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Memorandum to Clients

October, 2006 | *News and Analysis of Recent Events in the Field of Communications* | No. 06-10

FCC opts to do the "white" thing

Unlicensed Use of TV "White Space" Moves Closer to Implementation

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

The FCC has released its First Report and Order and Further Notice of Proposed Rulemaking dealing with the authorization of unlicensed devices to operate in the spectrum currently set aside for television broadcasting. As we reported last month, the Commission is moving forward with a rulemaking that commenced in 2004.

In the First Report and Order (FR&O) component of the FCC's decision, the Commission has determined that it is possible to authorize low power devices to operate in the TV band, so long as no harmful interference is caused to television stations. To that end, the Commission is refusing to authorize the use of personal *portable* unlicensed devices; instead, only *fixed*, or stationary, low power operations will be permitted. Because the use of personal portable devices would likely pose a greater risk of interference, the FCC is seeking further comment on such use in the Further Notice of Proposed Rulemaking (FNPRM) component.

The Commission has also decided to prohibit any low power device from operating on TV Channel 37 (to protect the radio astronomy services) and Channels 52-69 (to protect the wireless and public safety services authorized to operate on these channels). Finally, to protect the television stations that are busily finalizing their transition to digital transmissions, and to give itself time to adopt the technical rules under which the new unlicensed service will operate, the FCC has prohibited, until the end of the DTV Transition in February, 2009, the marketing of the types of unlicensed low power devices which will ultimately be covered by the new rules.

In the FNPRM, the Commission wades deeply into the devil's snare of technical rules, seeking comment on every regulatory element relating to the proposed fixed low-power devices. First, the FCC questions whether the use of the TV spectrum for these fixed low-power devices should be on a licensed or unlicensed basis. The FNPRM suggests that the Commission's strong preference would be for the ***un***licensed use of the spectrum, given the wide range of the spectrum's availability (rural vs. urban), and the difficulty which would be involved in creating priority rights to the spectrum among licensees.

The Commission wades deeply into the devil's snare of technical rules, seeking comment on every regulatory element relating to the proposed fixed low-power devices.

Additionally, the Commission is seeking comment on the appropriate method to use for determining whether a particular swath of spectrum is available for use and, perhaps more importantly, whether unlicensed devices would not cause harmful use to television stations in the vicinity. As we described in last month's *Memo to Clients*, the Commission has proposed three possible mechanisms: (1) enabling the devices to "sense" whether the spectrum is available; (2)

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The Scoop Inside

Your CP is not a magic anti-zoning bullet

Bureau Affirms That Broadcast CP's Do Not Preempt Local Zoning Rules

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

So you have a construction permit – issued by the FEDERAL Communications Commission, thank you very much – and it says that you can – no, wait, you HAVE to – build your towers at a certain spot. But then there's this local governmental authority that says no, you can't build your towers there. What's a broadcaster to do?

Well, the first thing you should ***not*** do is assume that the FCC will automatically trump the locals. A licensee looking to build some towers to implement a relocation of its Maryland AM station into the Washington suburbs recently found that out.

The licensee's goal was to move the station from a chicken-farming and fishing region near Maryland's coast into the more lucrative inland Washington market. The licensee had obtained its FCC permit and was ready to construct. But then came a bunch of local opposition, which sought to get local authorities to put the kibosh on the project. The opposition argument was based in large measure on the fact that the proposed tower site lies in an area that was set aside long ago to protect from encroaching suburban sprawl the rural character of otherwise valuable suburban land. A big honking AM array in the middle of that area would seem contrary to that goal of bucolic preservation.

The licensee apparently figured that, by waving its FEDERALLY-GRANTED permit around, it could somehow persuade the locals that they should get out of the way and let the construction go forward.

The local opposition, however, decided to cut that approach out from under the licensee by going directly to the FCC. They asked the Commission for a declaratory ruling confirming that the FCC has no rules or regulations preempting local zoning rules affecting broadcast towers. And – presumably much to the chagrin of the licensee – the Media Bureau confirmed that in so many words: "the Commission has not adopted any rules or regulations that preempt local zoning rules affecting construction of broadcast towers." As a result, the local authorities are not likely to be swayed by claims that a federally-issued construction permit is the be-all and the end-all as far as local zoning is concerned.

The big loser here appears to be the licensee, which has only a couple of weeks left before its construction permit runs out in early November. While at least one published report indicates that the licensee believes it can get its construction permit extended, the prospects for success at the FCC are not necessarily good. Such extensions have been rare to non-existent since the FCC adopted the current three year construction regime.

In the old days, with shorter construction periods, extensions were relatively easy to come by – so much so that some construction permits went unbuilt even after a decade or more. Today, exceptions are few. Natural disasters and the like are the kinds of things that are most likely to lead the FCC to stop the clock (which in FCC-speak is called "tolling"). While appeals of a local zoning decision to a "local court" may qualify for tolling, here the Maryland AM's lawyers reportedly intend to argue that the FCC permit trumps local land use rules. In view of the Bureau's declaratory ruling here – a ruling which merely re-stated well-established Commission policy – it's not clear that the licensee's argument will be persuasive.

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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, Kevin M. Goldberg, Patrick A. Murck, Lee G. Petro, R.J. Quianzon, Michael Richards and Ron P. Whitworth

Focus on FCC Fines

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

This month's column will focus on several seemingly obvious ways to avoid fines from the FCC. The most obvious way to avoid a fine is to follow the FCC's regulations. Surprisingly, there are other similarly obvious ways which, for one reason or another, may not have been as obvious to some licensees. Check out these cases.

Heed the FCC's Warnings – We lead off with two tower inspection cases. An FCC agent inspected a tower in New Jersey. The same month, a different agent inspected a Pennsylvania tower. In both cases the FCC pointed out to the licensee that the tower in question had problems (one licensee's tower needed re-painting, the other needed to have Antenna Registration Numbers posted on each of its towers). In both cases the feds, having alerted the licensees to what needed to be done, gave the stations an opportunity to follow through on the suggested corrective measures. Not unexpectedly, the FCC agents returned after a while to re-inspect the stations.

The FCC agents were less than pleased to find that the towers *still* did not comply with the regulations despite the generous warning each licensee had been given. In the Pennsylvania case, the FCC told the AM station that it had to register both of the towers in its array and post an FCC Antenna Register Number for each. The station registered only one of the towers and still failed to post the FCC number for the towers. Unimpressed (well, to be perfectly honest, the inspectors were probably impressed – just not favorably), the FCC hit the station with a $3,000 fine. In the New Jersey case, the G-man returned to the station seven weeks after explicitly telling a licensee representative that the tower needed painting – and lo and behold, the tower hadn't been painted. The FCC leveled an $8,000 fine for failing to paint the structure.

Don't Make Up Employees - In what appears to be a first for the FCC's Enforcement Bureau, an applicant simply made up an employee to include in the signature block of an application. Although most FCC applications are filed on-line through the FCC's electronic filing system (which does not require an actual hand-written signature), certain rules applicable to non-broadcast services require applicants in those services to print out and sign electronically-filed applications and keep such signed copies in the applicant's records. But along came an applicant who didn't do that – in fact, it *could not* do that because the name which was included in the "signature" block on the application was a name which had been made up to fill in the application. Two applications were electronically signed by an employee using the name Mr. Noel Imitz. The licensee later admitted that there was no Mr. Imitz on staff; rather the company simply wanted to type "No Limits" into the signature box. The FCC, noting that it did have a limit for fines, levied a $17,500 fine. The FCC based its fine on the fact that the licensee provided false information and was not honest.

Don't Advertise on the Internet or in Gift Shops - Two equipment manufacturers are in hot water for selling unauthorized equipment. How did the FCC find out about this? Simple. It did what normal people do – it checked out eBay and a local gift shop. In one instance, the Commission simply searched through eBay and found an on-line shop selling uncertified equipment. In the other instance, an agent who worked in the FCC's Seattle office visited the city's Space Needle and its gift shop. While in the gift shop, the FCC agent stumbled upon the "Space Needle" FM radio. The agent turned the radio over, found no FCC markings and sent the manufacturer a $7,000 fine.

Agents in the 'Hood - The FCC has twenty nine offices located across the United States. In addition to Washington, D.C. the FCC has staff in: Chicago; Kansas City; San Francisco; Atlanta; Boston; Chicago; Columbia, MD; Dallas; Denver; Detroit; Kansas City; Los Angeles; New Orleans; New York; Philadelphia; San Diego; San Francisco; Seattle; Tampa; Anchorage; Buffalo; Honolulu; Houston; Miami; Portland; Saint Paul; San Juan, PR; and Norfolk, VA. There probably is an FCC agent near you. However, a Norfolk tower owner found out that the FCC had an office in town the hard way. Tower lighting went out on a Norfolk tower on June 3 and the Norfolk agent noticed the problem the next day. The agent contacted the tower owner a few days later and inspected the tower logs. The agent noticed that although the tower lighting problems were logged on June 3 and 4, the FAA had not been notified. The FCC responded by slapping the station with a $10,000 fine. While all tower owners and licensees should comply with FCC regulations, those who live in a city with resident FCC agents should remember that there are extra eyes in town which are upon them.

En garde!! AM Owners are Responsible for Fencing their Towers - An AM station faced a fine for failing to keep a proper fence around its tower array. In response, the station told the FCC that it did not own the tower and thus should

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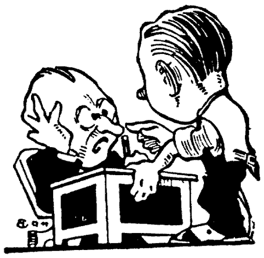

EEOuch!!!

EEO Audit Leads to Fine, Reporting Conditions

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

The FCC recently fined a radio licensee $12,000 for failure to comply with the FCC's Equal Opportunity Employment (EEO) rules. The FCC also imposed "reporting conditions" on the licensee, requiring that it submit EEO recruitment documentation annually to the FCC for three years. The "reporting conditions" would transfer to any buyer of the stations during the three-year reporting period.

The FCC emphasized that its EEO rules require a broadcast licensee to: (a) recruit for ***every*** full-time (30 or more hours per week) job vacancy; (b) for ***every*** job vacancy, use recruitment sources sufficient to widely disseminate vacancy information to the ***entire community***; (c) analyze its recruitment program regularly to ensure it is reaching all potential job applicants in the community; (d) correct problems found in the recruitment program; and (e) ***retain dated copies*** of all advertisements, bulletins, letters, faxes, and other communications announcing each full-time vacancy.

This double whammy – fines and reporting conditions – serve as a reminder to broadcast licensees that their EEO obligations are very real and subject to review by the Commission.

The fines and reporting conditions arose from FCC review of the licensee's employment practices covering a two-year period. During that period the licensee had 25 full-time job vacancies to fill. What the licensee's records showed (or didn't show) relating to those 25 vacancies led to its problems.

First, the licensee got spanked for $5,000 for failing to recruit for eight of its 25 full-time job vacancies. The licensee relied solely on walk-ins to fill two vacancies and relied solely on referrals from employees and other individuals the licensee knew to fill six vacancies. The FCC emphasized that, while walk-ins and referrals from employees and the licensee's private contacts may correctly be listed on a licensee's annual public file report as the "source" of a person interviewed or hired, walk-ins and employee/private referrals are ***not*** recruitment actions. In addition, general recruitment activities which do not announce a specific job vacancy, but instead advise that a station often has vacancies, are ***not*** recruitment actions.

Second, the FCC tacked on another $5,000 fine for the licensee's failure to recruit "widely" for an additional five job vacancies. For these five vacancies, the licensee relied solely on either a single Internet website or that website plus walk-ins. The FCC emphasized that it does not require that a specific number of recruitment sources be used, but that the combined sources used must reach the entire community. According to the Commission, a licensee may limit itself to only one recruitment source *if the source reaches the entire community*. The FCC requires a licensee to recruit from non-Internet sources, in addition to Internet sources, because the FCC apparently feels that Internet usage has not become sufficiently widespread to allow it to be used as a sole and exclusive recruitment source.

Third, the licensee got nicked for an additional $1,000 fine because of its failure to keep documentation of its recruitment actions for five full-time job vacancies. The FCC did not accept the licensee's explanation that prior general mangers had kept the documents in their offices and the documents could not be located after the general managers left.

Fourth and finally, the FCC iced the cake with yet another $1,000 fine for the licensee's failure to regularly evaluate the effectiveness of its recruitment program and correct any problems found in the program. The FCC determined that the licensee's continuing failure to appropriately recruit through the last month of the two-year period the FCC reviewed indicated that the licensee had not evaluated its recruitment program.

This double whammy – fines *and* reporting conditions – serve as a reminder to broadcast licensees that their EEO obligations are very real and subject to review by the Commission. The recent enforcement action illustrates the importance of diligently following through with all elements of those obligations. Licensees must: recruit for every full-time job vacancy; recruit "widely" to the entire community for each vacancy; keep dated records of all job vacancy announcements; and regularly (perhaps quarterly) evaluate the number of serious applicants received from the licensee's recruitment actions and add recruitment sources if needed.

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VNR Update

RTNDA Attacks FCC Inquiry Into Video News Release Practices

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

As the FCC has said before, it is not supposed to tell broadcast newsrooms how to make editorial decisions. Yet, every now and again, someone tries to get the FCC to barge into editorial offices, grab all the blue pencils, and impose on the broadcast audience the FCC's own view of what's reliable, relevant and of interest.

The well-intentioned rationale for such FCC intervention is that we will supposedly all end up with more truthfulness. The problem is that when government defines truth, truth is often the first victim.

As we have reported in earlier issues of the *Memo to Clients*, back in April a "public interest" study railed against the unattributed use of video news releases in local newscasts. That report, unveiled with much bally-hoo and with publicly-announced kudos from a Commissioner, prodded the FCC into its latest foray into the truth business. The result? The FCC issued scores of letters of inquiry which required TV stations from coast-to-coast to disclose in considerable detail information about their sources of particular on-air content and the process by which they decided to air certain material.

The FCC's underlying, and untested, theory appeared to be that use of news release materials is somehow akin to payola if a "sponsorship identification" is not provided naming the party providing the news release.

Shortly before the deadline for the responses to the Commission's inquiries, the Radio Television News Directors Association (RTNDA) punched back with a 16-page retort laying out the fictions, fallacies and fundamental flaws in the notion that the FCC could or should police the truth.

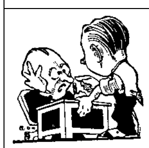
The RTNDA's message was that use of FCC enforcement personnel as truth police is by its nature necessarily "chilling". Concern about second-guessing by the government may cause broadcast journalists to avoid valuable newscast elements as those journalists look nervously over their shoulders, worried more about staying in the good graces of government regulators than choosing the best material.

> *The RTNDA's message was that use of FCC enforcement personnel as truth police is by its nature necessarily "chilling".*

If a problem does exist, any solution lies not in the hands of government, but in the hands of journalists, RTNDA noted. RTNDA, for instance, has a code of conduct that many newsrooms use as a basis for local policies. Other guides are available, as well.

Finally, RTNDA complained that the FCC's effort was based on a deeply flawed report. RTNDA noted that the report, issued by the self-styled "Center for Media and Democracy", was full of incorrect statements. Yet the FCC used it as the basis of an inquiry with far-reaching free speech ramifications.

RTNDA was not alone in its outrage. A number of broadcasters – including two clients of this Firm– tersely answered the FCC's inquiries and then refuted the central premise of this FCC police action. The FCC's chill breeze has been answered with heat from many quarters. It remains to be seen which will prevail, but as for us – we hold with those who favor fire.



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In addition, licensees should be sure to (a) participate in the required number of EEO "non-vacancy" recruitment activities every two years and (b) annually place in each station's public file and on each station's website the annual EEO public file report.

The Commission has for several years monitored EEO compliance through a program of random audits. The licensee which just got fined was one of dozens which happened to be audited. The FCC is ***still*** undertaking these random audits, which means that in any given year, any given station's number might come up. If that happens to you – maybe this year, maybe next year, maybe five years from now – the best protection will be a well-documented record of compliance. If you would like any assistance in meeting that goal, you should contact the FHH attorney with whom you normally work.

Nowhere to run to, baby, nowhere to hide

Copyright Office Finalizes Reporting Rules for Streamers

By: Kevin M. Goldberg
703-812-0462
goldberg@fhhlaw.com

It is time to pay the piper (and the guitarist, keyboardist, bassist, backup singers, roadies and assorted hangers-on). Interim rules released by the Copyright Royalty Board (CRB) on October 6, 2006, wrap up a proceeding related to recordkeeping and notice requirements for digital audio services (variously and commonly referred to as Internet "radio", "webcasters", "streamers", or "simulcasters") that loomed large and unresolved over the nascent streaming industry for four years.

For the last 18 months or so of uncertainty (since April 1, 2004), internet radio stations were supposed to be keeping detailed records about the songs they were playing. The problem was that the CRB had not specified what, if anything, was to be done with those records. So stations have presumably been meticulously maintaining those detailed records and sticking them in a file somewhere for future reference.

In addition to imposing exorbitant royalty fees for internet transmissions, the Copyright Office adds insult to injury by forcing radio stations to do the dirty work of recordkeeping.

The time has now come to dig those files out of that backroom file drawer, dust them off, and – for better or for worse – ship them off to the powers-that-be. The CRB's action this month means that those detailed records must now be filed with a receiving agency. It also means that copyright holders in musical and other works will now have all the information required to receive royalties for these performances, so it is likely that enforcement against possible online infringers will increase.

For nearly a decade, over-the-air broadcasters have been on notice that they must pay copyright royalties for works – usually music – transmitted over the Internet. A lengthy proceeding at the Copyright Office, followed by federal court litigation, clarified that the copyright licenses administered by ASCAP, BMI and SESAC apply only to over-the-air radio. The Office concluded (and the courts affirmed) that transmission of programming over the Internet is a separate and distinct "performance" of that programming, even if it's nothing more than a simulcast of the over-the-air signal. And as all of us who took Copyright 101 know, a distinct "performance" of a copyrighted work triggers the required payment of separate copyright royalties.

Enter SoundExchange, Inc., an offshoot of the Recording Industry Association of America. SoundExchange positioned itself to be the sole receiving agency for copyright royalties paid by Internet streamers pursuant to a statutory licensing scheme created in Sections 112 and 114 of the Copyright Act. Simply put, to play music over-the-air, a radio station need deal only with ASCAP, BMI and SESAC. To play music over the Internet requires a separate payment to SoundExchange.

However, paying in is only part of the equation. SoundExchange needs an equitable manner for calculating payout as well. So in addition to imposing exorbitant royalty fees for internet transmissions (a fair description as applied even to non-commercial radio stations and those defined as "small webcasters" in the Small Webcaster Settlement Act of 2002), the Copyright Office allowed SoundExchange to add insult to injury by forcing radio stations to do the dirty work of recordkeeping. On March 11, 2004, interim rules were announced which require every radio station streaming over the Internet from April 1, 2004 onward to compile records of every song played. (We described those interim rules in the May, 2004 issue of the *Memo to Clients*.)

These "reports of use" must consist of the following information regarding ***each song played*** on the station:

- The licensee's name;
- The "transmission category" code;
- The name of the performer of the song;
- The name of the song;
- Sound Recording Identification, consisting of:
    - International Standard Recording Code ("ISRC"), or
    - Album Title and Marketing Label;
- Total Performances of that song consisting of:

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Actual Total Performances, or

Aggregate Tuning Hours, Channel or Program Name, and Play Frequency.

The silver lining is that these reports must be filed only for two seven-day periods within each quarter year. These seven-day periods do not have to be consecutive to each other, nor do they have to start or end on a Sunday. In other words, licensees must engage in this mind-numbing work for eight weeks' worth of playlists per year.

In interim rules published on October 6, 2006, the CRB, specified the format in which these reports must be filed with SoundExchange. The new rules delve into very technical issues regarding the standards for creating and delivering the forms. The CRB attempted to create a "reasonable" system for creating, maintaining and delivering these records to SoundExchange, mindful of the fact that "reasonable" minds can differ as to the definition of "reasonable". Noting that broadcasters' view of "reasonable" essentially equated with "cheapest possible means" and SoundExchange's (and, therefore, the music publishers' and performers') views of "reasonable" meant "easiest to process and understand", the CRB essentially sided with SoundExchange on most technical issues.

The rules clearly favor the copyright holders, and the recording industry has shown it intends to enforce them with vigor.

As a result, all filings must be in electronic format. They must be in spreadsheet form (using either Microsoft Excel or Corel's Quattro Pro) and must be encoded in ASCII. Of course, to anyone's knowledge, only one company currently allows broadcasters' prescheduled playlists to be automatically converted into an ASCII spreadsheet which can be filed with SoundExchange under these rules. This quarterly report can be sent to SoundExchange in one of the following formats (note that no web-based filing mechanism similar to the FCC's CDBS database will be employed):

- E-mail
- File Transfer Protocol (FTP)
- CD-ROM
- Floppy Disc

And here's the really bad news. Now that these reporting, formatting and delivery specs are in place, Internet webcasters must now file with SoundExchange all quarterly reports of use ***dating back to April 1, 2004 and for every quarter going forward***. *Ouch!!!* Any hopes that an Internet radio station could continue to blind itself to the recordkeeping requirements is gone, especially as SoundExchange has the power to audit internet radio services (and has demonstrated a desire to use said power) to ensure compliance with the statutory licensing scheme.

To summarize, any radio station that is simulcasting its over-the-air signal on the Internet, or creating unique content of any type and streaming it on the web, must:

- Have on file at the Copyright Office a Notice of Use of Sound Recordings Under Statutory License;
- Pay copyright royalties on a monthly basis, as appropriate;
- File records of use on a quarterly basis;
- Comply with the technical requirements of the Digital Millennium Copyright Act intended to prevent musical piracy, many of which contain strict controls on playlists that may affect over-the-air broadcasts if the internet signal is simply a simulcast.

If this sounds burdensome and more than a little confusing, that's because it is. The rules clearly favor the copyright holders, and the recording industry (through SoundExchange) has shown it intends to enforce them with vigor. This article simply provides the latest "state of the musical union" with regard to internet radio. We at Fletcher Heald have prepared a memorandum which discusses all regulatory requirements related to Internet radio in significant detail. If you would like a copy of that memorandum or if you have any further questions about these laws, please contact the attorney with whom you regularly work, or contact Kevin M. Goldberg at goldberg@fhhlaw.com.

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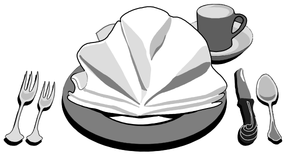
In the FCC's view, "diligent permittees can eliminate or mitigate zoning delays by applying for approval from the pertinent local authorities prior to the issuance of a construction permit." The lesson for broadcasters is: be ready to change plans fast if and when zoning and local politics get in the way. If you can't convince the local powers-that-be that construction of your tower is more important than their zoning (or other land use) rules, don't expect the FCC to come bail you out.



The FCC sets the table

Near-final DTV Table of Allotments Released

Limited changes still possible

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

The FCC released the long-awaited draft DTV Table of Allotments this month. In its Seventh Further Notice of Proposed Rulemaking (seven, count 'em, seven notices – yowza, the time has flown!!), the Commission is giving television licensees one last chance to make sure that their digital technical facilities are accurately reflected in the Table. In addition, the Commission established a limited number of opportunities for licensees to modify the table to maximize their facilities.

First, the Commission asks that all licensees carefully review the table of allotments and confirm that the technical facilities set forth in the Table accurately reflect the facilities that the licensee expects to be operating with at the end of the DTV transition in February 2009. If there are errors in the draft DTV Table, then licensees should submit comments seeking correction. A copy of the Table can be accessed at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-150A2.pdf.

The Commission asks that all licensees confirm that the technical facilities set forth in the Table accurately reflect the facilities that the licensee expects to be operating with at the end of the DTV transition.

Second, the Commission will permit licensees to request alternative channels assignments *in a **limited** number of instances*. Specifically, under the following conditions, a licensee may submit a request to change DTV channels, but ***only if*** the licensee can also demonstrate that it will cause less than 0.1% interference to other DTV stations, or if it obtains consent from the DTV station which would receive the interference, ***and*** it fits into one of these limited categories:

- If a licensee was unable to construct its full, authorized DTV facilities due to a conflict with another licensee when making its tentative channel designation;
- If the licensee has an international coordination issue that the Commission has been unable to resolve;
- If the licensee has a low-VHF (Channels 2-4) channel designation; or
- If the permittee or licensee received a new authorization after the channel election process commenced, and the Commission assigned it a digital channel because its NTSC or DTV channel would cause impermissible interference to existing licensees.

All other licensees and permittees not satisfying any of these categories are stuck with their listed channels until after the final DTV Table is adopted. The Commission will permit eligible licensees to reach consensual substitutions with otherwise ineligible licensees, but in analyzing such proposals, it will consider whether the proposed substitutions would create loss areas and would be in the public interest.

The Commission will also permit licensees who failed to timely file their pre-transition certifications (FCC Form 381) to file a request to change their certification from the default replication facilities to specify maximized facilities for which they could have filed. Significantly, the Commission will also permit licensees that have constructed (or received authorization to construct) facilities that provide service to areas beyond that which was certified in the FCC Form 381 to file requests to modify their facilities to match their authorized or constructed facilities. These licensees must submit either (a) an engineering analysis demonstrating that the proposed facilities will not cause more than 0.1% interference to another licensee's DTV station or (b) a consent from the affected licensee(s).

Finally, the Commission has also tentatively figured out how it plans to deal with stations which had not been authorized at the time the initial DTV Table was adopted in 1997. This universe includes (a) stations which had applications pending in 1997, but which have since been approved; and (b) applications for new stations which currently remain pending. The Commission has tentatively determined that many of these facilities can operate on their currently assigned analog channel. For the others, the FCC made the "best available" channel assignment, and will permit requests to change channels, as discussed above. For applications that are granted prior to the adoption of a final DTV Table, the Commission will either designate their current channel, or make a best available determination. The Commission will then issue

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Copyright Office looks to the digital future

Cable Copyright Concerns Considered

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

The Copyright Office has published a Notice of Inquiry seeking comment on issues arising from retransmission of digital content by cable carriers. The issues are two-fold: first, whether compulsory licensing under Section 111 of the Copyright Act applies to digital retransmission, and second, whether cable carriers are accurately reporting the amount due under the compulsory license for retransmitting digital content.

Section 111 of the Copyright Act imposes a compulsory licensing system for the retransmission of broadcast content by cable carriers. This means that cable carriers can retransmit without first seeking broadcasters' consent or negotiating a royalty rate with broadcasters. That convenience does come at a cost though: rather than negotiate individually, carriers must pay a "statutory" rate – that is, a rate imposed by the government and not subject to separate negotiation – calculated on the basis of the carrier's reported gross receipts.

> *If the Copyright Office were to interpret Section 111 as not including digital transmissions, then cable carriers would have to negotiate royalty payments individually with broadcasters, and vice versa.*

Digital Application

Because Section 111 was passed before the DTV transition, it does not expressly address how the compulsory licensing scheme should be applied to digital retransmission. Instead, the plain language of the statute applies to analog retransmission of content. The Copyright Office's Inquiry encourages commenters to argue either for or against an interpretation of Section 111 which would include digital retransmission.

The consequence of such an interpretation would be to include digital retransmission within the same compulsory license scheme as analog retransmission. If, on the other hand, the Copyright Office were to interpret Section 111 as *not* including digital transmissions, then cable carriers would have to negotiate royalty payments individually with broadcasters, and *vice versa*. At a minimum, such individual negotiations could impose a heavy, if not crippling, practical burden on broadcasters and cable systems alike. Whether such a system would place some elements of the broadcast industry at a competitive disadvantage is also a consideration which may be addressed.

Reporting Requirements

If the Copyright Office interprets Section 111 to include digital retransmission, then the requirement to report certain gross receipts would attach. However, there is a lack of clarity as to some of the specific reporting requirements. Comments are sought on how the Copyright Office can specify: (a) how cable carriers report receipts from converter boxes and second set fees; (b) whether cable carriers must separately identify digital and analog streams if there is dual carriage; and (c) whether cable carriers must separately report each multicast stream if the broadcaster is multicasting over their digital signal.

As the final date for the digital transition draws inexorably closer, questions such as these become increasingly important to resolve. If you are a television broadcaster who anticipates cable carriage following the final shift to digital, now is a good time to ponder these issues and offer up your thoughts to the Copyright Office.

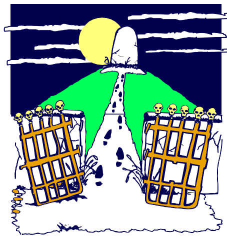
Comments are due by November 6, 2006 and reply comments are due by December 4, 2006.

(Continued from page 8)

a Notice of Proposed Rulemaking in these cases, and seek additional comment.

We are now entering the home-stretch with regard to the DTV Transition. While a number of additional questions remain unanswered – such as how "flash-cut" stations will, as a practical matter, commence DTV service on their analog channels – the adoption of the final DTV Table is a huge step in reaching an orderly conclusion to this process.

We highly recommend that all licensees carefully review the proposed DTV Table, and consult with their engineers (and lawyer!) soon to make sure that their facilities are protected. Comments in response to the Seventh Further Notice are due by January 11, 2007.



Spitzer anti-payola suit dodges dismissal

The Crusade That Wouldn't Die!!!

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

With New York Attorney General (and would-be Governor) Eliot Spitzer madly fanning the flames to keep the fire alive, the payola issue sprang back to life in two recent developments. First, Spitzer and his prosecution team survived an effort by Entercom to have the NYAG's payola case against the radio chain thrown out of court. And second, Spitzer managed to convince CBS to settle the investigation of CBS's alleged payola involvement.

As we have reported in previous *Memos to Clients*, the NYAG has declared war on what he perceives to be payola practices in the music and radio industries. So far he has managed to browbeat several record companies into settling with him – in which cases the companies have ponied up several million dollars each and agreed to change their evil (at least in Spitzer's view) ways. While radio companies were caught up in the investigation, none had been publicly singled out for public treatment until last Spring, when Spitzer's crew filed suit against Entercom.

With the rejection of Entercom's motion to dismiss, Spitzer's payola crusade has survived what many thought would be a wooden stake pounded into its heart.

Entercom fired back with a motion to dismiss the case, arguing that the NYAG's office fundamentally misconceives the notion of "payola" on several levels and does not have the authority to sue on that basis in any event. Unfortunately for Entercom, the presiding judge has now denied its motion, thus clearing the way for Spitzer's trial to proceed.

The judge's decision is a tad convoluted. F'rinstance, the judge looks at "spin programs" – *i.e.*, programs sponsored by record companies which feature repeated plays of particular records the companies want to promote. Those programs are normally tagged with clear sponsorship ID's, making them legal as far as the FCC is concerned. But the judge concluded that, despite those ID's, the programs are *still* fraudulent because they supposedly pull the electronic wool over the electronic eyes of ratings service systems which rely on the "fingerprint" of records to tally airplay.

While many may disagree with the judge's ruling in whole or in part, we are probably stuck with it for the indefinite future. With the motion to dismiss denied, the case will now proceed through discovery and into trial. But it seems a reasonable guess that Entercom, faced with the unattractive next step of opening its files and employees (past and present) to be examined by Spitzer's squad through the discovery process, may conclude that it's time to settle the case and move on with life . . . if Spitzer will let them.

There is reason to believe that a settlement may be possible. Spitzer's shop recently cut a deal with CBS pursuant to which CBS agreed to pay $2 million to resolve the investigation into its practices. Amusingly, Commissioner Adelstein, a longtime, vocal fan of Spitzer's anti-payola crusade, issued a press release which claimed that, in settling, CBS "finally admit[ed] wrongdoing". Perhaps the good Commissioner should have read the fine-print – CBS's settlement specifically provided that it was ***not*** admitting wrongdoing of any kind. When this was brought to Adelstein's attention, he re-issued his release with the mistaken language deleted.

With the rejection of Entercom's motion to dismiss, Spitzer's payola crusade has survived what many thought would be a wooden stake pounded into its heart. As a result, the crusade lives on. Since at least Commissioner Adelstein continues to following Spitzer's progress, we may assume that payola will remain a matter of potential FCC concern for the time being.

"The circus is in town" - Bob Dylan (Desolation Row)

Opening Ownership Confab Convened

Hey, Rube!!! The big top's up, the clowns are dressed, the sideshow's ready – and the crowd's getting ugly. This can mean only one thing: the FCC is on the road again.

A raucous crowd numbering in the hundreds packed into a crowded conference room at the University of Southern California on October 3 to participate in the first of six planned meetings on the state of media ownership. Attendees likened the atmosphere to that of a major sporting event – panelists were roundly booed, given rousing ovations and chanted at vociferously throughout the day.

The media ownership meetings are being held against the backdrop of the Commission's latest review of its media ownership rules. As you are no doubt already aware (unless you happened to have been in an extended coma, or possibly living in a cave), in 2003 the Commission voted 3-2 to loosen restrictions on cross-ownership between newspapers and broadcast stations and restrictions on the number of radio/television stations a company may own in a single market. It also increased the national audience cap for television station owners. A majority of those new rules were then trashed by the United States Court of Appeals for the Third Circuit in 2004. The court shipped the whole matter back to the Commission for further consideration. And there it has sat, without that mandated further consideration, until the FCC re-opened the matter with a further Notice a couple of months ago.

Back in 2003, then-Chairman Powell held just one public hearing, and was criticized for failing to account for public sentiment prior to the Commission's decision. Current Chairman Kevin Martin took notice and is planning six events (including the recent LA gig) at various locations across the country. All five FCC Commissioners were in Los Angeles.

The hearing was also heavily attended by entertainment industry employees – including actors, directors and writers – many of whom may be looking for the return of some form of program regulation (*e.g.*, syn-fin) which might benefit their corner(s) of the industry. They reportedly gave their boisterous support to Commissioners Adelstein and Copps and other panelists advocating stronger protection against consolidation. The Commissioners told the crowd that increased media consolidation is responsible for the lack of diversity and localism in broadcasting.

"My question is whether [creative content producers] can get access to the public airwaves," Copps said. "And I want to emphasize those last two words – ***public airwaves***. They belong to you and me and every person in this country, not to any corporation or conglomerate."

Chairman Martin stated that while he is conscious of the need to further competition, diversity and localism, the current rules "may no longer reflect the current marketplace." He said a rule for cross-ownership should be developed that "reflects current market characteristics, including the struggling nature of today's newspaper industry, and recognizes how ownership rules impact the ability of newspapers and broadcasters to serve their local communities."

Commissioner Tate echoed the sentiments of the Chairman, saying that we need to examine alternative media citizens are using to obtain their news and information,

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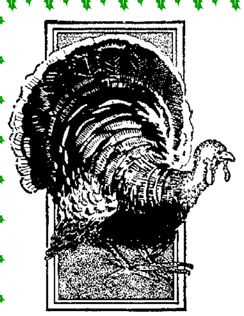
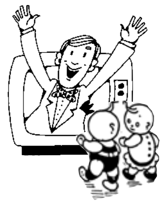


Holiday Schedule Reminder

Fletcher, Heald & Hildreth, P.L.C.
will be officially closed on
November 23-24 (Thanksgiving weekend),
December 25 and January 1.
We will be open on Friday, November 10
(the federal holiday in honor of Veterans' Day).

Update from Planet Kidvid



Brought to you by the letters "F" and "C" and "C"

KidVid 2007

The wheels of the bureaucracy go round 'n' round

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

As we reported in last month's issue, the FCC approved several modifications to the children's television rules recommended by "a group of cable and broadcast industry representatives and children's television advocates." Since last month's issue, the text of the FCC's Order was released, allowing us to review the final results of more than two years of arguments, debates and compromises.

As expected, the FCC adopted essentially all of the "Joint Proposal" put forward by the group, which included the big four networks but ***not*** the NAB or any affiliates. Presumably the networks and the public interest groups will now withdraw the various court challenges to the new rules and will not file any further appeals. Virtually all objections and suggestions from outside the group were quickly and firmly brushed off. Thus, the new kidvid rules – which will probably go into effect around the start of 2007 – are as follows:

DTV Core Programming Requirements. The FCC has long required that television stations air at least three hours per week of "core" children's educational programming to qualify for staff-level review of the children's programming portion of their license renewal applications. The FCC's new rules, which were formulated in the FCC's 2004 Children's Television Order, extended the core programming requirements to the main programming stream of digital television broadcasters.

In addition, for DTV broadcasters that offer multicast program streams, the FCC increased the core programming requirement in proportion to the amount of additional free video programming broadcast. The new rules require an additional 30 minutes of core programming for each 1 to 28 hours of video programming provided per week, up to 3 hours per week of core programming for each 24-hour free multicast program stream. Despite objections that this new requirement will inhibit the offering of new specialized services, such as 24 hour weather channels, the FCC retained these new requirements.

The only change recommended in the Joint Proposal and adopted by the FCC was to clarify that at least 50 percent of the core programming counted toward meeting the additional 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. The quarterly children's program report (FCC Form 398) will not collect information about which specific programs are allowable repeats, but will require a certification that the station has complied with the repeat restriction.

The FCC added that licensees will be required to retain records sufficient to document that certification, including records of actual program episodes aired, and to make such documentation available to the public upon request. (At this point it does *not* appear that this documentation must be included in the station's public file, although it clearly must be made available to the public on request.)

Licensees will be required to retain records sufficient to document that certification, including records of actual program episodes aired, and to make such documentation available to the public upon request.

Preemptions. In its 2004 Order, the FCC imposed a 10 percent cap on preemptions of core children's programming. Based on the Joint Proposal's recommendations, however, the FCC eliminated this new cap and returned to a case-by-case approach. Under this approach, the networks may seek informal approval of their preemption plans by submitting them to the Media Bureau by August 1st of each year. The FCC presumed that non-network affiliated stations "do not need broad preemption relief." In general, preempted programs must be rescheduled to a "second home" timeslot and on-air notifications of the schedule change must be made during the previously scheduled episode.

Website Displays. One of the most widely-discussed elements of the new kidvid rules was the new restriction on the display of website addresses during children's programming. Display of a website address would only be permitted during children's programming if it met a four

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part test: (1) the website offers a substantial amount of *bona fide* program-related or other noncommercial content; (2) it is not primarily intended for commercial purposes, including either e-commerce or advertising; (3) its home page and other menu pages are clearly labeled to distinguish the noncommercial from the commercial sections; and (4) the page of the website to which viewers are directed by the televised website address is not used for e-commerce, advertising, or other commercial purposes (*e.g.*, it contains no links labeled "store" and no links to another page with commercial material).

In keeping with the Joint Proposal, the FCC affirmed its new rule but clarified it to provide that (1) the requirements of the rule apply only when Internet addresses are displayed during program material or during promotional material not counted as commercial time, and (2) if an Internet address is displayed during a promotion that does not meet the four-prong test, in addition to counting against the commercial time limits, the promotion will be clearly separated from programming material.

The FCC also provided a few exemptions from the website rule. PSAs that display websites not under the control of the station are exempted from the website rule if they are aired on behalf of either (a) independent non-profit or government organizations or (b) media companies in partnership with non-profits or government entities, . In addition, station identifications and emergency announcements are not subject to the website display rule as long as the display is consistent with the purpose of the announcement.

Host Selling. The 2004 Order completely prohibited the display of website addresses in a children's program when the site uses characters from that program to sell products or services. After considering the Joint Proposal and other comments, the FCC agreed that this absolute prohibition should be replaced with a rule prohibiting the display of a website address during or adjacent to a program if, at that time, on pages that are primarily devoted to free noncommercial content regarding that specific program (or a character appearing in the program): (1) products are sold that feature a character appearing in that program; or (2) a character appearing in that program is used to actively sell products. This new 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.

Under the current rules, licensees certify compliance with children's advertising commercial limits on their license renewal and maintain in their public inspections files records sufficient to substantiate that certification. The FCC reiterated that licensees are now required also to certify that they have complied with the requirements concerning the display of website addresses in children's programming and maintain in their public inspections files records sufficient to substantiate that certification.

Definition of Commercial Matter. In the 2004 Order, the FCC redefined "commercial matter" subject to the children's program restrictions to include all program promotions other than promotions for educational and informational programming. Per the Joint Proposal, however, that redefinition has been redefined to ***ex***clude promotions for ***any*** children's programming on the same channel or educational/informational programming on any other channel.

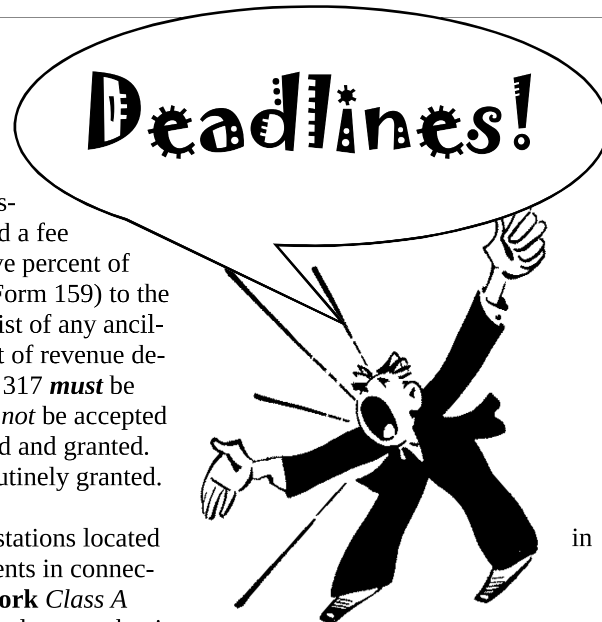
As noted above, these new rules should become effective around the start of 2007. In the meantime, please call your friendly neighborhood communications counsel if you have any questions about compliance with the children's programming rules.

(Continued from page 3)

not have to pay the fine. The FCC pointed out that its rules make AM licensees, and not just the actual tower owners, responsible for assuring adequate fencing around their stations' towers. *Touché!* AM licensees who do not own the towers from which they broadcast nevertheless should be careful to ensure that the towers' fencing complies with FCC regulations.

FM Station Makes a 180-Degree Turn - Among other violations that the FCC found at a Puerto Rico FM station, the station apparently had problems with the "directional" part of its directional antenna. An FCC agent inspected the FM station and found that it was operating at more than five times its authorized power. The station, authorized to operate with 5,000 watts, was actually transmitting at more than 26,000 watt ERP. Even more interestingly, although the station was authorized to point its directional antenna toward 20 degrees true, the antenna had been installed and was facing 202 degrees true. The station got whacked with an $8,000 fine.

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. Note that, as of November 1, Form 317 ***must*** be filed electronically. After October 31, paper submissions will *not* be accepted unless a waiver of the electronic filing requirement is requested and granted. The Commission has advised that such waivers will *not* be routinely granted.

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.

January 10, 2007

Children's Television Programming Reports - For all *commercial television* and *Class A television* stations, the re-

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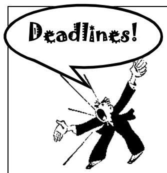

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ports on FCC Form 398 must be filed electronically with the Commission, and a copy must be placed in each station's local public inspection file.

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.

(Continued from page 11)

such as blogs, vlogs, and podcasts.

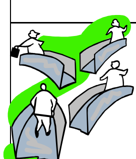
The Democratic Commissioners disputed the contention that there has been a significant shift in how Americans receive their information. Adelstein stated that in the 2004-05 seasons, the 255 highest rated programs were on broadcast television. He also highlighted the massive disparity between satellite radio subscribers (11 million) and those listening to terrestrial radio each week (more than 200 million).

The LA event illustrated the heated debate which will stretch deep into 2007. We may all get a preview of the direction the FCC may take later this year, in the context of one individual station's cross-ownership situation. In LA, the Tribune Co. owns the Los Angeles Times and KTLA(TV), having taken advantage of the relaxed media ownership rules by purchasing Times Mirror, the former owner of the Times. Tribune is hoping that the Commission will eliminate the current ban on a single entity owning a newspaper and TV station in the same market. KTLA's license expires on December 1; if the cross-ownership ban is not eliminated by then, Tribune might be required to divest the newspaper as a condition of getting its license renewed.

Tribune has requested a waiver. The waiver has been met with considerable opposition. As an example of the arguments being advanced by opponents of the waiver, we give you comments by Rev. Jesse Jackson, who attended the LA hearing: "[Tribune] operates out of Chicago and not L.A., and there is something about that that is inherently undemocratic."

While the Commission is under no obligation to act on the waiver request within any particular time frame, it's clear that any action it might take on the request will be viewed as an indication of the FCC's thinking on the broader issue of cross-ownership.

There has been some speculation that public comments in the media ownership proceeding could top the one million mark. The deadline for filing initial comments was extended until October 23, and reply comments are due December 21. The date/location of the next five ownership hearings has not been announced.



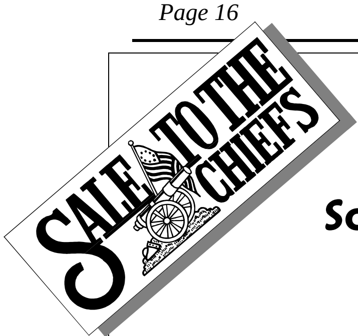
FHH - On the Job, On the Go

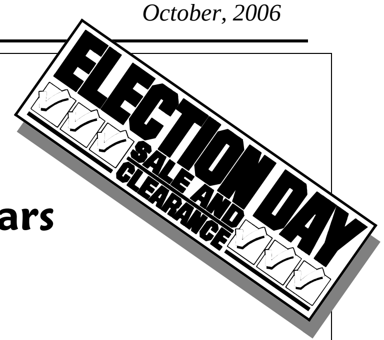
Gene Lawson recently participated in the 21st Annual Mid-Atlantic Institute on Bankruptcy and Reorganization in Charlottesville, Virginia. Topics included protecting claims under the new bankruptcy laws and opportunities for astute buyers to purchase assets free and clear from bankruptcy estates. (If you have questions about such matters, contact Gene at lawson@fhhlaw.com.)

Frank Jazzo helped organize and conduct a program on "Client Creation, Conflicts and Confidentiality in the Administrative Process" for the Federal Communications Bar Association in Washington on October 16.

Frank J. and **Joe Di Scipio** will conduct an FCC Update Panel at the Alaska Broadcasters Association's Annual Convention in Anchorage on November 16.

As previously reported here, **Kevin Goldberg** will travel to Antalya, Turkey as a member of the U.S. delegation to the ITU Plenipotentiary Conference from November 17-24. More importantly, though, **Kevin** is the *Media Darling of the Month*. He appeared on a German television news show, expounding eloquently on First Amendment issues for the better part of 40 seconds. The piece which included his interview was even available for viewing on the Internet.





Political Broadcasting:
Some Reminders As Election Day Nears

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

The Nebraska Broadcasters Association (NBA) sought and received a declaratory ruling from the FCC certifying that two NBA-produced shows are bona-fide news interviews and exempt from the FCC's equal-time requirements. This ruling allows NBA member stations to continue broadcasting these shows without having to give the political opponents of the show's namesakes (the Governor of Nebraska and one of its Senators) equal time on-the-air.

Of course, during the campaign season, when a legally qualified candidate for public office appears on a broadcast station in a way which constitutes a "use" of the station, the licensee must afford equal opportunities to that candidate's competitors. However, appearances on certain types of programs, such as "bona fide news interview programs", are exempt. The standard question, then, is whether any particular show is a "bona fide news interview program".

In the NBA decision the FCC reiterated its longstanding three-prong definition. The Commission will consider whether: (1) the program is regularly scheduled; (2) the broadcaster or independent producer controls the program; and (3) the broadcaster's or independent producer's decisions on format, content, and participants are based on newsworthiness rather than on an intention to advance or harm an individual's candidacy.

The NBA didn't have much problem meeting that test with respect to its two programs (which consist of call-ins to the Governor and a Senator). The NBA passed the first prong by showing that the Governor's show had aired on a monthly basis since 1984 and the Senator's show, on a quarterly basis, since 2005. The second prong was a lay-up as well because the NBA could demonstrate that it wields complete control over the production, format, and direction of the programs and that the candidates do not have any prior knowledge of the subjects discussed or questions asked. Finally, since the intent of the shows is to focus on current newsworthy events and issues in Nebraska, the third prong was met and qualification was a slam dunk.

While many aspects of the political broadcasting rules are by now well-established and easily recognized – like the bona fide news exemption – it is important to recall that there are some relatively recent additions to those rules. As the election season builds up to the Big Day in November, stations should be attuned to those new wrinkles as well as the old familiar ones.

For example, the recent flap over video news releases (VNRs) has focused attention on candidate-provided materials. According to the Commission, if a candidate or a campaign supplies tape or video to a bona fide news program, the station must announce that the material was supplied by the candidate/campaign. But this does ***not*** apply to printed materials like news releases. When the programming in question is plainly *not* bona fide news programming, then the station must adhere to the FCC's and FEC's sponsorship ID rules. This can be a complicated and confusing area of the law and any specific questions or circumstances should be referred to communications counsel.

The sponsorship ID rules require that when a political ad is run there must be a statement that the ad was "paid for" or "sponsored by" the group or person purchasing the ad time. If the advertiser did not include the statement, the station must add this language on its own accord (if necessary, it can do so over the content of the spot – no free time need be provided). For television ads, the statement must be visual and run for four seconds, occupying at least four percent of the screen.

Stations running Federal campaign ads must also meet a variety of additional requirements imposed by the Bipartisan Campaign Reform Act (BCRA, sometimes also known as the McCain-Feingold Act).

BCRA requires that political radio ads include a statement, spoken by the candidate, which identifies the candidate, asserts that he or she approves the broadcast, and that he or she, or his/her campaign committee, paid for the ad. In addition to the radio requirements, television ads must show the candidate making the statement in a full-screen (80% or more), unobstructed view, or as a voice-over while displaying a clearly identifiable image of the candidate.

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If the ad is paid for or sponsored by a third-party, then the ad must clearly indicate whether it was or was not authorized by a candidate. The sponsor identification statement must include both the "paid for" or "sponsored by" language *and* "authorized by" or "not authorized by" a particular candidate or campaign committee. If it is not authorized there must be an additional audio statement that the name of the entity purchasing the ad "is responsible for the content of this advertising." This is in addition to relevant state law, which may require more.

The BCRA also requires that the broadcaster's political file must now contain all requests for time by anyone (including non-candidates) who seeks to communicate a message that refers either to a legally qualified candidate, or to any election to federal office ("election message request"), or to a national legislative issue of public importance ("issue request"). In addition to disposition of the request and details of the order (including rate charged), the station's records must show the name of the candidate to which the advertising refers (if applicable), the office that candidate is seeking, and the election or issue to which the ad refers. It must also show the name of the person purchasing the time, the name, address and phone number of a contact person, and a list of the chief executive officers or governing board. Note that while most of BCRA's provisions refer solely to candidates for federal office, the language in the public file provisions should be read to include all candidates for any federal or non-federal public office.

And there's more. Broadcasters should be aware that electioneering communications limits are now in place. "Electioneering communications" are any paid broadcast, cable or satellite programming that refers to a federal candidate, is aired 60 days prior to a general or 30 days prior to a primary election, and reaches 50,000 or more persons. BCRA prohibits certain entities (*i.e.*, corporations and labor organizations) from making electioneering communications. Any reporting obligations regarding electioneering communications lie with the person or entity making the electioneering communication and ***not*** with the broadcaster or other media outlet airing the communication. However, media outlets may be asked by potential advertisers whether their communications will reach an audience of 50,000 to comply with their reporting requirements.

To assist broadcasters in responding to such queries, the Commission has created an Electioneering Communications Database. It is available on the FCC's website (http://gullfoss2.fcc.gov/ecd/) and enables a user to determine whether a communication sent via broadcast station, cable system and/or satellite system can or cannot reach 50,000 or more people in a particular Congressional District or State. If the database has no information regarding the audience for a particular station, the advertiser may rely on information received directly from the media outlet.

Finally, BCRA also requires that federal candidates or their authorized committees provide a broadcast station with a written certification stating whether or not the programming refers to another candidate for the same office in order to receive the benefit of a station's lowest unit charge (LUC). This certification must be provided to the broadcast station at the time the programming is purchased.

If the programming does refer to an opposing candidate, the certificate for a radio spot must state that the programming will include a message, in the candidate's voice, identifying both the candidate by name and the office being sought, and expressly stating that the candidate approved of the broadcast.

For a television spot that refers to an opposing candidate, the certificate must state that the programming will include a clearly identifiable photographic or similar image of the sponsoring candidate simultaneously displayed with a legible printed statement which identifies the candidate and states that (a) the candidate approved the broadcast and (b) the candidate or the candidate's authorized committee paid for the broadcast. This image must appear in an unobscured full-screen view for at least four seconds at the end of the political spot.

This provision, while originally intended to reduce "attack" ads, broadly applies to any mention of an opposing candidate, regardless of the context. Since it is the obligation of the candidate (or committee) to provide the certification, broadcasters may breathe a little easier with respect to this particular provision. But heads up: a candidate who fails to provide this certification forfeits all rights to the LUC for all programming aired during the remainder of the political window. That provision opens the possibility that a broadcaster could get caught between feuding candidates, with one asserting that the other is not entitled to LUC treatment.

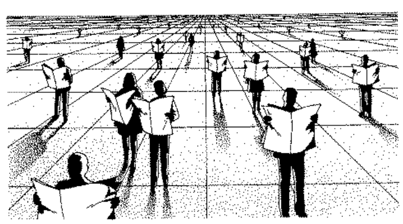
The bottom line here is that the political broadcasting area remains a potential minefield which must be navigated carefully.

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

Updates on the News

FM freeze sets in – To paraphrase B.B. King, the chill is on, or it soon will be. In anticipation of the upcoming Auction 68 in January, the Commission has announced that it will not accept any FM minor change applications – commercial or noncommercial – during the Auction 68 filing window. That window extends from November 6 to November 13. The Commission is also freezing out any rulemaking counterproposal looking to change the channel, class and/or reference coordinates of any of the nine channels up for bids in Auction 68. The rulemaking freeze started as of October 6. After the close of the auction window (*i.e.*, November 13), the staff will not accept any counterproposals which would involve a change in, or which do not fully protect, preferred site coordinates specified in the various Auction 68 applications which the FCC expects will be filed.

LPTV/TV translator settlement period opens – You may recall that, back in April, the FCC invited LPTV and TV translator stations to submit proposals for digital companion channels. Many folks took advantage of that opportunity. And not surprisingly, many of the channel proposals were mutually exclusive with one another. In an effort to let the proponents themselves try to work out their differences, the Commission has announced that, from now until December 15, 2006, parties may enter into settlement agreements or otherwise resolve their mutual exclusivities (say, by some engineering fix). The settlement window does ***not*** contemplate approval of any settlements which would involve any payment exceeding the payee's legitimate and prudent expenses.



Let's get digital! – Now would be a good time to make a note in your calendar that, effective ***December 31, 2006*** – this coming New Year's Eve – the FCC's rules will require all DTV and digital radio stations to participate in all national EAS activations. The requirement does not necessarily extend to state and local activations ***but*** if a station does broadcast state/local EAS alerts digitally, it's got to broadcast them on ***all*** its various digital channels.

Inflation strikes – As we reported last month, the FCC has issued a new schedule of application fees. You can check out the complete listing of new fees at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267890A3.pdf. Those fees went into effect as of October 17.

Form 317 goes exclusively on-line – Annually, all DTV licensees are required to file Form 317 (real name: "Annual DTV Ancillary/Supplementary Services Report for Digital Television Stations") to advise the Commission as to whether the station provided any ancillary or supplementary services at any time during the 12-month period preceding September 30. Starting this year (actually, starting as of November 1), this form ***must*** be filed electronically through the FCC's CDBS electronic filing system.

Get Sirius! – Well, Sirius or XM, it's apparently all the same. Those rascally folks in the satellite radio biz apparently have something of a problem with earth-bound realities. First, as we and others have reported in recent months, the non-terrestrials were found to have been marketing consumer gear that resulted in excessive FM signals (mainly on certain non-commercial FM channels) which allowed those transmitting units to override legitimate stations operating on those channels. The result has been an on-going rash of complaints from listeners whose contented enjoyment of local NCE programming (think, maybe, classical music, or religion) is suddenly interrupted by some satellite-borne material – the most jarring example of which has tended to be Sirius's Howard Stern Show.

While the Commission has, at long last, apparently been trying to get a handle on that problem, lo and behold, up pops another problem. It turns out that both XM and Sirius have now acknowledged that they have been operating significant numbers of terrestrial repeater stations with the wrong power and/or at the wrong site or height, and maybe even on the wrong channel. It's unclear how long these non-conforming facilities have been in operation, but one published report suggests that, at least in some cases, it may have been years. Not to put too fine a point on this, but broadcasters have historically been expected to exercise caution to assure that the facilities they build are in fact the facilities that they have been authorized to build. It is a mystery why the FCC could or should expect anything different from other spectrum users, including XM and Sirius. We should all stay tuned to see what penalty (if any) the FCC metes out in response to the XM and Sirius confessions.

Indecency update – Apparently unwilling to take points off the board, the Commission denied two petitions for reconsideration which asked that the FCC's 2004 indecency settlements with Viacom and Emmis be reversed. This doesn't change the, er, lay of the indecency land at all, but it does keep the $3.8 million settlement payments securely in the government's coffers.

A word to the wise from Joe Di Scipio

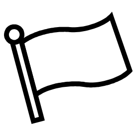
Putting the BS in "Bureaucratic Shuffling"

The FCC proudly announced the creation of a new bureau late last month – the Public Safety and Homeland Security Bureau (PSHSB). The FCC created the new PSHSB in response to "the events of September 11, 2001" and the 2005 hurricane season. The FCC is nothing if not timely. According to the FCC, the new bureau will "build-on the Commission's longstanding commitment to meet the needs of public safety by promoting robust, reliable and resilient communications services in times of emergency."

The PSHSB will have three divisions. The Policy Division is responsible for developing and drafting rules for 911, Public Safety Answering Points and operability/interoperability issues. The Policy Division will also oversee the licensing of spectrum for police and fire departments and other public safety entities. The Public Communications Outreach & Operations Division (that is the PCOOD of the PSHSB, for those keeping score) is responsible for coordinating the Commission's emergency response procedures and operations. PCOOD will serve as the lead point of contact for all inter-governmental coordination activities with other Federal agencies. PCOOD will operate the Commission's Communication Center (COMM-CTR) and its High Frequency Direction Finding Capability (HFDFC) facilities. In other words, the PCOOD of the PSHSB will operate the COMM-CTR and the HFDFC. Finally, the Commutations Systems Analysis Division (CSAD) will collect information and perform studies on public safety, homeland security, emergency and disaster management and preparedness and national security. And no, we do not know what FEMA does or why the FCC needs to do this.

It is more than a little surprising that the Commission did not also include at least a separate office, if not a fully-staffed division, to oversee and coordinate the use of acronyms, since the scarcity of combinations of the letters of the alphabet suggests that such regulation may prove necessary.

While Chairman Martin has said that public safety is one of his and the Commission's top priorities, the PSHSB is without a permanent Bureau Chief. It is not clear how the PSHSB will work with the other bureaus and what impact it will have on licensees' day-to-day activities. Look to these pages for further updates as we figure out what the PSHSB does, and whether it will impact you – the regulated entity.



(Continued from page 1)

having the devices professionally installed, equipped with GPS, and guided by a database of existing television stations; and/or (3) establishing a control signal program in which existing FM, TV and CMRS providers would continuously broadcast a signal providing a list of channels available to devices, and limiting the device to operate only on one of those channels. The Commission recognizes that there is only one other "sensing" system currently authorized for use in the 5 GHz band, but that there are substantial differences between that already-authorized use and the use which is contemplated in the current proceeding. Therefore, the FCC is asking for testing to show that a "sensing" system could work in the TV band.

The Commission is also seeking comment on the best system for making these systems work, and which system the Commission should adopt. For example, the FCC is seeking comment on the appropriate threshold for "sensing" devices, and whether to protect TV channels that are adjacent to the spectrum to be used for the unlicensed devices. Also, the FCC is considering whether these unlicensed devices will be required to use transmit power controls that will limit the transmit power to the minimum necessary.

The Commission is also considering excluding the devices from operating on TV Channels 2-4. And with respect to possible standards and limits for out-of-band emission levels, the Commission has asked whether it would be appropriate to use the same standards currently applied to other unlicensed devices.

Importantly, the Commission is also asking the public to substantiate their claims with data and test results. While the FCC will be conducting tests to determine if any or all of the methods for avoiding harmful interference will work, it is also seeking studies from the public.

The FNPRM includes numerous and extensive discussions of specific technical proposals. We invite any interested parties to contact us to discuss any or all of the FNPRM in more detail. Comments are due 75 days from the release of the Order/FNPRM in the Federal Register, which has not yet occurred. As always, we will keep you updated with respect to further developments.

FM ALLOTMENTS ADOPTED –9/22/06-10/19/06

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
KS	Kinsley	132 miles W of Wichita, KS	288C3	06-65	TBA
OR	Powers	143 miles S of Eugene, OR	293C2	05-14	TBA
TX	Zapata	206 miles S of San Antonio, TX	292A	05-15	TBA
MD	Fruitland	3 miles S of Salisbury, MD	299A	04-409	None
VA	Lakeside	4 miles N of Richmond, VA	265B1	04-409	None
VA	Warsaw	53 miles NE of Richmond, VA	298A	04-409	None
MO	Boonville	58 miles NW of Jefferson City, MO	226C3	06-88	None
MO	Wheatland	60 miles N of Springfield, MO	272A	06-88	None
IN	Edinburgh	33 miles S of Indianapolis, IN	262A	06-77	None
IN	Hope	45 miles SE of Indianapolis, IN	275A	06-77	None
KY	Greensburg	89 miles S of Frankfort, KY	289A	06-77	None
KY	Hodgenville	98 miles S of Louisville, KY	297A	06-77	None
KY	Horse Cave	81 miles S of Louisville, KY	293A	06-77	None
KY	Lewisport	87 miles W of Louisville, KY	274A	06-77	None
KY	Lebanon Junction	33 miles S of Louisville, KY	257A	06-77	None
KY	Lyndon	46 miles W of Frankfort, KY	276C2	06-77	None
KY	St. Matthews	7 miles E of Louisville, KY	295B	06-77	None
TN	Belle Meade	9 miles SW of Nashville, TN	246C2	06-77	None
TN	Goodlettsville	14 miles N of Nashville, TN	221A	06-77	None
TN	Hendersonville	17 miles NE of Nashville, TN	259C0	06-77	None
TN	Millersville	17 miles N of Nashville, TN	294C3	06-77	None

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.