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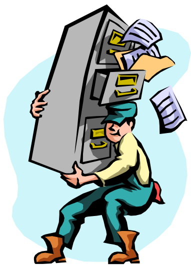
Memorandum to Clients

January, 2007 | News and Analysis of Recent Events in the Field of Communications | No. 07-01



Once more, with filing

Reminder: First Round of Mid-Term EEO Reports Due This June

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Just when you thought that you had a handle on all the routine filings the FCC expects of you, look out – here comes a new one. Starting this summer, many (but not necessarily all) broadcasters will start having to file the new FCC Form 397 – "Broadcast Mid-Term Report" – which will provide the Commission with information about each reporting licensee's on-going EEO efforts.

The Form 397 requirement is technically not really "new". It was first announced by the Commission in late 2002, when the FCC reviewed its EEO rules and policies in the wake of a 2001 court of appeals decision which required the Commission to re-think parts of its previously-adopted EEO program.

As its name implies, the new form is intended to provide the Commission with a "mid-term" report on EEO activities. All full-service radio and television licensees with five or more full-time employees are already required to prepare Annual Employment Reports to be placed in their local public inspection files ***and*** to submit copies of the two most recent such reports along with their regular renewal applications. But renewals are filed only once every eight years, and the Commission figured that it ought to check up on EEO goings-on more often than that, sooooo . . . along came the "Mid-Term Report", which is to be submitted to the FCC mid-way through the regular renewal cycle.

> *Renewal applications are filed only once every eight years, and the Commission figured that it ought to check up on EEO goings-on more often than that, sooooo . . .*

And for those of you whose licenses were renewed at the beginning of the most recent renewal cycle (*i.e.*, in 2003), congratulations – you've reached the mid-term and, starting this June, it will be Form 397 time. Here's the what, when and who.

What must be filed?

The new Form 397 has not yet been released. A draft version of the form was prepared in 2002. It merely requires the standard identifying information about the licensee filing the form (*i.e.*, name, address, station list, etc.) and, if the licensee is subject to the full filing requirement (*see below*), copies of the licensee's two most recent annual EEO reports as placed in the stations' local public inspection file.

When must it be filed?

The schedule for filing Form 397 is based on the staggered schedule for filing renewal applications. Thus, if your last renewal was due to be filed by June 1, 2003, your Form

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The Scoop Inside

Shaping the shape of things to come?

Sinclair/Mediacom Slugfest: Retransmission in Transition?

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As of press time, the retransmission consent/compensation war between Sinclair and Mediacom continues to rage, and approximately 700,000 cable subscriber households are suffering collateral damage as a result. In the November, 2006 *Memo to Clients* we reported on the brewing dispute between one of the largest (if not *the* largest) independent station owners, Sinclair Broadcasting Group, Inc., and the 8th largest cable company, Mediacom Communications Corporation, over negotiations concerning how much Mediacom should pay Sinclair to carry Sinclair's stations on Mediacom's cable systems. The contretemps continues: earlier this month Sinclair pulled 22 of its stations off Mediacom facilities in markets from Iowa to Florida.

The FCC has so far refused to step in to force the parties to resolve what is fundamentally a commercial dispute over price. Although neither side has disclosed the actual dollar amounts up for grabs, Sinclair has said that all it wants is to receive compensation similar to what Mediacom pays for the right to carry such cable-only fare as Animal Planet, MTV and HGTV. Mediacom, on the other hand, questions why it should pay Sinclair for programming that Sinclair gives away *gratis* to owners of conventional over-the-air TV receivers.

Adding fuel to the fire is a new three-year agreement signed on January 19 between Sinclair and Time Warner, which gives Time Warner's cable systems the right to carry all of Sinclair's stations programming. Mediacom officials are now demanding the same terms.

We won't bore you with the blow-by-blow legal and political battles that have been waged by the parties. Suffice to say that battalions of lawyers have been kept busy filing emergency petitions, seeking relief, and generally complaining to anyone who will listen (and many who won't) about how unfair and unreasonable the other side has been in this dispute.

So far, Sinclair has prevailed in each skirmish. Federal courts in Iowa have refused to prevent Sinclair from pulling its stations (Mediacom is appealing) and the FCC issued a similar ruling refusing to find that Sinclair has acted in bad faith (also subject to an appeal by Mediacom). The FCC did suggest that the two resort to binding arbitration, with the Media Bureau presiding. Mediacom was all for that approach. Sinclair took a pass, however, since the Commission said it would require Sinclair to consent to carriage while the arbitration was going on, and since it also probably figured that the Commission would likely just split the difference between the parties.

Meanwhile, various local, state and federal politicians have been enlisted to write letters to the FCC and hold hearings about the matter. And both sides have taken it to the streets, with Sinclair reportedly offering a bounty for cable subscribers to switch to DirecTV and Mediacom giving away over-the-air TV antennas and staging events at local venues for group-viewing of popular programs (like football games) broadcast on Sinclair stations.

While it may be hard to get all worked up for either side in this particular fight, what should attract our attention is the fact that the fight is going on at all. Historically, there have been precious few disagreements about carriage of local programming, pos-

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Focus on FCC Fines

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New Years Resolutions

In this column we typically report on FCC fines to provide a "police blotter" for the broadcast community and to alert readers to the cautionary tales of the latest items of interest in the FCC's enforcement regimen. This month's police blotter is empty – perhaps the Enforcement Bureau folks were overcome by the holiday spirit – so we take this opportunity to provide readers with potential resolutions for the New Year.

Monthly installments of this column tend to highlight the more interesting enforcement actions taken by the FCC. While the less interesting enforcement actions may not make the editorial cut, they nevertheless result in tens of thousands of dollars in FCC fines each year. With that in mind, below are a few resolutions that readers may want to adopt in the new year in the hope of avoiding fines. The list comes nowhere close to summarizing all of the federal regulations that apply to broadcasters, but merely indicates which regulations are frequently cited by the FCC.

Resolve to Maintain Your Tower

The easiest target for an FCC agent to inspect is the massive tower structure that broadcasters must use to transmit their signal. The FCC frequently fines broadcasters for violations which could be avoided by attending to a few simple details. This year, you may want to resolve to make sure that:

- your tower is properly registered with the FCC;
- your FCC registration number is properly posted as required;
- your tower is painted in conformance with your license;
- your tower is lighted as required, and all the lights work, and you have a monitoring system in place to inspect the lights and follow-up immediately in the case of any outages; and
- your tower is properly fenced in and ***locked***.

These are all items which have generated, and continue to generate, Commission fines, despite the fact that such fines could be easily avoided with a relatively small amount of regular attention.

Resolve to Maintain Your Public File

A public file can be viewed by anyone and often is the camel's nose under the tent of a listener's or disgruntled employee's complaint to the FCC. In addition, when it comes time to seek renewal of your license, you will find that the renewal application form ***requires*** you to certify that your public file has been maintained in a timely and complete manner throughout the preceding license term – and those renewal applicants who can't provide that certification generally find themselves looking down the wrong end of a fine that could range from $4,000 to $15,000 or so. This can be avoided by ensuring that your public file contains all required documents ***and*** that those documents were placed in the file at the proper time. For a small charge we can provide a memorandum listing the items that must be in the public file; also, be sure to read through the Deadlines listing in the *Memo to Clients* every month for additional reminders.

Resolve to Maintain and Test Your EAS

Both FCC rules and public safety necessitate an operational and wide reaching EAS system. The FCC is less than sympathetic to broadcasters who fail to comply with these critical EAS regulations. Part of ensuring that a broadcaster has the proper EAS system includes:

- verifying that your system properly operates;
- conducting weekly and monthly tests;
- monitoring the correct stations;
- maintaining your EAS log.

In several instances, the FCC has fined broadcasters for failing update the local station that they monitor – a problem which can crop up when stations move on the dial or change ownership. Take the time, frequently, to verify your monitoring assignments and ensure that your equipment is operational.

A small price to pay for peace of mind

Trademark Registration:
A cheap and easy safeguard against commercial identity theft

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It has often been said that trademarks represent the "blood, sweat, and tears" of the business aspect of an enterprise. In the broadcast business, one of the most obvious trademarks that a station has is its call sign, a unique identifier with which the station can brand itself in the minds of its audience.

Significant time, money and effort can (and generally do) go into promoting a station's call sign as a primary identifier of the business. And given that, the wary broadcaster should be concerned about an infringer trying to incorporate those unique call letters into some marketing effort for the infringer's benefit, in effect piggy-backing on the station's reputation among its audience.

Registering more than one domain name amounts to an insurance policy against infringement-by-domain-name.

Unfortunately, the "lawless" Internet provides multiple opportunities for infringers to try to do just that.

Take websites, for example. A station may figure that it is sufficient to register a single domain name using the station's call sign – say, WQQQ.com. The station figures that it really only needs one website, right? But what if Mr. Infringer then registers WQQQ.net or WQQQ-FM.com or WQQQ.org or some other variant. Internet surfers looking for the station's site could easily find themselves looking at some other site instead, and that alternate site owner would thus be benefiting from the good will and reputation inherent in the station's call sign/ trademark, *i.e.*, the factor that ended up delivering the surfer to the bogus site.

Because of that possibility, it makes sense to consider registering more than one domain name. Domain names can be had for about $35 per year. Isn't it worth it to register variations of a prominent call sign (or the call plus frequency or the call plus station slogan, etc.)? There is no requirement that a registrant actually use the domain name to create or maintain a website. Registering more than one domain name amounts to an insurance policy against infringement-by-domain-name.

And even if a licensee does protect itself in that way, it should still police unauthorized use of station call signs and other general business identifiers on a regular basis. Two cases involving trademark infringement through the unauthorized registration of call signs as domain names are particularly illuminating.

In one, Station WEVD, a radio station in New York, used an alternative dispute resolution process to have the rights to two domain names incorporating the station's call sign (www.wevd.com and www.wevd.net) transferred back to the station licensee. Those domain names were registered by a former freelance producer who often bought time on the station to broadcast restaurant reviews. He then kindly offered the domain names back to the station in exchange for free airtime during the next five years' "drive time."

The second case is even more frightening. Tennessee station WNRQ used the same procedure to try to wrest its call sign from a domain name registrant who was using it to advertise penis and breast enhancement supplements, personal ads, and links to other websites containing sexually explicit materials. Not the sort of thing you want your listeners to encounter when they go searching for your latest contest or station-sponsored events in the community, is it?

The good news is that the organization which administers domain names around the world has recognized the danger of allowing anyone in the world to register multiple domain names at a very low price. It is to combat the activities of unscrupulous "cyber squatters" that the "Uniform Dispute Resolution Policy" was created. Under that policy, a streamlined, paper-only arbitration process serves as an alternative to court litigation when unauthorized registration of a domain name is alleged to infringe a federal trademark. In addition to being relatively cheap (usually under $1,000 to file a case to be heard by an arbitrator, plus attorney fees) and quick, a complainant is spared the need to go overseas to prosecute a claim of trademark infringement in the country in which the domain name registrant is located. And a successful arbitration will result in transfer of the contested domain name within 10 days of an arbitrator's final order.

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FCC roughed up in Second Circuit oral argument

Indecency: Commission Position Slipping on Appeal?

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The FCC had a long, profanity-laced day before the U.S. Court of Appeals for the Second Circuit shortly before Christmas as the agency's lawyers tried to defend the Commission's ever-expanding definition of indecency. And from the reaction of the judges hearing the case, it appeared that the Court was not favorably impressed with the FCC's defense of its position.

The oral argument was held in an appeal taken by a number of broadcasters – led by Fox Television – with respect to the FCC's "omnibus" indecency ruling issued last March. In that ruling (which we described in the March, 2006 *Memo to Clients*), the Commission addressed complaints about a broad number of programs, ranging from music videos to documentaries to sitcoms to police dramas to awards shows. Some of the target programs were deemed not to be indecent or profane, while others got the big thumbs down. Two in the latter category involved Billboard Music Awards shows in which two awards presenters (Cher and Nicole Richie, in separate programs) used language which the FCC held to be indecent (although it issued no fine in either case).

FCC to Court: The FCC prefers not to second-guess a broadcaster's determination of what is or is not "news". Court to FCC: "Are you just telling the networks ... to make some sort of cockamamie claim and they'll survive?"

Throughout the oral argument (which you can check out for yourself at http://www.c-span.org/rss/video.asp?MediaID=29085), two of the three judges seemed puzzled by the FCC's justification for its regulation of indecency. While the Commission asserted that its regulation is intended to protect children from being exposed to indecent or profane language, the FCC had to admit that it might be permissible for stations to broadcast portions of the oral argument during a 6:00 p.m. newscast – even those portions of the arguments in which both the attorneys and some of the judges used "fuck" and "shit". One judge even asked whether, in connection with a news piece about the argument, a broadcaster might also be able to air file footage of the supposedly offending remarks as they were delivered during the telecast awards shows. And if the original footage could be broadcast, why would not a child exposed to that latter broadcast be as adversely affected as one who might have seen the original broadcast?

In another potentially telling exchange, one judge picked up on the FCC's claim that material broadcast during "news" coverage might be kind of exempt from indecency concerns. The judge asked whether a broadcaster could simply label as "news" the Billboard Music Awards show, in which case the remarks by Cher and Ms. Richie would arguably have been exempt. Commission counsel acknowledged that the FCC prefers not to second-guess a broadcaster's determination of what is or is not "news", which prompted the judge to snort, "Are you just telling the networks ... to make some sort of cockamamie claim and they'll survive?"

And so it went for an hour of back-and-forth.

Any observer of appellate courts will tell you that it is a fool's errand to try to predict, on the basis of oral argument, how a court will rule in any particular case. Judges often play the devil's advocate, tossing seemingly pointed questions to test the strengths and weaknesses of arguments being presented. But in this case, it did seem reasonably clear that at least two of the three members of the panel were impressed – but not favorably – by the FCC's argument.

It is not clear when the Court will issue its opinion in this case. Some courts try to get their opinions out within two-three months of oral argument, but that is at most an informal, non-binding, often-disregarded guideline. We'll just have to wait and see.

And while we're waiting for the Second Circuit, we can also wait for Episode Two of "The FCC Goes To Court". The Commission is due to argue its indecency position again in the near future, this time before the U.S. Court of Appeals for the Third Circuit in Philadelphia. That's where CBS appealed the Commission's ruling on the 2004 Super Bowl half-time show, featuring the inimitable Janet Jackson and, for approximately half a second, Ms. Jackson's right breast. The briefing in the Third Circuit has been completed, and next on the agenda should be a yet-to-be-scheduled oral argument where the FCC will again be given the opportunity to explain how its

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Nine permits sold off the repo lot

Auction 68 Gaveled to a Close

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It took the FCC only five days to auction off nine FM permits that had been returned or "repossessed" by the government. The nine permits had previously been auctioned by the FCC but for various reasons they remained unbuilt. In most instances the permits had been hooked and landed successfully during an auction but then thrown back at the last moment, either because the winning bidder got cold feet or because it simply could not pay the FCC when the auction was over. All of the previously successful bidders who failed to pay up now face penalties from the FCC; the penalties will be based upon the winning bids from the most recent auction.

And the winning bid is . . .

Outlook MT	Class C	$ 43,000
Covelo CA	Class A	$ 61,000
Cedar Key FL	Class A	$ 131,000
Ocracoke NC	Class C1	$ 150,000
Perry FL	Class A	$ 173,000
Myersdale PA	Class A	$ 376,000
Tecopa CA	Class A	$ 728,000
Parowan UT	Class C2	$ 892,000
Kihei HI	Class C2	$1,109,000

The current auction saw a crowd of bidders for California, Florida and Utah markets – as many as a dozen bidders slugged it out for licenses in those markets. Only five bidders showed up for a Class C2 in Hawaii, but the bidding was intense, ending up with a final bid of $1.1 million, more than 10 times the original minimum bid of $90,000 which the FCC had set. By contrast, only one bidder was interested in a North Carolina permit which sold for its opening bid of $150,000. Winning prices, cities of license and FM classes appear in the box above. Readers who plan to participate in the upcoming Auction No. 70 in March may wish to analyze the results of this auction.

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sibly because many broadcasters were happy to avail themselves of their must-carry rights.

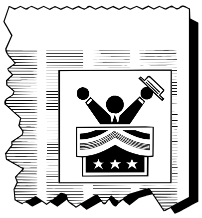
But that was then and this is now. And now cable operators are suddenly starting to experience competition from new and robust sources, like satellite TV, digital multicasting, telephone companies and even the Internet. The phone companies, in particular, have reportedly cut generous retransmission consent deals with local TV operators in many markets.

And now television licensees are also feeling the pinch, with networks cutting back on payments to affiliates, so broadcasters have obvious motivation to look for revenue-producing options.

As a result, it is not surprising to see a shift in what traditionally has been a near-symbiosis between cable and local TV, as local television stations flex their muscles and demand more compensation for the rebroadcast of their programming. And cable operators are learning that, while over-the-air viewership may have waned some, there is still considerable demand for local news, weather and sports.

Perhaps even more significantly, the Commission is still mulling over a range of carriage issues – for example, whether cable operators must carry all of a broadcaster's multichannel digital stream, once the DTV conversion has been completed, or whether cable operators will be permitted to cram over-the-air HD signals into standard format – that could further rock the boat. And speaking of multichannel digital streams, there remains the possibility that a plethora of free, over-the-air DTV signals, combined with free on-line video sources, could wean many subscribers off the cable for good, further eroding cable's historically unchallenged monopoly position.

The Sinclair and Mediacom clash over retransmission consent pricing will undoubtedly influence the FCC as it addresses these questions. That clash may well be cited as a perfect example of how commercial interests of broadcasters and cable companies cannot always be amicably reconciled without the heavy hand of government regulations. That's why this conflict is fascinating to watch, but potentially dangerous to all factions of the television industry if it continues much longer.



New BCRA loophole?

Court Limits McCain-Feingold Prohibition On “Electioneering Communications”

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When is an issue ad not an issue ad? The answer to that rather obscure question may greatly affect the number of potential advertisers during the 2008 federal elections. In late December 2006, a three-judge federal court ruled that even though certain issue ads by the advocacy group “Wisconsin Right to Life, Inc.” mentioned, by name, a candidate for federal office, none of the ads could be considered prohibited “electioneering communications” under federal election law. If upheld, this ruling could open a new range of advertising possibilities for issue advertisers during the weeks leading up to next year’s primary and general elections.

While this decision has the potential to increase the number of “issue ads” aired in the weeks preceding the next election, the matter is far from settled.

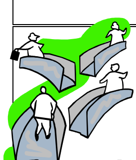
The Bipartisan Campaign Reform Act of 2002 (you may know it as “BCRA”, or maybe “McCain-Feingold”) prohibits corporations and labor organizations from making “electioneering communications” within 60 days prior to a general election or within 30 days prior to a primary election. An “electioneering communication” is generally defined as any paid broadcast, cable or satellite programming that refers to a federal candidate and can be received by 50,000 or more people in the area the identified candidate seeks to represent.

In 2003, the U.S. Supreme Court held that this prohibition is constitutional, even though the BCRA clearly restricts election-related speech. The Supremes gave themselves some wiggle room, though. They left open the possibility that the BCRA’s blanket prohibition might not apply to ads that purely focus on an issue and do not include “express advocacy” for or against a particular candidate could refer to a candidate.

Into this opening marched Wisconsin Right to Life, Inc. with ads urging audience members to contact Wisconsin’s senators (*i.e.*, Russ Feingold and Herb Kohl) to oppose the filibustering of judicial nominees. The ads did not reference either Senator’s past votes on the issue, suggest either Senator’s position on the issue, or otherwise promote, attack, support, or oppose either Senator.

On this basis, two of the three presiding judges concluded that, on their face, the ads did not constitute express advocacy and could not be constitutionally prohibited. In so doing, the Court determined that a mere reference to a federal candidate does not transform a permissible issue advertisement into a prohibited “electioneering communication”.

While this decision has the potential to increase the number of “issue ads” aired in the weeks preceding the next election, the matter is far from settled. This month the Supreme Court decided that it would review the case, setting up the possibility of a reversal that would once again shut the door on such ads. Although a date has not been set for oral arguments, briefing on the case should be completed by April, suggesting that a decision will be made well before the media campaigns for the 2008 Presidential election begin. We, and sales managers across the country, will be watching with great interest.

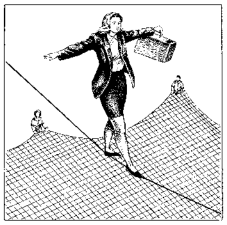


FHH - On the Job, On the Go

In January, **Frank Montero** participated on a broadcast due diligence panel for prospective station buyers at the *Fly-In Conference on the Clear Channel Station Dispositions* presented by the Minority Media and Telecommunications Council and hosted by the National Association of Broadcasters Education Foundation and Clear Channel Communications, Inc. in Washington, DC.

From February 17-19, **Jim Riley** and **Harry Martin** will be attending the National Religious Broadcasters convention in Orlando. **Jim** and **Harry** will be both appear as panelists during educational sessions on February 18 concerning FCC policies and regulations.

And speaking of **Harry**, it turns out that he’s our *Media Darling of the Month.* **Harry** was quoted as a knowledgeable “media lawyer” by the *Washington Times* in an article about a broadcast-related tragedy in California.



Bureau OK's foreclosure sale to creditor

A More Secure Path For Broadcast Lenders?

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A little over a year ago (in the November, 2005 *Memo to Clients*), we presented a cautionary tale about the legal pitfalls lenders face when trying to enforce liens against FCC licenses. That tale, arising from a federal appeals court decision in the *Kidd Communications* case, involved the seller of a radio station who financed the purchase price for the buyer (Kidd). Kidd defaulted on its loan payments to the seller, so the seller repossessed the station's assets (including the FCC license) pursuant to an order of a California court. The federal appeals court ruled that the FCC was wrong when it approved the assignment of the station's FCC license to the creditor, because the FCC had failed to explain adequately how it reconciled California state law interests with its own rules and federal communications law.

The FCC's reasoning effectively provides a roadmap to follow when preparing enforceable documents for loans to broadcast station owners and foreclosing upon them.

First, a quick reminder of the pertinent federal laws and regulations about granting liens on broadcasting licenses: All FCC license holders *must* obtain the FCC's prior approval before assigning or transferring their licenses to anyone else. Also, FCC rules prohibit the seller of a broadcast license from retaining any right to reassignment of the license (a so-called "reversionary interest") at a later date.

In the wake of the court of appeals decision in the *Kidd* case, the FCC recently released a written decision in a different case in which the FCC granted a license assignment to a buyer at a foreclosure sale. The FCC explained why the *Kidd* case was different and why the assignment in the new matter should be allowed under federal law. The FCC's reasoning in this decision is interesting, because it effectively provides a roadmap to follow when preparing enforceable documents for loans to broadcast station owners and foreclosing upon them.

The FCC's decision in the new matter was influenced by wording in the loan documents in question that explicitly excluded the station's FCC licenses from the description of collateral for the loan. While this might seem counterintuitive – to specifically exclude from the list of collateral the one asset that is probably the most valuable possession of the borrower (namely, the station's license) – it effectively negates any objection that the lender is trying to get around what is clearly the law.

When we draft loan documents, we insert wording to the effect that the lender and borrower acknowledge the FCC does not permit security interests in FCC licenses, so the parties will settle for a security interest in the proceeds (cash) received from the sale of the license, and if the law ever changes in the future so that security interests in the license *are* permitted then the station's license will automatically be deemed to be subject to a security interest in favor of the lender. While this may seem like a load of legal double-talk to most people, the new decision from the FCC confirms that such wording is vitally important to include in loan documentation.

Another factor cited by the FCC in the recent case is the fact that the lender/buyer at the foreclosure auction sale was not a former owner of the station. This completely sidesteps all of the issues that were dredged up in the *Kidd* case as reasons for why the FCC's policies against reversionary interests had been violated. Station owners who are willing to provide seller financing to a prospective purchaser are not helped by the new decision of the FCC, but commercial lenders will find the FCC's ruling comforting. In the new case, the lender bid the highest amount out of six bidders at a court-ordered auction open to the public.

Finally, in its latest decision the FCC rejected claims that the lender prematurely assumed control from the holder of the FCC license for the station. When the station's licensee defaulted on its loan, it declared bankruptcy. The bankruptcy court sanctioned an arrangement agreed to by the licensee and lender whereby a well-respected media broker was appointed to oversee construction pursuant to a pending FCC construction permit. The FCC found that this arrangement did not amount to an assumption of control by the broker or lender, since the bankruptcy court's order contained wording which confirmed that the licensee retained ultimate control over the process, and there was no evidence that subsequent actions by the appointed broker violated that principle.

This recent decision by the FCC restores some certainty to the area of lending to broadcast station owners. With

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Trying to turn nothing into something

Senate Bills Prod FCC On TV White Space Use

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After the Commission released its Notice of Proposed Rulemaking and developed a timeline for the development of rules authorizing the use of unused television spectrum for unlicensed wireless use (*see* our coverage in the March, 2006, and September, 2006 *Memo to Clients*), it was assumed that Congress would wait until the Commission completed its comprehensive review of the issue. However, in January, new legislation was introduced to expedite the unlicensed use of the spectrum.

Specifically, Senator John Kerry (D-Mass) and Senator John Sununu (R-N.H.) have introduced separate pieces of legislation which would require the FCC to permit unlicensed use without regard to the Commission's previously-adopted timeline. Both would require the FCC to complete its rulemaking proceeding and issue a final order no later than October 1, 2007, and permit unlicensed usage of the television spectrum no later than February 18, 2009 (the date of the end of the DTV Transition). Both bills would require the Commission to establish technical requirements that would protect incumbent primary television licensees, and require the Commission to initially applications for the certification of unlicensed devices no later than December 1, 2007.

Both bills would require the Commission to initially accept applications for the certification of unlicensed devices no later than December 1, 2007.

The bills would permit the Commission to conduct field testing in a "limited number of markets", the testing to be completed before the initiation of the equipment certification process, *i.e.*, before December 1, 2007. Senator Kerry's proposal would permit the Commission to solicit public comment on the field testing results, but only if the comment period could be completed within 180 days of enactment, or October 1, 2007. Senator Sununu's version also leaves open the possibility that a portion of the spectrum could be licensed, and, if so, would require that spectrum to be distributed via auction.

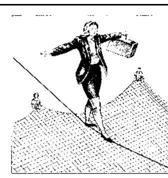
At this point, neither bill has been voted out of the Senate Commerce Committee, and no hearings have been scheduled. However, the reintroduction of the legislation on a subject that the FCC thought resolved must be sending shivers down the spines of the OET folks, and leaves them with questions such as: (1) how can we do field tests in 180 days on equipment that has yet to be produced; (2) how can we determine what spectrum should be licensed, and which should be unlicensed; and (3) how can we start certifying products that have yet to be produced, especially if the technical parameters have yet to be developed?

These questions, and many more, are likely to be on the tips of broadcasters' and FCC staffpersons' tongues as they consider their comments in the rulemaking proceeding, which are due on January 31, 2007. We will be watching the comments roll in, and provide further information as developments warrant.

(Continued from page 5)

indecency policy works and why it should be upheld.

Many observers assume that no matter how the Second and Third Circuits rule in these two cases, the losing party will seek Supreme Court review. It has been nearly 30 years since the seminal *Pacifica* case in which the Supreme Court upheld the Commission's conclusion that the broadcast of George Carlin's "Filthy Words" monologue was indecent. It may be time for the Supremes to take another look at the issue.



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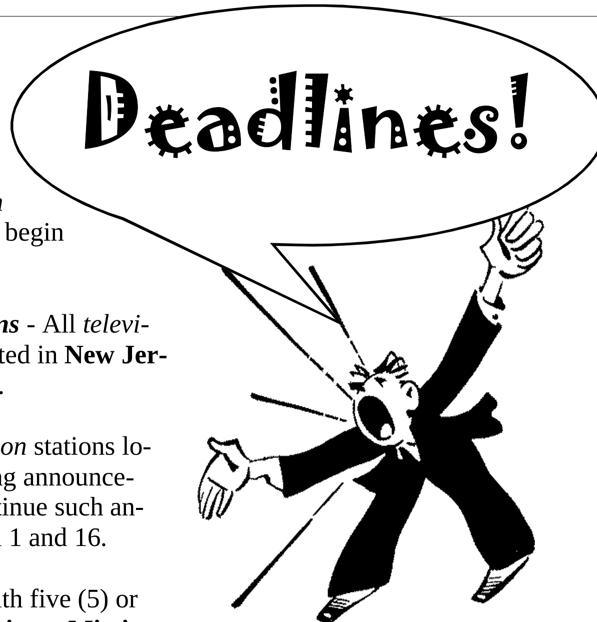
the proper wording of its loan documents, any lender who is not a former FCC licensee of the station in question can effectively take a security interest in the assets of the station and the proceeds of the sale of the FCC license of the station. The lender can even be the successful bidder at a state law-sanctioned foreclosure sale of the station's licenses and receive FCC approval of assignment of the station's license to it.



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 five (5) or more full-time employees located in **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.

April 1, 2007

Television/Class A/LPTV/TV Translator Renewal Applications - All *television*, *Class A television*, *LPTV*, and *TV translator* stations located in **Delaware** and **Pennsylvania** must file their license renewal applications.

Television Renewal Post-Filing Announcements - All *television* stations located in **Delaware** and **Pennsylvania** must begin their post-filing announcements in connection with the license renewal process, and continue such announcements on April 1 and 16, May 1 and 16, and June 1 and 16.

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

(Continued on page 11)

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397 is due to be filed by June 1, 2007, midway (*i.e.*, four years) through your current license term. Similarly, if your last renewal was due by October 1, 2003, then your 397 is due by October 1, 2007. That means that the first batch of 397's to be filed will be coming from radio licensees in Maryland, Virginia, West Virginia and the District of Columbia, whose 397's will be due by June 1, 2007. Next up will be North and South Carolina radio licensees, due to filed by August 1, 2007. And so forth. (We will include upcoming Form 397 filing obligations in our Deadlines section in future *Memos to Clients*.)

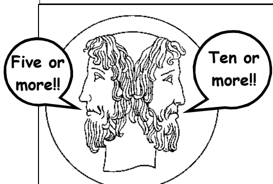
Who must file?

Although the Commission has done its best to try to muddy this question as much as possible (*see article below*), we believe that the answer is this: only television stations in employment units with five or more full-time employees and only radio stations in employment units with 11 or more full-time employees will have to submit Form 397 (together with copies of their Annual EEO Reports taken from their public files). Smaller stations (TV's with fewer than five, radios with fewer than 11) appear to be exempt from the filing requirement, although that could conceivably change once the final version of the form is adopted and released.

According to a member of the Commission's staff, the FCC will be examining each Form 397 carefully to determine whether the licensee has been complying with the rules. Any non-compliant broadcasters will be contacted by the FCC, and if the non-compliance is significant enough, the Commission will consider taking action.

The revised Form 397, as of this deadline, is still awaiting approval by the Office of Management and Budget, and is expected to be available electronically in April or May, which would be just in time for the initial June 1 deadline.

In theory this new filing requirement should not be a major hassle, as long as the licensee has been preparing its Annual EEO Reports and sticking them in its local public file, as required – and also, as long as those reports demonstrate that the licensee has been complying with the Commission's EEO rules. Still, if you have any questions about any of these requirements or if you would like to doublecheck to confirm that you've been doing things the right way, you should get in touch with the FHH attorney with whom you normally work.



The hobgoblin of little minds

FCC Sends Mixed Signals About Who Has To File Form 397

Who exactly is supposed to file Form 397? Let's take a look at the form itself, as the FCC first released it in 2002.

That form contains the following yes/no question:

> Does your station employment unit employ fewer than ten full-time employees if television or fewer than eleven full-time employees if radio?

After you have answered that question by checking off the "yes" or "no" box, the form says,

> If yes, you do not have to file this form with the FCC.

So that seems to say that the only folks who have to file anything at all are TV station employment units with ten or more full-timers and radio stations with 11 or more full-timers. So far, so good.

But then the form says,

> However, you have the option to complete the certification below, return the form to the FCC, and place a copy in your station(s) public file. You do not have to complete the rest of this form.

That seems to be inviting people who ***don't*** have to file the form to go on ahead and file it anyway. Like that would ever happen . . .

And then – still in the same paragraph, mind you – the form says,

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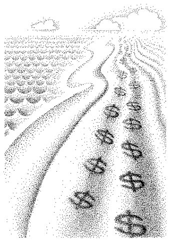
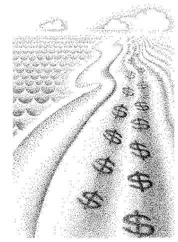


Streaming update

Deadline for Filing Streaming Reports Still Up In The Air



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

In the Brave New World (well, maybe it's not *that* new anymore) of Internet streaming, many daunting chores confront the would-be streamer. If you doubt that, check out the October, 2006 *Memo to Clients*, which catalogued a long list of regulatory requirements imposed on radio stations simulcasting their over-the-air signal on the Internet. Those requirements include calculation and payment of potentially hefty royalties as well as the possible need for playlist restrictions to bring the streaming content into compliance with the Digital Millennium Copyright Act. More recently, last month's *Memo to Clients* provided a listing of the various forms that come into play in paying royalties for Internet streaming.

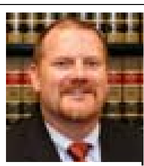
Probably the most-frequently-asked-question is "when do I file these quarterly reports"? The answer is "not just yet."

But when you get right down to the real nitty-gritty, perhaps the requirement that most terrifies Internet radio station personnel is the recordkeeping requirement. The thought of compiling nearly three years' worth of playlists with all of the obscure information that has to be reported, and then producing quarterly reports dating back to April 2004 in the hypertechnical form and elaborate organizational format required by SoundExchange, Inc. (the ASCAP/BMI of the streaming universe) has many re-thinking their decision to stream.

We continue to receive calls regarding the recordkeeping rules. Probably the most-frequently-asked-question is "when do I file these quarterly reports"? The answer is "not just yet."

The rules establishing the filing format for playlist reporting were released by the Copyright Office last October. Those rules seemingly dotted the i's and crossed the t's with respect to the minutiae of reporting – a May, 2004 decision had already established the basic information that must be reported, but left open the manner in which it was to be submitted.

But *mirabile dictu*, the new rules omitted one important factor: the filing date for each quarterly report! Without a filing date, there is no requirement to file at all. The Copyright Office has said it expects to publish another final rule setting the deadline for the filing of all quarterly reports back to April 2004 and for each quarter going forward. The smart money figures that the deadline will be something like 45 days after the end of the quarter to which the report pertains, but we won't know for certain until the Copyright Office has spoken. We will notify clients when this rule is published and the recordkeeping requirement transforms from inchoate concept to grim reality.



Joe Di Scipio

Joe Di Scipio Named Member, Jeff Gee Named Senior Counsel

Jeff Gee

FHH is pleased to announce that, as of January 1, Joe Di Scipio has become a member of the firm, and Jeff Gee has become a Senior Counsel.

Joe, who joined the FHH team in August, 2005, is a 1995 graduate of Syracuse University College of Law. He also holds a masters degree in public administration from the Maxwell School of Citizenship at Syracuse, and a B.A. (*magna cum laude*, thank you very much) from the University of Denver. Before law school, Joe was an FCC field agent and, after law school, he served as an attorney in the FCC's Compliance and Information Bureau and the Common Carrier Bureau.

Jeff has been with FHH since April, 2005. He is a 1995 graduate of Syracuse University, where he majored in Policy Studies, Political Science and Writing for Television, Radio & Film. He received his law degree from Georgetown University in 1998, and has been practicing communications law since. While a student he interned for an Illinois State Senator, Dean Witter, the U.S. Department of Justice, the British Broadcasting Corporation and the Renaissance Entertainment Corporation, where he worked as an actor, musician and stunt performer.

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

Updates on the News

***Show-and-tell at the FCC* –** Don't panic, we have not abandoned the graphic which usually accompanies this page. But we thought you would want to see the kicky, hip and happenin' new logo which the Media Bureau has apparently adopted for itself. This appeared on the Bureau's Annual Report which was presented to the Commission recently. Every year the Commission stages an open meeting at which the Chiefs of the various bureaus introduce themselves to the Commission and explain to the Commissioners what the bureaus do, usually with PowerPoint presentations designed to keep things from getting bogged down in too much detail. (The PowerPoint motto: "Squeezing even the most complex content into ten words or".)

The Media Bureau's presentation consisted of 11 PowerPoint slides – actually ten, if you don't count the opening title slide. After the obligatory mission statement – which looks more like a job description than a commitment to a mission – there are some nifty charts and graphs (about cable rates and the price of cable programming), a slide with bullet points about three particular cable deals, a slide about "broadband", and then finally some broadcasting material. Some, but not a lot: two slides showing more spiffy charts about the progress of DTV conversion; one slide reflecting the total number of digital terrestrial radio stations which have been licensed; and then a table showing the total number of broadcast stations which have been authorized. The final page refers to the on-going ownership proceeding, which is summarized in 28 words spread over five bullet points (our favorite, separately bulleted, point says in its entirety: "Large Public Record Generated"). You can see for yourself at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269542A1.pdf.

***Meet the new boss . . .* –** And speaking of the Media Bureau, Chairman Martin has named a new Bureau Chief. She is Monica Desai. Ms. Desai has been at the Commission since 1999, serving in a variety of positions, none of them in the Media Bureau.

First things first* –** And speaking of the ownership proceeding, we've seen some movement of late. Not progress, mind you, but movement nonetheless. First, the Bureau has posted on its website a boatload of reports and studies, including final versions ***and drafts, relating to media ownership, minority ownership, localism and related issues. (If your insomnia is acting up, check them out at http://www.fcc.gov/ownership/additional.html.) Chairman Martin requested that all this material be posted, even though the Commission assures us that the "FCC is legally entitled to withhold certain internal documents" from public disclosure. Our guess is that Chairman Martin's excess of candor may have something to do with the previously-unreleased draft study which popped up during a Congressional hearing last summer, presumably much to his embarrassment.

And second, Chairman Martin has reportedly assured some senators that the Commission will wrap up the localism proceeding ***before*** it wraps up the ownership proceeding. The localism proceeding (MB Docket No. 04-233, if you want to track it down in the FCC's system) is an inquiry started under former Chairman Powell. At last check, the docket files show a total of almost 83,000 documents already in the file of the proceeding, and we have seen no indication that the Commission is actually gearing up to do anything with them. But we can apparently be confident that something will be in fact be done with them before the ownership proceeding gets resolved – which probably says something about when we might expect to see the ownership proceeding closed out.

***FM freeze thaws* –** The freeze on minor modifications to FM stations has been lifted as of January 19, which also happens to be the effective date of the new FM allotment procedures. So now you can file for community of license changes through minor mod applications in most situations where, previously, you would have had to seek a rulemaking. If you decide to throw in an application, be alert that there are some additional showings required in the newly-revised Form 301.

***The fat of the land* –** Proving that it really has abandoned the notion of just being a traffic cop for spectrum users, the FCC has initiated a Task Force on "Media and Childhood Obesity: Today and Tomorrow". Aimed at what Commissioner Tate refers to as the "societal problem" of childhood obesity, the Task Force is designed to "provide a forum for the public and private sectors to jointly examine the impact of the media on childhood obesity rates" and, possibly to come up with "voluntary recommendations" for addressing the problem.

Say what?* –** And here we thought Commissioner Copps was the go-to guy for all things decent and non-profane. In a speech he gave in January, he railed against broadcasters generally, asserting that the American people have a "right to programming that isn't so ***damned bad so ***damned*** often." Yoicks!!! Query: can we broadcast that?

FM ALLOTMENTS ADOPTED –10/19/06-1/19/07

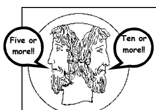
State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
OK	Hennessey	63 miles N of Oklahoma City, OK	249A	05-85	TBA
IN	Columbus	46 miles S of Indianapolis, IN	*228A	05-238	TBA (Non-commercial Reservation)
TX	Hale Center	35 miles N of Lubbock, TX	236C1	05-114	TBA
AL	Waverly	98 miles SE of Birmingham, AL	232A	05-79	TBA
GA	Smyrna	6 miles SE of Marietta, GA	231C0	05-79	Accommodation Reclassification

FM ALLOTMENTS PROPOSED –10/19/06-1/19/07

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
NY	Port Chester	6 miles SE of White Plains, NY	244A	06-193	Cmts-2/12/07 Reply-2/27/07	1.420(i)

Notice Concerning Listings of FM Allotments

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



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> If your station employment unit employs five or more full-time employees, if television, or eleven or more full-time employees if radio, you must complete all of this form and follow all instructions.

How's that again? That indicates that TV employment units with between five-nine full-timers ***are*** required to file the whole enchilada. But didn't the earlier language in the same paragraph say that the filing requirement was limited to units with ten or more full-timers? (Answer to that quasi-rhetorical question: yes.)

Okay, let's check the rules. Section 73.2080(f)(2) says the Form 397 requirement applies to all radio and TV stations in employment units of "more than ten full-time employees". Well, that seems to take care of that.

But wait, there's more. In its 2002 decision adopting the Form 397 requirement, the Commission said that it would "conduct mid-term review of television stations with five or more full-time employees and radio stations with more than ten full-time employees, using FCC Form 397".

So the Commission appears to have been consistent with respect to radio licensees – they have to file if their employment unit has more than ten full-timers. But on the TV side, the Commission has been less than constant. As best as we can tell, the FCC intends the Form 397 requirement to apply to TV stations in employment units with five or more full-time employees, despite what the Commission's rules and draft form say. But we also expect that the Commission will be issuing some instructional guidance on all this sometime in the next couple of months. Ideally, that will resolve any lingering questions.

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First Class

A word to the wise from Joe Di Scipio

With Spitzer Gone, What Price Settlement of Payola Inquiries?

By: Joseph Di Scipio
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discipio@fhhlaw.com

New York Governor elect Eliot Spitzer has closed his case against Entercom for alleged "payola" violations. We have written in these pages before that Spitzer was wrong – there was no payola and the legal grounds under which Spitzer stalked Entercom (and Sony BMG and Warner Music) were at best questionable. Entercom was the last to settle. Without admitting any guilt, Entercom agreed to contribute $3.5 million (down from the $20 million Spitzer reportedly originally sought) to the Rockefeller Philanthropy Advisors for use in the funding of programs aimed at music education and appreciation for the residents of the State of New York. Funny, that sure reads a lot like state-sponsored payola. We're just sayin' . . .

Now that Spitzer is done with his state-sponsored payola, we turn to the ongoing, independent FCC investigation. Whisperers in Washington indicate that the staff is close to a deal with the radio groups caught in the FCC probe. The deal is said to include setting aside airtime to promote "independently"-produced music. None of us here on the outskirts of Washington, D.C. (but still inside the Beltway) have any idea what "independently"-produced music is or what it will sound like, but we do know this is a very bad idea for about a zillion reasons (f'instance, how does one define "independently", how would a station prove compliance, how could the FCC enforce such a requirement – just to name a few problems that come immediately to mind). It would suck the FCC back into the quicksand of program regulation from which we thought the agency had successfully escaped (with the blessing of the Supreme Court, if you please) decades ago. Plus, it would force the Commission to supervise in some fashion not just the broadcast industry, but also the music industry, since regulation of the broadcast of "independently"-produced music would require the FCC to determine, and likely define in some sense, precisely what music is "independently"-produced and what isn't.

We will, of course, provide the details of any deal that is reached between the FCC and the probed radio groups in a future issue of the Memo to Clients