo, North Dakota-Moorhead, Minnesota Arbitron radio market. In that market the existing radio multiple ownership rules limit a company to owning six radio stations. A broadcast licensee which owns six radio stations in the market entered into a JSA in 2002 to handle the sale of air time for a seventh radio station. Under the revised rules adopted in 2003 (and which took effect in September, 2004), that JSA would normally have to have been terminated no later than September 3, 2006. But lo and behold, the FCC has granted the licensee a waiver allowing the JSA to remain in place until six months after the FCC's recently initiated multiple ownership rulemaking is completed – a timeframe which we can probably characterize as "indefinite" (although the Commission characterized the waiver as "temporary"). In order to reach that result, the Commission concluded that the licensee did not enjoy any unfair competitive advantage as a result of its ownership/JSA mix. Indeed, the FCC found that termination of the JSA might put the licensee at an unfair competitive disadvantage.

A similar result occurred in a similar situation from the Amarillo, Texas, market. There the broadcast licensee had been granted a waiver in 1996 allowing it to own two radio stations and a daily newspaper. The FCC had twice extended the waiver subject to the outcome of newspaper/radio cross-ownership rulemakings. In 2002 the licensee entered into a JSA to sell air time for a third radio station – which meant that, because the JSA created an attributable interest in that third station, the licensee in question had a third newspaper/radio cross-ownership interest. That necessitated FCC consideration of whether that third cross-ownership waiver was warranted

As in the Fargo/Moorhead market, the FCC granted a waiver allowing the JSA to remain in place until six months after the FCC recently initiated multiple ownership rulemaking is completed. Again, the Commission looked at the particulars of the situation, and concluded that preservation of the cross-ownership created by JSA was warranted. In the FCC's view, the JSA had permitted the subject station to "become a significant voice in the Amarillo radio market and community."

In yet another instance, Entercom has requested a waiver of the limit on the number of radio stations any single company may own in the Rochester, New York Arbitron market. The rules limit a company to a maximum of five FM stations in that market. Entercom already owns three FM stations in the market and has agreed to purchase four more FM stations in its multi-market deal to purchase various CBS radio stations. Historically, in similar multi-market station pur-

(Continued on page 15)

Update from Planet Kidvid

Promo, website restrictions eased a bit

Commission OK's KidVid Compromise

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

In late September the FCC finally got around to approving a compromise set of kidvid rules, ending more than two years of wrangling. The new rules are likely to take effect before the end of the year.

As you will recall, in September, 2004, the Commission wrapped up (or so it thought) a four-year-old docket by adopting a set of rules which would have imposed substantial new kidvid-related burdens on television licensees. Not surprisingly, a number of those licensees headed off to court while others sought reconsideration by the agency.

As the original effective date (*i.e.*, January 1, 2006) began to loom large on the horizon without any intervening FCC action, members of the warring factions hunkered down and hammered out a compromise which they could all live with. That compromise was then submitted to the Commission as a possible resolution of the conflicting proposals then before it. (For more details on the compromise, *see* related articles in the October, November and December, 2005, and January, 2006 *Memos to Client.*)

The compromise keeps the current FCC practice of evaluating preemption activities on a case-by-case basis, which should help stations which have a large commitment to breaking news and live sports coverage.

Now, after nearly a year, the Commission has adopted the compromise provisions, thus clearing the way for the new rules to go into effect. While the full text of the FCC's decision had not been released at press time, the terms of the private compromise which spurred the decision should provide reasonable clues to what we can expect.

Under the compromise, at least 50 percent of a station's core children's programming counted toward meeting the additional multicast programming guideline cannot consist of program episodes that had already aired within the previous seven days on either the station's main program stream or on another of the station's free digital program streams. Once half of the programming consists of reruns, any additional airings within the seven-day window will simply not count toward meeting a station's kidvid obligations.

While the limit on repeat programming may impose some burden on broadcasters, they will get to count commercial time more favorably. The original rules would have counted as commercials cross-promotions for other shows. Since the number of advertising minutes on children's programs is legally limited, broadcasters would have had to choose between their own promos and revenue. Under the compromise, cross-promotions will not count as commercial spots.

Also gone with the compromise are some of the FCC's major league restrictions on cross-promotion of show-related websites. As originally adopted, the FCC's rules would have completely prohibited the display of website addresses in a children's program when the site uses characters from that program to sell products or services. Under the compromise, that blanket prohibition would be relaxed. The compromise rule would prohibit the display of a website address during or adjacent to a program if, at that time, on pages that are primarily devoted to free noncommercial content regarding that specific program (or a character appearing in the program): (1) products are sold that feature a character appearing in that program; or (2) a character appearing in that program is used to actively sell products. Importantly, the compromise rule would not apply to third-party sites linked from the companies' web pages, on-air third-party advertisements with website references to third-party websites, or pages that are primarily devoted to multiple characters from multiple programs.

The compromise also heads off a change in preemption rules that would have made it much harder for stations to meet their mandatory quota of kids' shows if any were preempted. The compromise keeps the current FCC practice of evaluating station preemption activities on a case-by-case basis. This should help stations with a large commitment to breaking news and live sports coverage.

Once the full text of the Commission's action is released, we will be able to determine whether the Commission has in fact adopted the compromise in its entirety. The compromise rules will take effect 60 days after publication in the Federal Register – which could mean they'll be in effect by year's end.

FM ALLOTMENTS ADOPTED –8/19/06-9/21/06

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
OR	Arlington	137 miles E. of Portland, OR	295C2	05-9	None
OR	Athena	227 miles E of Portland, OR	264C2	05-9	None
OR	Hermiston	186 miles E of Portland, OR	261A	05-9	None
OR	La Grande	171 miles NW of Boise, ID	225C1	05-9	None
OR	Monument	247 miles NW of Boise, ID	280C1	05-10	TBA
OR	Prairie City	176 miles NW of Boise, ID	260C	05-10	TBA
OR	Ione	171 miles W of Portland, OR	258A	05-9	TBA
OR	Prineville	149 miles E of Salem, OR	267C1	05-10	TBA
ID	Weiser	75 miles NW of Boise, ID	*247C1	05-10	Accommodation Substitution
WA	Oak Harbor	89 miles N of Seattle, WA	277A	04-305	TBA
WA	Oak Harbor	89 miles N of Seattle, WA	*233A	04-305	TBA
WA	Sedro-Woolley	74 miles N of Seattle, WA	289A	04-305	TBA
GA	Lexington	88 miles E of Atlanta, GA	249C2	04-379	None
WI	Monona	7 miles E of Madison, WI	263A	05-122	None
FL	Lake Park	13 miles N of Palm Beach, FL	262A	05-147	TBA

Notice Concerning Listings of FM Allotments

Consistent with our past practice, Fletcher, Heald & Hildreth PLC provides these advisories on a periodic basis to alert clients both to FM channels for which applications may eventually be filed, and also to changes (both proposed and adopted) in the FM Table of Allotments which might present opportunities for further changes in other communities. Not included in this advisory are those windows, proposed allotments and proposed channel substitutions in which one of this firm's clients has expressed an interest, or for which the firm is otherwise unavailable for representation. If you are interested in applying for a channel, or if you wish us to keep track of applications filed for allocations in your area, please notify the FHH attorney with whom you normally work.

(Continued from page 13)

chases which would have put the buyer over the existing limit, the buyer typically has told the FCC that the buyer will place in a trust the number of stations required to achieve compliance with the ownership limit. But in this case, Entercom asked the FCC for a six-month waiver of the limit which would allow Entercom to acquire and operate the stations for up to six months while it tries to sell the stations.

No word yet from the Commission as to whether Entercom's waiver will be granted, but the two other cases do seem to suggest some willingness at the Commission to consider multiple ownership waiver requests.

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

First Class

A word to the wise from Joe Di Scipio

Inquiring TV Minds Want To Know: "What About Our JSA's?"

Well, the FCC is about to begin the Media Ownership II Tour of America (the "We Will Get It Right ***This*** Time Tour - Really") in an effort to craft ownership rules that will satisfy the courts and special interest groups while still reflecting the reality of today's market place. Good luck. The sold-out tour begins on October 3rd in Los Angeles, although at least one Commissioner (Adelstein) was slated to appear at a similar confab two weeks earlier, in Austin. While the LA gig is an FCC production, the Austin do was organized by two Latino groups, reportedly with backing from other simpatico organizations like the Consumers Union.

Elsewhere in this edition we discuss two recent waivers the FCC issued in regard to radio station joint sales agreements (JSAs) extending those agreements. In radio, these agreements began to count against the ownership limitations this month. Although there is a long pending Notice of Proposed Rulemaking asking whether TV JSAs should also count against ownership limits for TV, no similar rule currently exists for TV.

The combination of the Media Ownership II Tour and the radio JSA waivers set us to wondering what this means for new TV deals that include JSAs or similar arrangements. Occasionally, due to pending rulemakings, the FCC will issue an official freeze against filing applications that include the subject of the rulemaking (like TV JSAs) or they will unofficially place a freeze by not processing TV station sales that include JSAs.

After putting together a few of these deals recently, reading the tea leaves, gazing into our crystal ball, and, yes, meeting with the FCC staff (drum roll, please); we're guessing – and yes, it is only a guess at this point, but it is our best guess – that the FCC will continue the status quo as it relates to TV JSAs. Which means, that as long as the JSAs comply with the current rules and polices, parties can continue to enter into TV JSAs without it counting against the current ownership cap. In fact, if you are thinking about entering into a TV JSA or similar arrangement, now is probably the best time to do so. Those agreements may become taboo if and when the Media Ownership II Tour concludes and the FCC ever gets around to wrapping the ownership proceeding up.