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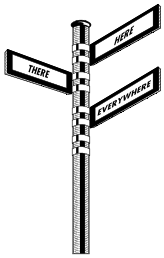
Memorandum to Clients

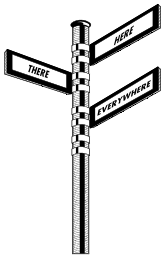
November, 2006 *News and Analysis of Recent Events in the Field of Communications* No. 06-11



Smooth moves?

AM/FM Allotment Processes Revised

Community of license changes simplified



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This month the Commission adopted rules to change the way in which the community of license of existing AM and FM stations can be amended. Rather than require a two-step process for FM stations, and the possibility of an auction for AM stations, the Commission will permit such changes to occur through a minor modification application.

The FCC announced its decision in a public notice which summarized the high points of its actions. However, the full text of the decision, containing the nitty-gritty details governing exactly how the new system will work, has not been released. From the public notice, however, we can discern at least the following elements.

The FCC has decided to permit AM and FM licensees and permittees to change their community of license by filing a minor modification application.

On the FM side, for nearly half a century the distribution of FM channels throughout the country has been codified in the FM Table of Allotments, which is actually a separate section of the FCC's rules (for the *cognoscenti*, that would be 47 C.F.R. §73.202 – you can look it up). That has meant that, in order to modify an allotment to, say, specify a different community of license, you had to undertake a formal rule making proceeding, pursuant to the Administrative Procedure Act (APA). Such a proceeding is by nature a long and usually tedious affair, commenced with the filing of a petition for rule making, followed by issuance of a notice of proposed rule making inviting comments and reply comments and, possibly, counterproposals, and then a long period while the FM allotment brain trust at the FCC mulls it all over before issuing a decision.

Since there is no corollary AM Table of Allotments, any change to an AM station's community of license must be submitted as a "major modification application" during one of the AM Auction windows which are opened periodically.

A central disincentive in both the FM and AM approaches has been that each involves the possibility of some competition or counterproposals. That is, even if you have devised an excellent way of moving your own station around to another community, usually in order to effectuate that plan you had to submit your idea and then wait with fingers crossed to see whether anyone else chose to file a mutually exclusive proposal. While the filing of such an MX proposal would not necessarily be the kiss of death, it would certainly be the kiss of mucho delay and considerably greater expense.

To help put an end to these time-consuming proceedings – and to encourage licensees to advance plans to (at least theoretically) increase the efficient use of the spectrum – the Commission has decided to permit AM and FM licensees and permittees to change their community of license by filing a minor modification application. Such applications will

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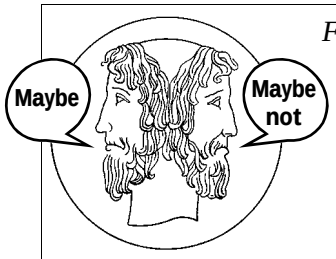
The Scoop Inside



FEC to broadcasters: Beats us!!!

FEC Fails To Reach Decision On BCRA Question

Second election cycle in a row passes without agency determination

By: Patrick A. Murck
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Ask the Federal Election Commission (FEC) a simple question, get a simple non-answer. The FEC was recently given another opportunity to clue broadcasters into whether they can provide "lowest unit charge" (LUC) rates to candidates who fail to comply with the "stand by your ad" requirements imposed by the Bipartisan Campaign Reform Act (BCRA, also known as McCain/Feingold Act). In a sense, that question can be restated to ask whether broadcasters are going to be enlisted as enforcement agents for campaign finance laws, policing every candidate's disclosure statements.

This question had been asked before, by the Missouri Broadcasters Association in 2004. Then the FEC declined to provide a definitive ruling. This time around it was the Bob Casey for Pennsylvania Committee that went looking for an answer – again, unsuccessfully.

The question here arises from the interplay of two laws. The first is the classic LUC requirement of the Communications Act. That, of course, requires that broadcasters offer their "lowest unit rate" to legally qualified political candidates during certain time periods immediately preceding primaries and general elections.

The second is the BCRA. Among its various complex provisions is the "stand by your ad" rule. That rule says that if a federal candidate's ad makes a direct reference to the candidate's opponent, then the ad must include certain language specifically identifying the advertising candidate and specifically stating that that candidate approved the ad. No problem so far. But the BCRA further provides that, if a candidate's ad fails to include the necessary acknowledgement, then that candidate "shall not be entitled to receive" the LUC.

That last twist is where broadcasters get caught between the two laws.

Sure, the candidate whose ad fails to meet BCRA requirements may not be "entitled" to receive the LUC, but what if the broadcaster *chooses* to give that candidate the LUC anyway? Would such an approach constitute, in effect, a campaign contribution by the broadcaster to the advertising candidate – a contribution worth the difference between the LUC and what the broadcaster could otherwise have charged the candidate for the time?

In 2004, when the Missouri Broadcasters raised the question, only two FEC commissioners (out of a possible total of six) were willing to take a position. Since the FEC requires at least four votes before it can take an action, the result in 2004 was that the FEC was unable to issue a decision.

In October, 2006, in response to the Casey request, some progress was made, but not enough. This time, three commissioners were in agreement that a broadcaster offering LUC to a political advertiser who had failed to comply with the "stand by your ad" rule would ***not*** be deemed to have made a campaign contribution.

So the good news is that a consensus of sorts may be forming among the FEC commissioners on this issue; the bad news is that we will likely have to wait until the next election cycle to see which opinion will win majority support.

The split in the FEC centers on the definition of "ordinary course of business". The FEC has previously held that a business may offer candidates discount prices if such discounts are offered in the "ordinary course of business". But what exactly does that

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Focus on FCC Fines

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Leeches stick to AM - The occasional round-up of tower violations usually appears at the end of this column; however, this month the circumstances of a Puerto Rico AM crawled to the top of notable fines and forfeitures. The station faces a $15,000 fine for operating with a daytime pattern at nighttime, for failing to maintain its public inspection file and for failing to have an effective locked fence.

The station was inspected by an FCC agent who noted a sizable hole in the perimeter fence of the AM array. The station declared that it cannot maintain its fence because of vandals. But then it went on to explain that it really doesn't need a fence because the tower is bordered on one side by a swamp filled with leeches and crocodiles which serve as an effective locked fence. The Commission wasn't convinced, though – it pointed out that the crocodiles and leeches were apparently not all that effective a barrier since the station admitted that vandals got through to vandalize the tower.

The FCC declined to accept the "fence au naturel" explanation, citing a previous decision in which the Commission had declared that natural barriers cannot be a substitute for an effective locked fence. As repeated many times in this column, stations should ensure that their fences are in good repair and are locked. FCC agents effectively can assess the physical aspects of a tower or a fence – how secure they are, how visible they are, how adequately lit they are – even before entering the station's offices to meet with station staff.

Ex-licensee less than half as bad as a pirate. The standard FCC fine for pirates who operate transmitters without an FCC license is $10,000. In fact, this month several pirates were nabbed in Iowa, New York and Washington State. Among this month's crew, however, one "pirate" was able to snag a reduced sentence – because he really didn't fit the definition of a pirate.

Normally, a person who transmits on a broadcast frequency without an FCC license is labeled a "pirate". But the FCC recognized that that label doesn't necessarily apply in every case. Take the Texas FM station situation that cropped up this month. The station had failed to file for renewal of its license in 2005. As a result, the station's license had expired, and the station was without any FCC authorization. And yet it continued to operate, presumably (if surprisingly) unaware of its unauthorized status. Any conceivable claim of justifiable ignorance went away in 2006 when the FCC visited the station, explained that the license had expired, and ordered the station to stop transmitting. The FCC then turned its sights on renewing the FM license – which it did. The FCC also proposed a fine for the station. However, providing insight into what little regard the FCC has for pirates, the FCC noted that the base fine for unauthorized operation is $10,000, but since the station had previously been licensed, it was not really a "pirate", so the fine could be dropped to $4,000.

CBS and ABC fined for technical violations. Large radio and television station operators are subject to the same technical rules as small and mid-sized stations. On occasion, the FCC reminds the large operators of this – and likely sets off a firestorm of intra-corporate memos to remind all employees that broadcast rules apply to everyone.

As part of the emergency alert system, broadcasters must monitor *two* EAS sources. An FCC inspection of CBS radio's flagship station in Manhattan seems to have turned up the surprising circumstance that the station was apparently monitoring only one EAS source. At this point the jury is still out on the facts: CBS has responded to the FCC's initial inquiry, but the FCC has not yet announced its view of CBS's response. Still, it's a safe bet that every CBS station in the New York area has since reviewed its EAS monitoring sources, and every station nationwide should do the same.

Elsewhere on the network front, ABC owns and operates a TV station in Philadelphia, whose assets include the station's 1300-foot tower. At that height, the tower has four levels of obstruction lighting. However, the monitoring system installed to register failures of the lighting was designed to kick in only when all four levels of lights failed. In other words, the monitoring system did not sound any alarms *unless all four levels failed at the same time*. This system is a problem when fewer than all the levels fail, since such failure still constitutes a violation of the station's tower-lighting obligation. And wouldn't you know it, when the top level failed recently – and the monitoring system didn't notify the licensee, so the top level stayed dark for a while – who do you think happened to notice? Sure enough, it was an FCC inspector. ABC has 20 days to explain to the FCC why it should not be fined.

With a little luck, maybe a flush?

Odds Worsen For Online Gambling

Could your license be on the line?

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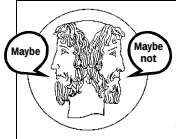
As we have previously reported, several states, as well as the federal government, have been cracking down on online gambling. In a significant new move against online gambling, last month the President signed the "Unlawful Internet Gambling Enforcement Act of 2006", which made it illegal for U.S. banks and credit card companies to make payments to online gambling sites.

Although this legislation stopped short of declaring online gaming itself illegal, the Justice Department has long taken the position that with very few exceptions, all online gambling operations are in violation of federal law. Citing the federal Wire Wager Act and other federal statutes, the Justice Department back in 2003 warned the National Association of Broadcasters that broadcasters who accept and run advertisements for online gambling may be prosecuted for aiding and abetting an illegal activity. Indeed, the following year the U.S. Attorney's office for the Eastern District of Missouri announced a settlement agreement with three Missouri radio stations that agreed to pay $158,000 to settle allegations that the stations "promoted, aided and abetted illegal offshore and online gambling activities." In addition, the FCC's staff has informally advised broadcasters that online gambling violates federal law.

Whether or not all online gambling is illegal – and that remains an open question in many minds – the DOJ thinks it's illegal.

Given recent developments in this area (including the arrest of the CEO of a UK-based online gaming site), stations should think long and hard before accepting any advertising for online gambling sites. Even sites that are promoted as being "for fun" or as not requiring any money to play should be viewed with suspicion because such sites often serve as gateways for "pay" gaming sites.

The core underlying problem here is that, whether or not all online gambling is illegal – and that remains an open question in many minds – the DOJ thinks it's illegal, and the DOJ is in a position to make life pretty miserable for you if you do things which it thinks are illegal. And if you don't believe us, ask the Missouri licensees who forked over $158,000 to get rid of the DOJ's allegations. Is the risk of getting on the wrong side of the Feds really outweighed by whatever income you might make off of a flight of ads? In our view, any requests for advertising time for such sites should be thoroughly vetted with communications counsel.



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mean?

In the view of three of the commissioners, the fact that the LUC is statutorily required and, thus, routinely made available to political advertisers easily establishes it as a discount offered in the "ordinary course of business". In their view, the LUC *can* be offered to candidates who fail to meet the BCRA standards *so long as* the LUC rate is offered to all *candidates*.

The other three Commissioners feel that the LUC rate can be offered in these circumstances so long as it is offered to all candidates *and non-candidates* who are purchasing air time. That is, in their view the mere fact that LUC may be routinely available to political advertisers is not enough to establish an "ordinary course of business". After all, they reason, the BCRA obviously recognizes the existence of LUC, but by its own terms seems to foreclose LUC treatment to advertisers who don't include the required disclaimer. So unless the LUC is routinely available to *all* advertisers – political and non-political – it can't be said to be the "ordinary course of business".

This is a fine subject for hours and hours of intellectual debate. The trouble is that broadcasters are caught in the middle, and could find themselves in violation of the campaign financing laws, depending on how the issue is finally resolved. In view of that potential risk, any resolution of the question is desirable, since a resolution – one way or the other – will at least give broadcasters the guidance they need to assure that they comply with the law.

Thus, regardless of what one may think of either of the possible FEC interpretations, the only thing worse than either proposal is the FEC's failure to pick one. For the time being broadcasters are left in the awkward position of having to make their own determinations of what their LUC policy should be.

Verify first, certify after

FCC Puts Price Tag On Failure To Comply With Historical/Environmental Rules

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Over the last couple of years we have repeatedly reported on the FCC's program for assuring that communications towers do not obstruct or unduly compromise historic or environmentally- or culturally-significant sites. That program led to the development of a "National Programmatic Agreement" (NPA) involving the FCC and various historical and native American groups nationwide. Under the NPA, proponents of new tower construction (and, in some cases, modification of an existing structure) have to perform an elaborate analysis of their proposal. Unless the proposed site fits into one of a few *very* narrow exemptions, the proponent generally has to hire a consultant who in turn performs a study of the proposal's potential impact on nearby historical/environmental/cultural features, and notifies potentially affected organizations. The notified organizations then have the opportunity to respond.

In the end, what needs to filed with the FCC tends to be very little – normally only a certification in its application that it has done the necessary analysis. Providing such a certification means, of course, that the proponent has *already* jumped through all the NPA hoops *before* it can certify compliance.

One lingering question has been what happens if a proponent certifies that it has done its NPA homework when, in point of fact, that's not true. We found out recently, when the Commission fined a couple of non-broadcast licensees who did the requisite historic preservation and related environmental assessment of a construction site – but, oops, did it only *after* their build-outs had been completed. In each instance there was *no* historic preservation or environmental problem created by the constructed facilities. The problem was that the facilities got built first – and the required NPA analysis was completed only later.

That timing problem cost the wrong-doers $5,600 and $11,000. And again, the construction in each case ended up having *zero* adverse effect on any historic/cultural/religious/environmental sites.

The message could not be clearer: ***do not certify that your proposal does not raise any environmental, etc., questions unless and until you have completed the NPA-mandated analysis and notification process***. It's also good to remember that this basic commandment *may* also apply even when you plan to utilize an existing tower structure. It is important to consider carefully possible NPA obligations regardless of where you propose to put your antenna.

Note that this does ***not*** mean that you have to complete all the NPA analysis and notifications before filing your application. You can upload and submit a 301 application before those chores have been completed ***as long as*** you make clear in the application that you are ***not*** certifying that your proposal has passed environmental, etc., muster. The form includes a certification question on that point, and when you get to it, you simply answer "no", and include an explanatory exhibit describing the steps you have taken or that you plan to take to satisfy the NPA requirements. Then, when those requirements have been satisfactorily completed, you amend your application accordingly. Until that amendment is filed (*i.e.*, until you have certified environmental, etc., compliance), the staff will not grant your application.

> *The Commission has stated explicitly that it is going to levy big fines to "ensure that forfeiture liability is a deterrent and not simply the cost of doing business."*

In its recent actions, the Commission warned that it would impose tough fines for NPA-related violations, including violations which ultimately proved harmless. In one of those actions (against mobile phone provider T-Mobile), the Commission stated explicitly that it was going to levy big fines to "ensure that forfeiture liability is a deterrent and not simply the cost of doing business."

Meanwhile, the FCC is making it easier for both applicants and those reviewing proposed sites to act. The automated system that notifies tribal, Alaskan native village and native Hawaiian review authorities has been streamlined. These authorities can opt into a new electronic notification system that will allow them quicker access to electronic, rather than paper, documents and give them more efficient electronic means to reply. In some cases, snail mail will still be the notification means of choice – but the options are now increased to facilitate speedier action.

Complying with the historic preservation rules can be daunting and frustratingly slow. FHH is therefore establishing relationships with qualified experts to assist us

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Incredible but true!

Remand Decision Muddies Already Murky Indecency/Profanity Policy

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You definitely cannot say "fuck" or "shit" on television. Unless you do it during a news program or it's really important or no one in your market complains, in which case, maybe you can. Except when you can't.

In a nutshell, that's the latest word from the FCC on indecency and profanity. In early November, the FCC released its highly anticipated "remand" decision on four indecency cases that were originally decided by the FCC in March, and then were appealed to the Second Circuit Court of Appeals, and then were returned to the FCC for further consideration. (As you may recall from the September *Memo to Clients*, the U.S. Court of Appeals for the Second Circuit, which is hearing the appeal of the FCC's March order, remanded the case back to the Commission for no more than 60 days in order to allow the Commission to re-address certain limited aspects of its earlier decision.)

While few expected the FCC to provide real guidance on what will or will not be considered indecent or profane, the FCC somehow managed to make the status of indecency and profanity even more confusing.

In a decidedly mixed opinion, the FCC changed its mind with respect to two of the four situations it had before it during the remand. It dismissed those two cases – in one, because the allegedly indecent material appeared during a "news" program, and in the other, because none of the complaints against the program in question were filed by anyone from the market in question. At the same time, the FCC upheld its prior findings in the two other cases, affirming the idea that even isolated or fleeting utterances of certain words may be punished. While few expected the FCC's most recent decision to provide real guidance on what will or will not be considered indecent or profane, the FCC somehow managed to make the regulatory status of indecency and profanity even more confusing.

As our long-time readers know, the 2004 "Golden Globe" decision reversed the FCC's long-standing policy that an isolated or fleeting expletive would not be considered actionably indecent. In that case, rock star/social superhero Bono asserted that his band's Golden Globe Award was "fucking brilliant". In two of the cases at issue in the recent remand, singer/actress/infomercial huckstress Cher made a single use of the word "fuck" at the 2002 Billboard Music Awards, while "Simple Life" star Nicole Richie opined at the 2003 Billboard Music Awards that it was "not so fucking simple" to "get cow shit out of a Prada purse." In the remand decision, the FCC affirmed that even a single utterance of these very bad words would be enough to trigger an indecency penalty. These words, the FCC determined, are inherently sexual or excretory in meaning and are patently offensive in almost any context, even if used only once.

Several commenters argued that prosecuting isolated use of particular words threatens all "live" broadcasting. The FCC, however, quickly dismissed such arguments, noting that: (1) these cases did not involve breaking news or sports programming; (2) the shows were only "live" on the east coast (mountain and pacific time viewers saw the shows on a delay), and (3) the shows weren't really "live" because of the natural delays inherent in electronic communications (*e.g.*, transmission via satellite causes a delay of up to three seconds). Thus, the FCC reasoned, imposing an additional five, ten, or twenty second delay to permit "live" editing would not burden the viewers or the broadcasters in any significant way.

In the two Billboard Music Award cases, the FCC also affirmed its new "profanity" analysis, which is distinct from its traditional indecency analysis. In the Golden Globe case, the FCC concluded that "fuck" and its variants were not merely inherently sexual and offensive (*i.e.*, indecent), but "so grossly offensive to members of the public who actually hear it as to amount to a nuisance" (*i.e.*, profane).

In the Billboard Music Award cases, the FCC extended this profanity analysis to the word "shit," and found that "fuck" and "shit" were not merely profane but "presumptively profane". That is, these words *always* will be considered profane and subject to punishment unless they are "demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance." Although the FCC provided no guidance on when the word "fuck"

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might be essential for informing viewers on a matter of public importance, they decided that the Cher and Nicole Richie statements definitely did not qualify.

These holdings, however irksome to broadcasters, were more or less in line with the FCC's prior decisions. In addressing its prior decision concerning the CBS "Early Show", however, the FCC opened a whole new area for confusion by simultaneously (a) insisting that there is no "news exemption" to the indecency rules, while (b) applying this non-existent exemption to excuse the use of the word "bullshitter" by a former "Survivor" contestant appearing on the "Early Show". Although the Commission flatly held that "there is no outright news exemption" from the indecency rules, the FCC also stated that it is committed to "caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment's free press guarantee."

> *"It is unreasonable to say that the latest contestant to be voted off the island or the latest contestant to hear 'you're fired' ...is 'serious public affairs programming.'"*
> *Comm. Adelstein*

Certain critics, Commissioner Adelstein among them, point out that the case at hand illustrates the difficulty in sorting out news from entertainment programming. Although the "Early Show", like the "Today Show" and other morning news programs, certainly covers "hard" news items, the segment in question was a cross-promotion for "Survivor", a primetime entertainment program. As Commissioner Adelstein stated in his dissent from the decision, "[i]t is unreasonable to say that the latest contestant to be voted off the island or the latest contestant to hear 'you're fired' or even 'come on down' is 'serious public affairs programming.'" Nevertheless, the FCC argued that it was appropriate under the circumstances to defer to CBS's "plausible characterization of its own programming" as bona fide news programming. And, because the "bad" word ("bullshitter") was used in the context of an interview which CBS characterized as a "*bona fide* news interview", the FCC concluded that that broadcast of that word was not indecent or profane under the FCC's rules and denied the complaint.

Finally, the FCC dismissed complaints regarding several "NYPD Blue" episodes aired on Kansas City, Missouri, ABC station KMBC-TV. The complaints about this show were filed by a single individual who stated that the show "originally aired at 9:00 p.m. CST on Kansas City affiliate KMBC" and was "also seen in homes across the country on ABC affiliates." The individual filing the complaints, however, was located in Alexandria, Virginia, where the complained-of shows aired at 10:00 p.m. (*i.e.*, during the "safe harbor" period). In the Omnibus Order that originally decided these cases, the FCC established a policy that it would penalize only stations whose broadcasts were the subject of a viewer complaint filed with the FCC. Because the material was aired during the safe harbor in Alexandria, Virginia, the individual filing the complaint could not claim that his local station (*i.e.*, presumably the ABC affiliate in the Washington, D.C. market) had violated the rules. Moreover, he did not claim that he actually viewed the complained-of material on KMBC-TV or any other station outside of the safe harbor. As those complaints were not from a viewer of KMBC-TV and no actual viewers of KMBC-TV or any other ABC affiliate filed a complaint, the FCC dismissed the complaints.

Under the terms of the Second Circuit's remand order, the two Billboard Music Award cases now automatically return to the Second Circuit, where the appeal will continue on an expedited basis. Although these cases were returned to the FCC at the FCC's request, it is unclear that the FCC's decisions will improve its case before the Second Circuit. Indeed, by introducing a different standard for news programming and applying its new enforcement policy to dismiss out-of-market complaints, the FCC may have done little more than emphasize the wildly inconsistent nature of its indecency and profanity regulations.

The news programming exemption (or non-exemption, depending on what part of the FCC's decision you read) may be particularly troublesome. While the Commission (inspired, one hopes, by the First Amendment) has historically tried to refrain from involving itself in news judgments of licensees, it is difficult to see how it expects to continue to do so: to the extent that the "decent" or "indecent" nature of a word may depend on whether a program is news or not news, the FCC will perforce have to decide, first, whether a program is or is not news. That presents a slippery slope, indeed.

Moreover, to the limited extent that the Commission *has* engaged in such analysis, the hands-off approach it has taken is likely to create headaches on the indecency/profanity front. During election season, an appearance by a candidate does not subject a station to equal opportunity obligations if the appearance occurs during a *bona fide* news interview program. As a general matter, the Commission has tended to apply a very broad definition to that term for that purpose. For example, the "Howard Stern Show" has been deemed news interview programs

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50,000,000 birds can't be wrong, can they?

Bird Crash Backlash?

NPRM suggests revised tower regs to save the birds

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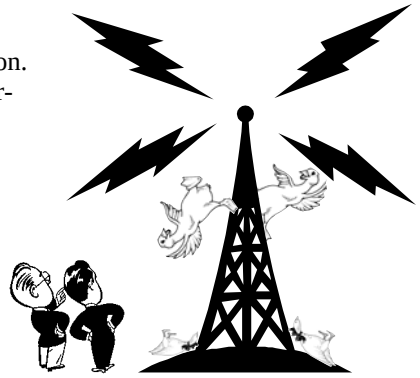
After years of pressure from environmental and wildlife groups – and, at their behest, the courts – the FCC has adopted a Notice of Proposed Rulemaking (NPRM) looking at possible measures to reduce the number of migratory bird deaths resulting from communication tower collisions. The Department of the Interior's United States Fish and Wildlife Services (FWS) estimates that at least 4-5 million – and possibly as many as 50 million – birds die in the United States *each year* as a result of tower collisions.



This is not a new item for the Commission. More than three years ago, after considerable pressure from various quarters, the Commission issued a *Notice of Inquiry* (NOI) designed to develop some factual record about the cause of migratory bird deaths. The NOI sought information on various factors such as lighting, tower height, antenna structure, weather, location, and migration paths. In addition to numerous comments and *ex parte* submissions, the Commission hired an environmental consulting firm, Avatar Environmental LLC, to evaluate existing research.

Industry comments and Avatar's findings led to a series of tentative conclusions which are included in the NPRM. The FCC has now requested additional comments in several areas, including its legal authority to adopt regulations concerning the collisions, and the role of tower lighting and other factors (including tower height, location, the use of guy wires, and the collocation of new antennas on existing towers) in the collisions.

On the issue of legal authority, the Commission was still a bit tentative, concluding only that the National Environmental Policy Act (NEPA) "may provide a basis for the Commission" to take action to protect the migratory birds if there is evidence that communications towers are adversely affecting the birds. Commissioner Adelstein disagreed with the tentative nature of this conclusion. In his view, the NEPA gives the FCC explicit authority to regulate communications towers in the protection of migratory birds. Additionally, Section 303(q) of the Communications Act grants the FCC the authority to require painting and/or lighting of antenna structures which may constitute a hazard to air navigation.

Responding to evidence from the Federal Aviation Administration and other parties that lighting is a primary factor in many bird deaths, the Commission tentatively concluded that white strobe lights should be the preferred lighting system for modified and new communications towers. Evidence indicates that white strobe lights create better visibility for birds than red obstruction lighting systems. Particularly in poor weather, and when birds are flying at a low altitude, lights that do not blink often confuse birds into flying in circles, leading to exhaustion and collisions with towers. The use of strobe lights may enable birds to stay on course.

Accordingly, the Commission tentatively concluded that red obstruction lighting should be replaced by medium intensity white strobe lights "for nighttime conspicuity, to the maximum extent possible without compromising safety."

The FCC is seeking information on additional tower factors (such as tower height, location, the use of guy wires, and the collocation of new antennas on existing towers), particularly in light of its tentative conclusion regarding white strobe lights. The use of white strobe lights might eliminate the need for additional remedies proposed by environmental groups to curb the number of deaths.

While protection of wildlife – and especially endangered species – is clearly a desirable goal, it does appear that the precise nature and extent of the threat here is a bit fuzzy. While Commissioner Copps, in his separate statement, cited the FWS estimates of "as many as 50 million" tower-induced bird deaths *each year* in the U.S., the FWS itself acknowledges that its figures are only "educated guesses" and that mortality figures are "difficult to determine" (http://www.fws.gov/birds/mortality-fact-sheet.pdf). And when you think about it, the notion that *50 million* birds die from flying into towers *every year* seems a bit extreme. That would translate to a *daily* national average of 137,000 birds. If the problem is really of that magnitude, it's surprising that FWS can offer only an educated guess about the number of fatal bird-tower collisions.

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124 - oops, we mean 121- beauties on the block

FCC Lays Out New Rules for FM Auction 70

Applications due December 19, Bidding opens next March

By: R.J. Quianzon
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The FCC has finalized the rules for the upcoming auction of 121 FM construction permits. We reported that this auction was in the offing in last September's *Memo to Clients*. The permits are for locations throughout the nation. While the actual bidding won't crank up until March 2, 2007, anyone who intends to bid must submit an application to participate to the FCC between December 6 (starting at noon) and December 19 (by 6:00 p.m. Eastern time), 2006. Those who do so will still have to wire their upfront payment – basically, the ante to get a seat at the table – to the FCC by February 5, 2007.

Although the FCC originally proposed auctioning off 124 permits, they realized that three of the permits originally proposed for auction were technically infeasible or were subject to legal uncertainty. The FCC's own failure to catch its mistaken inclusion of those three in the first go-around is a stark reminder to bidders that the FCC provides no warranties on what it is putting up for auction. Bidders must do their homework to determine whether what the FCC is selling is really worth buying. One bidder who did her homework was able to convince the FCC to lower the opening bid for the Ephraim, Wisconsin permit by one-third. All other opening bids remain the same as proposed by the FCC.

The FCC has also adopted the strict auction rules that it previously had proposed. As FM auctions have evolved, the FCC has become aware that bidders have been able to game the system through various techniques. The FCC has now tried to disable at least some of those techniques for this auction. Specifically, bidders can no longer withdraw bids in this auction. Once a bidder has placed a bid and a round has closed, the FCC will not permit a bidder to take back its bid. Of course, if another bidder places a higher bid, the matter will be moot. However, in previous auctions, bid withdrawals seemingly were used strategically by bidders to ward off competitors in certain markets.

As FM auctions have evolved, the FCC has become aware that bidders have been able to game the system through various techniques. The FCC has now tried to disable at least some of those techniques for this auction.

In addition to eliminating bid withdrawals, the FCC has imposed a significant penalty on bidders who do not pay their winning bids after the auction has ended. If a bidder fails to pay for a winning bid, it will have to pay the difference (if any) between its winning bid and the eventual bid price when the permit is re-auctioned. In addition, the FCC has also established that the bidder will pay a penalty which is 20% of the winning bid (or the re-auctioned bid if lower).

The FCC's failure to notice that some of its permits were technically infeasible and the adoption of stricter rules should encourage bidders to start preparing early for the upcoming auction. Both a thorough engineering and legal review should be conducted by bidders prior to committing any money through the bidding process. Readers should contact the attorney in our office with whom they usually work in order to prepare for the auction.

(Continued from page 8)

Comments and Reply Comments are due 60 and 90 days, respectively, from publication in the Federal Register. As of press time, the NPRM had not yet been published in the Federal Register.

The issue of the effect of towers on migratory birds is one which has hovered over the Commission for years. In fact, wren the Commission took no action on the issue, birders felt rooked by the delay and eventually groused to the court to try to force the FCC to stop ducking the issue. For its part, the FCC has resisted such goosing, apparently because it feels a bit auk-ward about regulating in avian matters which are outside the Commission's normal expertise. While the Commission presumably has no egrets about the fact that the issue is still up in the air, the adoption of the NPRM may bring the matter home to roost. Owl it get resolved? Stay tuned.

Big Cable vs. Big Broadcasting

FCC Wades Into Carriage Contract Contretemps

By: Steve Lovelady
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lovelady@fhhlaw.com

As more homes subscribe to cable and satellite TV services, local television broadcasters increasingly need to have their stations carried by these systems in order to reach local viewers. The cable and satellite companies, in turn, want to carry the stations' programs that are popular with subscribers – particularly local news and broadcast network programming. Although this seems to be a win-win situation for the local stations and cable and satellite companies, conflicts arise from time-to-time among them about how to split the economic benefits. One such dispute recently erupted between two big players in the broadcasting and cable businesses—Sinclair Broadcasting and Mediacom Communications, and it is shaping up to be a major battle. At stake are 800,000 Mediacom cable subscribers and 22 Sinclair television stations.

The FCC's rules provide for two types of arrangements under which local television stations can be carried by cable companies: "must-carry" and "retransmission consent". Under the must-carry rules, a station can force cable companies operating in the station's vicinity to carry the station's programming on local cable systems. The station can't demand any separate compensation from the cable company, but the station doesn't have to pay anything to the cable company either.

Alternatively, under the retransmission consent rules, a local television station gives permission to a cable company to carry the station's programming, usually in exchange for some consideration (*e.g.*, payment of a fee to the station, provision of a second cable channel, etc.). The more popular a station is, the greater the consideration it can demand from cable companies when negotiating retransmission consent arrangements. The parties must negotiate retransmission consent in good faith, and the FCC can impose sanctions if the parties do not.

Stations are required to choose once every three years, on a system-by-system basis, whether to obtain carriage by must-carry or retransmission consent. Added to this mix is a rule that prohibits cable companies from carrying broadcast network programming of a non-local station, if there is a local network affiliate in the market.

The dispute between Sinclair and Mediacom involves stalled negotiations over retransmission consent arrangements between them that expire at the end of this month (November, 2006). Sinclair is one of the largest and most diversified television station group owners, with 58 stations in 36 markets. Mediacom is the nation's eighth largest cable company, focusing mostly on smaller cities and towns. The dispute with Mediacom involves 22 Sinclair stations, ranging in location from the frozen tundra of Minnesota to the balmy beaches of Florida, and including affiliates of all the major commercial networks. Sinclair wants Mediacom to substantially increase the amount it pays to Sinclair to carry all of the stations, even though Sinclair maintains that the total amount is less than the "fair market value," whatever that means.

The "cha-ching, cha-ching" sound you may hear in the background is the sound of Mediacom and Sinclair running up substantial legal bills by suing, defending, asking for relief, objecting, etc., in various venues.

Mediacom, on the other hand, complains that Sinclair has engaged in "outrageous and deceitful behavior" during their negotiations. Unlike the other 40 station group owners with which Mediacom claims to have successfully negotiated new retransmission consent arrangements during the past year, Sinclair has violated its obligation to negotiate in good faith, according to Mediacom.

The "cha-ching, cha-ching" sound you may hear in the background is the sound of Mediacom and Sinclair running up substantial legal bills by suing, defending, asking for relief, objecting, etc., in various venues. Mediacom has been the primary instigator of these legal battles, first by suing in federal court in Iowa and then complaining to the FCC.

In the Iowa lawsuit, Mediacom contended that Sinclair violated federal antitrust laws, interfered with Mediacom contracts and engaged in unfair competition. The trial court denied Mediacom's request for an injunction to

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allow Mediacom to continue carrying the Sinclair stations beyond the November 30th cut-off date, on the grounds that Mediacom was unlikely to prevail on the merits of its case. Mediacom has appealed the trial court's decision, but the federal appeals court doesn't appear ready to finish hearing the parties' arguments until late January 2007 – well after the cut-off date.

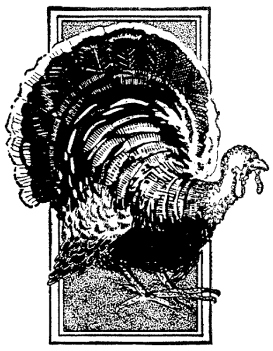
Mediacom next turned to the FCC for relief, complaining that Sinclair acted unreasonably during the aborted retransmission consent negotiations, and asking for an interim order permitting Mediacom to continue carrying the Sinclair stations until the matter is resolved. The FCC has posted Mediacom's complaint and asked the public for comment. Such comments were due by November 28th, and answers and replies are due ten days after that. From this schedule, it appears that FCC action on Mediacom's petitions will not occur until after the November 30th cut-off date.

Mediacom and Sinclair are battling each other in the public forum as well. Mediacom's website lists the names and phone numbers of local Sinclair station general managers and asks "loyal Mediacom customers" to "encourage Sinclair to behave rationally" and "Be Fair, Sinclair." Sinclair, on the other hand, has been reminding Mediacom customers that they can switch to DirecTV as a reliable method of being able to view local Sinclair station programming after November 30th.

This fight may have larger implications in the FCC's pending media ownership proceedings, since large station group owners (such as Sinclair) have been accused of abusing their power in negotiations with cable services and programming content providers. Sinclair, however, is no stranger to high-profile cases (the John Kerry/Swift Boat documentary during the run-up to the 2004 presidential election, for example) and is likely to continue playing its hand in this game, regardless of any bad publicity blowback it may generate. A public fight in which hundreds of thousands of small town cable subscribers are denied their God-given right to watch *Desperate Housewives* in December might provide the poster-child for big media ownership abuse that advocates of tighter ownership limits are looking for.

On the other hand, the cable industry has occasionally been viewed as the heavy-handed monopolist, securing control of the majority of TV sets in a market through a government-sanctioned monopoly, and then demanding free access to the broadcast content it sends to those TV sets. Since cable systems have not historically been subject to any significant threat of "over-building", *i.e,*, the arrival of a competing cable operator, the cable company hs been in a position to say "my way or the highway" to broadcasters seeking carriage. But with the ascendancy of satellite-delivered TV services such as DirecTV and the Dish Network, broadcasters are in a position to go elsewhere – and that's just what Sinclair is demonstrating.

The real question here is why the FCC is allowing itself to get dragged into what is basically a private contract negotiation between two parties who seem to enjoy reasonably off-setting negotiating positions. Ordinarily, the Commission prefers to steer clear of private contractual disputes, leaving the parties and the civil courts to sort them out. But by inviting comments and replies in response to Mediacom's effort to suck the FCC into the brawl, the FCC has hinted that it may be willing to act as a referee in the slugfest. Of course, even though it has solicited public comment, the Commission may still walk away from the fight. But for the moment, at least, it has put itself in the middle of the fight.

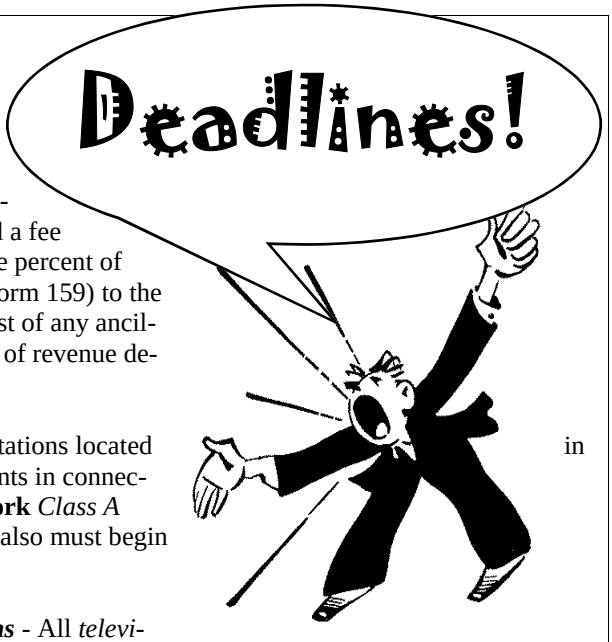


Holiday Schedule Reminder

Fletcher, Heald & Hildreth, P.L.C. will be officially closed on December 25 and January 1.

We wish you safe and happy holidays.

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 6-19, 2006

FM Auction 70 - Short-form applications to participate in the upcoming auction of FM construction permits must be filed electronically on FCC Form 175 between noon on December 6 and 6:00 p.m. EST on December 19, 2006.

December 11, 2006

FM Auction 68 (Previously Unsold Allotments) - Upfront payments must be paid by wire transfer by 6:00 p.m. EST.

December 13, 2006

Non-Mutually Exclusive LPTV/TV Translator Applications - Applicants from the 2000 LPTV/TV Translator filing

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window that were listed as non-mutually exclusive must electronically file complete long-form applications by this date.

December 15, 2006

Digital Companion Channels for LPTV/TV Translators/Class A Television - The window for applicants to submit settlement agreements or engineering solutions to resolve mutual exclusivity among applications for digital companion channels closes at 6:00 p.m. EST.

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 2, 2007

Children's Television Programming - For all *television* stations, the Commission's new rules with regard to additional core educational programming to be aired on multicast programming streams, limits on display of website addresses, change in the definition of commercial matter, and host selling restrictions based on mentions of websites during commercial time will go into effect.

January 10, 2007

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.

FM Auction 68 - Auction of construction permits previously offered but unsold will begin.

February 1, 2007

Television Renewal Pre-Filing Announcements - *Television* stations located in **Delaware** and **Pennsylvania** must begin pre-filing announcements in connection with the license renewal process. **Delaware** and **Pennsylvania** *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 **New Jersey** and **New York** must file their license renewal applications.

Television Renewal Post-Filing Announcements - All *television* stations located in **New Jersey** and **New York** must begin their post-filing announcements in connection with the license renewal process, and continue such announcements on February 1 and 16, March 1 and 16, and April 1 and 16.

EEO Public File Reports - All *radio* and *television* stations with more than five (5) full-time employees located in

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be processed on a first come/first served basis. As part of this new approach, the Commission will require that notice of the requested change first be published in the Federal Register, with the Media Bureau prohibited from processing the application for at least 60 days thereafter.

In addition, the Commission will require that petitions to amend the FM Table of Allotments to insert new FM allotments must be accompanied by a full construction permit application ***and*** the application filing fee ($3,210) which would ordinarily be required for such an application. The Commission believes that this rule will ensure that those who submit petitions for new FM allotments will be those that place the highest value on the allotment. Essentially, the Commission is telling new channel proponents to put their money where their mouth is. Finally, the Commission eliminated its prohibition on using the FCC's electronic database for the submission of documents filed in allotment proceedings.

Essentially, the Commission is telling new channel proponents to put their money where their mouth is.

While these changes all appear geared to facilitate changes to existing stations, it remains to be seen exactly how the Commission plans to sidestep some of the thornier issues, both legal and practical, that lurk in the details. For example, if the Commission wishes to abandon the full rule making regime when it comes to changing the FM Table of Allotments, the Commission will likely have to remove the Table from the rules, since the APA is pretty clear that, if an agency wants to amend its rules, it has to jump through the rule making hoops. But if the FM Table is not going to be in the rules anymore, where will it be? Presumably, the Media Bureau could maintain the Table as a part of its routine broadcast database – but that could raise questions about precisely how that database is maintained and monitored.

Similarly, changes in community of license for all services have routinely been analyzed through the lens of Section 307(b) of the Communications Act, the section of the Act that requires that the Commission provide for the "fair, efficient and equitable" distribution of spectrum among the "several States and communities". In its decision the Commission will have to address how its newly streamlined processes will accommodate that statutory obligation.

All of which is simply to say that the devil is in the details. Again, as of press time the Commission has not released the full text of the order, so we can't know for sure what those details may entail. And, of course, since the new rules and procedures have not yet been formally published, they cannot yet take effect. Once the full text is released, we will let you know. In the meantime, if you have any questions, please feel free to give us a call.

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Arkansas, **Kansas**, **Louisiana**, **Mississippi**, **Nebraska**, **New Jersey**, **New York**, and **Oklahoma** 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 **Kansas**, **Nebraska**, and **Oklahoma** 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 **Arkansas**, **Louisiana**, **Mississippi**, **New Jersey**, and **New York** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323 or 323-E.

February 5, 2007

FM Auction 70 - Upfront payments for mutually exclusive short-form applicants to participate in the auction must be paid by wire transfer by 6:00 p.m. EST.

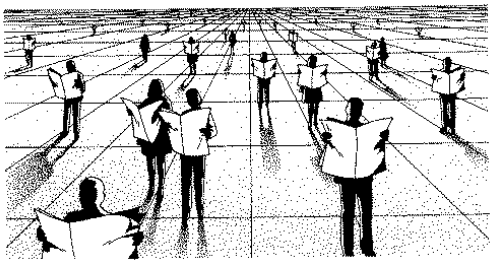
March 7, 2007

FM Auction 70 - Auction of FM construction permits begins.

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

Updates on the News

Nashville cats – Yee haw, tune up the six-string and rosin up the bow, 'cause the FCC wants y'all to come on down for some good time pickin' and grinnin' in Music City, USA, when the Commission holds its second field hearing on media ownership in Nashville on December 11. Details of the hoe-down haven't been released yet. The FCC's field hearings (we reported on the first one, held in Los Angeles, in last month's *Memo to Clients*) are the Commission's way of taking-it-to-the-streets to get a real feel for what Joe Six-Pack thinks about multiple ownership – that's the way the Commission tends to pitch it, at least. We are not inclined to go that far, but we can say for sure that these "hearings" provide a limited number of folks, many of them hand-picked by the Commission, a chance to speak into a microphone while in the same room as some Commission representatives.



VNR inquiries – they're baaaaaaack – As we have reported previously, in August the FCC issued inquiries to approximately 75 TV stations, asking about possible sponsorship identification violations. The inquiries arose from a report, issued by an organization called "the Center for Media and Democracy" (CMD) in April, in which CMD suggested that the targeted stations had all violated the sponsorship ID rules by broadcasting, without proper identification, video news releases (VNR's). Several months later, the FCC's inquiries gave the named stations the opportunity to explain to the FCC why, in many (if not all) the cited cases, no sponsorship ID issue was involved. The Commission was still cogitating on those replies when what should appear but yet another report from CMD, this one entitled "Still Not The News: Stations Overwhelmingly Fail To Disclose VNR's". In the new report, CMD claims that, since its first report, it has observed 46 stations which broadcast VNR's with little or no disclosure as to the source of the programming.

If past is prologue, the 46 stations listed in CMD's latest report can probably expect to be receiving FCC inquiries in a couple of months. That's especially likely if Commissioner Adelstein has his way. Apparently in conjunction with the release of the report, Adelstein issued a statement "commend[ing] the Center for Media Democracy [sic]" for its study. According to Adelstein, the television industry "is patently incapable of self-regulation" and "it's up to the FCC to enforce our disclosure rules." Adelstein urges the Commission "to investigate these new allegations" quickly.

It is troublesome that Adelstein, who as a Commissioner will presumably be called upon to review and assess the results of any inquiry which the FCC may undertake, has apparently already made up his mind about the miscreant traits of the television industry. It is also troublesome that Adelstein views VNR's as "corporate propaganda in lieu of real news." That assertion indicates that the Commissioner believes there to be something called "real news" which he, for one, is apparently able to identify with confidence. We would have thought that, contrary to Adelstein's view, propaganda becomes a problem when the government is the one that decides what's "real news".

If you want to check out the CMD's latest handiwork, go to http://www.prwatch.org/fakenews2/execsummary. If you find your station listed in the report, you may want to prepare for incoming from the FCC early in '07.

The chill is still on – Remember how we reported in last month's Updates column that the Commission had imposed a freeze on FM applications in light of Auction 68? Well, this month the Commission has done the same thing for Auction 70. The Auction 70 freeze prevents any FM rulemaking petitions or counterproposals that would involve a change in channel, class or reference coordinates for any of the 121 allotments on the block in Auction 70. The freeze will also preclude any commercial or noncommercial FM minor change applications from December 6 – 19, 2006.

White space comment period established – If you have any interest in filing comments in the Commission's "white space" proceeding, the dates have now been set. Comments are due by January 31, 2007, and replies are due by March 2, 2007. Given the scope of that proceeding, it's possible that those dates may be extended, but for the time being any would-be commenters would be well-advised to get their drafting underway.

Five more years, five more years . . . – You could hear the chanting of happy bureaucrats all over town when word

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came down in November that the Senate had, at long last, confirmed Chairman Martin's re-appointment for a five-year term at the helm of the FCC. He can now get back to work on that whole multiple ownership thing (*see*, for example, the first squib above), an issue which has vexed both him and his immediate predecessor for years. And questions relating to multiple ownership are likely to get focused real fast in light of the news that Clear Channel is planning to sell off as many as 448 radio stations across the country. While it's too early to say precisely which of those transactions may raise ownership questions, it's safe to say that some such questions will invariably pop up somewhere along the line. Pressure from the affected parties in those deals may add further incentive to resolve the outstanding ownership issues at long last. We shall see.

Are they Sirius? – Anyone worried about possible terrestrial encroachment by the satellite radio industry should take a gander at Sirius's latest application, which proposes to extend its existing STA to operate terrestrial repeaters so that Sirius can operate them in Alaska and Hawaii as well. The problem is that, at least in theory, such repeaters would be used merely to re-transmit Sirius programming received from its satellites, and Sirius apparently has no satellite ability to feed Hawaii or Alaska repeaters. So "repeaters" would not really be an accurate word to describe those stations; rather, the Alaska and Hawaii stations would technically be – how can we say this delicately? – ***ORIGINATING STATIONS***. While Sirius's proposal is, at least for the time being, limited to the two non-contiguous states, it would not be much of a conceptual leap to see similar proposals for the lower 48 if this notion of non-repeating "repeaters" catches on.

The FCC's public address system, redux – Back in September, we reported on a couple of cases in which the FCC rejected submissions because they had not been properly addressed to Marlene H. Dortch, Secretary of the FCC. Instead, the filers had addressed their pleadings to the Commission offices which were going to deal with the matters presented in the pleadings. But the FCC said that that was not good enough, because the FCC wants all pleadings addressed to the Secretary (although below that address you can indicate that she should then forward them on to the office or official which will deal with the pleading). We mention all this again because the Commission did it again, chastising a petitioner for reconsideration for failing to address its petition to Ms. Dortch. This should serve as a reminder. As silly as the requirement may be, the FCC still expects its regulatees to comply with it. So remember, if you're sending something to the FCC, send it to the Secretary.

Late Breaking News!!!

Commission Commissions Ownership Studies

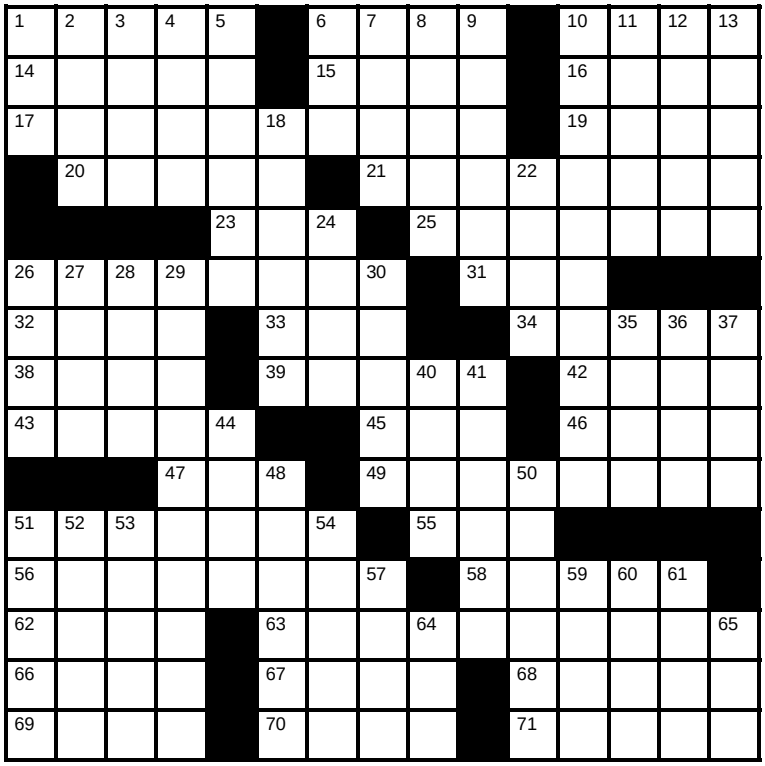
As we are going to press, the Commission has announced that it will be conducting 10 peer-reviewed economic studies in connection with the multiple ownership proceeding. That announcement, in turn, has elicited comments from Commissioners Copps and Adelstein, both of whom are critical of the decision to undertake the studies. We plan to cover this latest flap – including both the studies to be conducted and the Loyal Opposition's beefs about them – in next month's *Memo to Clients*.

(Continued from page 7)
in that context.

But reflect on the notion that use of, say, "shit" or "fuck" on the "Howard Stern Show" may be exempt from routine indecency/profanity enforcement. Next stop, the Twilight Zone.

Actually, the next stop in this saga is likely to be a decision from one or another of the two federal appeals courts which are currently handling indecency-related appeals. At present, no decision is expected until early 2007, at the earliest. It is difficult to see how the Commission might think that its most recent decision may convince either court that the Commission has a clear-headed, consistent, intellectually-defensible approach to indecency and/or profanity. Certainly, the scathing dissent from Commissioner Adelstein will do little to help the FCC prevail on appeal. As always, we will continue to follow this saga as it unfolds.

(Continued from page 5)
and our clients in navigating this complex system as quickly and effectively as possible. The experts can provide the needed certification of no adverse effects to historic properties (or help in mitigating adverse effects to an acceptable level). We remind potential constructors that it is important to begin the historic evaluation process well before your proposed construction date since the lead time to get feedback from the tribes, the SHPO's, and sometimes the FCC can be weeks or even months.



Where Have You Gone, Bill Tricarico?

This year our puzzle honors those unsung heroes of the bureaucracy, the Secretaries of the FCC. They're responsible for taking care of myriad picayune details necessary for the agency to function, they have to sign their names to every Commission decision, but what credit do they get? Just about squat, as far as we can tell. No longer. The last names of seven of the eight most recent secretaries (acting and permanent) are included in the grid. To make things really easy, the clue for each consists of the years of that person's tenure as Secretary (note that, with respect to 12-down, we reliably traced him back to 1962, but then the trail got cold). The only one we have left out is (as our title suggests) Bill Tricarico (1977-1987).

Anyone completing the puzzle and correctly identifying all seven Secretaries hidden in the puzzle will be suitably acknowledged in upcoming issues, with special props for the first one in the door. Send your answers to cole@fhhlaw.com.

Across

1. Homer classic
6. Rocky feature
10. Kitten noises
14. "___ Tango" by The Nuge
15. Type of ale
16. Esau's first wife
17. Logically
19. ___ Man (Harry Dean Stanton role)
20. Raccoon kin
21. Like some radios
23. Digital recording medium
25. 1988
26. Air passages
31. [like this]
32. O'Neil offspring
33. Nipper's co.
34. Training ground for the Dalai Lama
38. Malaysian town
39. Hawks
42. Common internet email protocol (abbr.)
43. Government neckwear?
45. Maritime assent
46. Snorts
47. AL linescore abbr.
49. Hippocampus member
51. 1973-1977
55. ___ Lanka
56. Allied (with)
58. 1993-1997
62. Fabulist
63. Shelter from reality?
66. "____ Nanette"
67. Second prefix
68. Actor Brooks, IOC Honcho Brundage, or the label maker
69. Slaughter
70. U.S. standards setter
71. ___ hand (help out)

Down

1. Wobblie org.
2. Not of the cloth
3. A fan of
4. Turkish honorific
5. 2002-Present
6. Best pal in April?
7. Kind of berry
8. Detached
9. Action, comedy and noir (among others)
10. Cherry liqueur
11. On-line obligation?
12. 1962 (?)-1973
13. Farrier, at times
18. Down ducks
22. Shadow
24. Sack or three-legged, *e.g.*
26. Ms. Amos
27. Tobacco or Thunder
28. Sometimes you feel like one
29. Look for them on 53 down
30. 1997-2002
35. Middle-eastern bigwig
36. Enervates
37. Altar site
40. Caustic soap ingredients
41. 1988-1993
44. Greek goddess born of Chaos
48. Cardiac condition
50. Type of hernia
51. Alan Alexander or Christopher Robin
52. Type of label to look for
53. South American plain
54. Resident of Fiji's capital
57. Years and years
59. It gyres and gimbles
60. Wedding crasher Wilson
61. Geek
64. Mari de la Reine
65. Scandinavian rug type

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First Class

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. . . or this?