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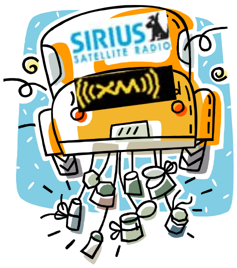
Memorandum to Clients

February, 2007 | *News and Analysis of Recent Events in the Field of Communications* | No. 07-02



Satellite services seek altered state

XM, Sirius Propose to Merge

But it's a long way 'til they can say "I do"

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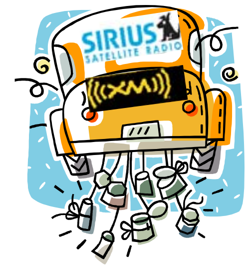

On January 19, XM and Sirius announced that they have agreed to merge the two satellite radio services, creating a "marriage of equals". Not surprisingly, several consumer organizations and the NAB have decried the proposed merger, citing concerns that the merged entity would have monopoly control over the satellite radio industry.

There are two main rallying calls against the proposed merger. First, when the FCC adopted rules in 1997 to authorize the satellite radio service, it included a rule prohibiting the ownership of both licenses by a single entity. Thus, as it stands now, the Commission could not grant a transfer of control application to merge Sirius and XM unless one of three things were to happen: either (1) the FCC would have to waive the rule, or (2) the FCC would have to formally repeal or revise the rule so that it would not prohibit the proposed merger, or (3) Congress would have to pass special legislation authorizing the merger. The odds that any of these might actually occur are far from clear, but it has already been reported that XM and Sirius have been on Capitol Hill talking to congressional staffers. And even if they hadn't, John Conyers (D-MI), Chairman of the House Judiciary Committee, had already scheduled a February 28 hearing on the proposal – the first in what could turn out to be a number of Congressional inquiries.

XM Satellite Radio
and
Sirius Satellite Radio
are pleased
to announce
their engagement
and impending nuptials
(if the FCC and DOJ say it's OK).

Even if the Commission were to conclude that the merger would be in the public interest (thus clearing the way for a waiver of the anti-merger rule), the Department of Justice would still get a chance to weigh in with respect to the potential antitrust aspects of the proposed merger—and the FCC will most likely hold off on announcing its views until the DOJ has shown its hand. The parties will have to file a notice with the DOJ because of the size of the transaction (as required by the Hart-Scott-Rodino Act), and the DOJ will have to find that the proposed merger of the only two satellite radio companies would not be anti-competitive.

For purposes of the antitrust evaluation, the identification of the relevant market will be important. Obviously, if the market is defined as the universe of satellite-based audio programming providers, the universe currently consists of two entities, XM and Sirius, and it would be reduced to one entity if the merger were approved. The antitrust gods would not likely look with favor on such circumstances. It's a safe bet that the NAB and consumer organizations

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The Scoop Inside

Plus ça change, plus c'est la même chose . . .

Congress 2007: MORA the same?

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The first "hundred hours" are over. And while the Democrats now in control of Congress continue to focus on war, peace and economics, media regulation can still evoke passionate discourse – and some legislative proposals, as well.

Of course, media regulation is usually a lofty sounding proxy term for broadcast regulation. After all, the First Amendment protections keep lawmakers out of editorial decisions unless the media outlet requires such federal property as the airwaves for its operation. Clearly, the Democrats are not about to license newspapers or web sites. But if they can counteract Rush Limbaugh – now that might be a goal the current Congressional majority might welcome, just as Newt Gingrich's crowd went after public broadcasting until Big Bird's dedicated squadron dive-bombed them into submission.

Take the "Media Ownership Reform Act," which would take on Rush by, among things, re-imposing the fairness doctrine. Known informally as "MORA," one of its prime sponsors, New York Congressman Maurice Hinchey, has been expounding on the beauty of forcing Limbaugh's stations to air views contrary to those of Rush's self-described ditto-heads. Of course, the Air America stations broadcasting Al Franken and other left-leaning counterpoints to the Ditto-crowd would also have to provide similar exposure to the views of others. So too would all those that have inherited the mantle passed from the now old "New Left", and even the stalwart "old 'New Left'" folks at such longstanding licensees as Pacifica Foundation.

MORA also aims to force increased "public service" obligations on licensee and re-impose certain multiple ownership restrictions – and those would not merely limit future transactions, but would also require divestiture of stations when multiple ownership arrangements, once legal, cease to meet current regulations. Yup – the end of grandfathering as we know it.

MORA was previously introduced back when the GOP held the reins of legislative power, so its previous incarnations were best described as quixotic. Today, while still not necessarily a high agenda item, MORA no longer appears as an impossible dream. That is especially so in view of the fact that Dennis Kucinich (D-OH), a presidential hopeful who has secured the chairmanship of the Domestic Policy Subcommittee of the House Government Reform Commission – a new subcommittee which will focus on communications issues – has been vocal on such issues, and has even made noises about trying to bring back the Fairness Doctrine.

But even without Congressional Democrats performing the full MORA, more political pressure exists today to get the FCC to increase regulatory activity – and increase it well beyond the agency's recent crusade to curtail dirty words and pictures.

Typical of the current rhetorical climate on Capital Hill, North Dakota Democratic Senator Byron Dorgan mixed it up with the FCC's Republican Chairman, Kevin Martin, at a hearing in early February. With Chairman Martin sitting just a gavel's-toss away at a hearing room witness table, Dorgan railed against loosening of ownership restrictions that the Senator says have "emasculated" the public interest.

The same guys once described by Republican Vice President Spiro Agnew as an "effete corps of impudent snobs" have apparently lost their testosterone. Chairman Martin retorted that public interest is made more "robust" by allowing market forces

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Focus on FCC Fines

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FCC fines 130 tardy stations – Last month's installment of this column reported on the absence of FCC fines over the holidays. The ho-ho-ho-holidays are over, and the FCC has wasted no time in making up for lost time. During the first three weeks of February, the FCC issued fines to no fewer than 130 different license holders.

The latest onslaught of fines was directed mainly at licensees who missed renewal deadlines for their station licenses. While your license may have an expiration date printed on it, FCC rules require broadcast licensees to apply for license renewal four months in advance of the expiration date. A whopping 72 stations were fined $1,500 apiece for filing renewal applications late. However, those 72 stations did file their renewal applications before their licenses expired.

Another 50 stations did not get around to filing a renewal application until ***after*** their licenses had expired. The expiration of the license triggered another violation, because between the expiration date and whenever the FCC got around to granting the licensee special temporary authority to continue operating, the licensee was operating without a valid license, which added another $5,500 to the ticket: those stations were hit with a $7,000 fine for their double violation. In all cases the FCC eventually renewed all of the licenses but will happily collect the fines for the missed deadlines.

Your renewal application gives you away – And just because you manage to get a renewal application filed on time, don't think that the FCC won't find some other reason to fine you. As part of a station's renewal application, a licensee must certify that it has complied with FCC regulations during the previous licensing term. As a result, renewal applicants must divulge whether their public files, children's programming and Equal Employment Opportunity programs have been properly handled throughout the license term. The self-certification forces licensees to audit their records and operational procedures.

In their renewal applications, a number of licensees from Iowa to California found themselves fessing up to the FCC that they did not run their stations according to the strict letter of the law. The FCC turned around and fined the stations. In many instances, the FCC also required the stations to implement internal compliance procedures to prevent the failures from occurring again.

Fines ranged from $3,000 to $20,000; the vast majority of the fines were in the five-digit neighborhood. Television, AM and FM licensees were all caught in the FCC's dragnet. The FCC spared no one as it set its sights on multi-station licensees as well as single station religious broadcasters.

Of course, the best way to avoid FCC fines is to always ensure that your operations and files are up to snuff.

The FCC does EEO audits, too – The FCC also has the authority to undertake audits of broadcasters' compliance with Equal Employment Opportunity requirements. Federal regulations require stations to undertake outreach efforts to encourage broad based hiring procedures by a company. To monitor compliance, the FCC randomly audits dozens of broadcasters each year. This past month, audits conducted back in 2005 resulted in a $20,000 fine to a Texas TV station which had not complied with EEO outreach requirements, and a $13,000 fine to a Georgia AM/FM combo operation for its EEO missteps. The Commission is continuing its random audit program, so any licensee who has not already been audited could be audited sometime soon. Forewarned is forearmed.

Note that the NAB recently issued a helpful reminder that, in order to qualify for EEO "outreach" credit for participation in joint activities with others (*e.g.*, other broadcasters, a state association, etc.), an individual station's participation must be "meaningful" . You can't just lend your name or provide money ; rather, the station and its personnel should be involved in the planning and implementation of the activity to get credit as a host or sponsor.

More than 5% of the problem is 100% of the liability – Several antennas were located on the roof of a Tampa, Florida, building when the FCC sent agents out to inspect the roof. While on the roof, the FCC found TV and radio transmitters which created Radio Frequency (RF) exposure on the roof which exceeded permissible levels. The FCC called up all of the stations who had towers on the roof and asked them to show up on the rooftop. Methodically, the FCC asked the stations to power down in order to see who was generating the RF problem.

The FCC decided that several of the transmitters were the

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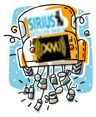

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opposed to the proposed merger will argue that DOJ's analysis should be limited to the satellite radio market. That limitation could be justified by citing differences in technology, delivery mechanisms and market structure (for one obvious example, XM and Sirius have paid subscribers, as opposed to broadcasters, who provide their service at no direct cost to the public).

But XM and Sirius will likely argue that the relevant market consists of all deliverers of audio programming to the public – a universe which would include XM and Sirius ***and*** all terrestrial radio broadcasters and, conceivably, some or all components of the MP3 industry. Sirius and XM could argue that their combined share of that much larger market is really quite small and should not be deemed to give them any excessive control of the market. When adopting the rules for the licensing of the service in 1997, the Commission did consider the impact of satellite radio on other audio-delivery services, so it is not too far-fetched to suggest that the parties will closely examine whether satellite radio competes with the other industries, and thus, should be considered part of the same competitive market. Of course, as our esteemed colleague Joe Di Scipio observes in his sidebar below, even if XM/Sirius were to prevail in this argument, broadcaster might ultimately benefit as a result.

Rumors and speculation about a possible merger of the two satellite radio companies have been circulating for several months. In fact, Chairman Martin was asked about the possibility in January – at which time he observed the "hurdle would be high, as the Commission originally prohibited one company from holding the only two satellite radio licenses". What a difference a month makes. Shortly after the formal announcement of the merger proposal, Chairman Martin issued a restatement of sorts, stating that any rule is open to modification – while not an absolute reversal of his earlier position, this latterday statement appears to be significantly more upbeat than his January version.

As noted above, it is likely that XM and Sirius will seek a waiver of the rule prohibiting the merger. In such a waiver request, the Commission requires the parties to demonstrate the grant of a waiver in this particular case will not undermine the purpose of the rule. When the rule was adopted in 1997, the Commission stated that they believed that there should be more than one licensee to ensure that subscription rates would remain competitive, and to provide diversity of programming voices. As such, XM and Sirius will be required to demonstrate how the purposes of the rule (competition, diversity) will be met by the grant of the merger, and how the grant of the waiver would be in the public interest. Presumably, the FCC would also invite comment from the public as well. In other words, the potential for delay here is substantial.

Most analysts put the odds of a grant by the FCC and the DOJ at 50-50. Mel Karmazin (Sirius' CEO) has said that the chances are better than 50%, and that he would not have gone to his board if he did not think he had a better than 50% chance. Whether this is just bravado or whether he had received promising advice from the FCC and DOJ, time will tell. However, it is likely that action on the proposed merger – either by the FCC and DOJ, or by Congress – will not occur until later this year, at the earliest.

A word to the wise from Joe Di Scipio

Can XM Be Sirius?

We have all read by now the various reports of the proposed XM/Sirius merger (including one in this issue of the *MTC*) and the prognostications of whether the merger will succeed. But I for one will not equivocate with a 50/50 chance of success prediction as others have. Put me down for "highly unlikely" on the chance of success at all, and "totally unlikely" on the chance the merger gains approval by the end of this year.

Although it's fun to predict the outcome of the proposed merger, the more meaningful discussion is the effect on broadcasters of the merger whether approved or denied. It is my view that either outcome would be a win for broadcasters.

If the merger is approved, that means that the Department of Justice and the FCC will have bought the arguments of XM and Sirius that the proper market to evaluate the merger is the entire audio delivery market, not just the satellite market. (Of course, the DirecTV and EchoStar folks tried the analogous argument on the video side and it failed, but presumably hope springs eternal.) If that "kitchen sink" market approach succeeds, this is a good result for the pro-consolidation broadcasters because the argument of what is the proper market would no longer be on the table.

It is important to note that the radio ownership caps are set by statute – so any change there would have to come from Congress. However, cross-ownership limits would likely`

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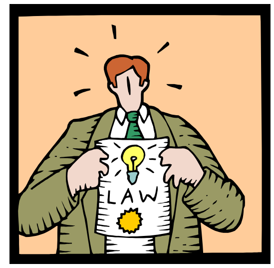

"Local" service from up high got you down? Maybe it's

Time to Call Your Elected Representative

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The announcement of an intended merger of XM and Sirius provides an excellent opportunity for radio broadcasters to speak out on one of the areas in which initial rules with regard to these satellite radio services have been disregarded: the provision of local traffic and weather content. XM and Sirius were originally prohibited from providing local traffic and weather information – since they were supposed to be providing a nationwide, ***not*** a local, service – but the FCC has already granted waivers that allow both of the satellite radio services to provide local traffic and weather to upwards of 20 markets each.

Rep. Gene Green (D-TX) has re-introduced a bill that would protect local broadcasters from these invaders from outer space. HR 983, the Local Emergency Radio Service Preservation Act of 2007, was introduced on February 12 and has been referred to the Committee on Energy and Commerce. The bill notes that it was originally understood that "digital audio radio satellite service licensees would provide only national programming" in order to protect a major competitive advantage owned by traditional radio broadcasters; it also notes that technologies exist that will allow satellite radio stations to increase the amount and scope of their local programming in the future. As a result, the bill directs the FCC to adopt rules which prohibit the transmission of different programming to listeners who are not in the same market – in other words, the same programming must go to all listeners at all times. The FCC is also required, however, to initiate a rulemaking to investigate further whether the satellite radio services can provide some form of local information, especially emergency information, without adversely affecting local over-the-air radio stations.

Over-the-air broadcasters should seriously consider contacting their Representatives to urge that he or she become a co-sponsor of HR 983.

This is the third time that this legislation has been introduced. Most recently, Rep. Charles Pickering (R-MS), joined by Rep. Green, introduced it as HR 998 in the 109th Congress (it was also introduced by Sen. Olympia Snowe (R-ME) in the Senate as S 2418). Though HR 998 did not move through Congress, it did have 139 co-sponsors, as opposed to the single co-sponsor (Rep. Pickering) that currently exists for HR 983.

Over-the-air broadcasters who are concerned about their ability to compete with satellite radio should seriously consider contacting their Representatives to urge that he or she become a co-sponsor of HR 983 and request that the bill be moved through the Energy and Commerce Committee and onto the House floor. Fletcher, Heald and Hildreth, P.L.C. can assist interested broadcasters in drafting a one-page letter that conveys this request.

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disappear due to such a broader market definition. Such a result could eventually lead to reducing the FCC's role in media ownership merely to that of a technical/interference traffic cop. This result is certainly possible because the FCC's current role in setting media ownership limits is based on the accepted "scarcity" argument – meaning spectrum is scarce, so the government has an interest and the right to impose policy considerations on the use of the spectrum. Once the market is defined more broadly than just the radio spectrum, the scarcity rationale strikes us as no longer valid.

If the merger is not approved, broadcasters also win. Why? Because the fact that the merger has been proposed at all tells us neither XM nor Sirius can survive on its own. And that's not us talking – that's how XM and Sirius are justifying their proposal. Technology has clearly passed satellite radio by. We know that not enough people (about 14 million people at last count) are willing to pay $12.95 a month to XM/Sirius for music they can get elsewhere for free or cheaply (at least not enough for either one to survive). Free over-the-air radio continues to get the job done. So does streaming music available on the Internet (in most cases the streams broadcasters are carrying on their web sites) and downloadable music to mp3 players. So, if the merger fails, so likely will XM and Sirius.

Either way, approval or no approval, it should be good for broadcasters.

120 shhhweet FM permits up for grabs

FM Permit Auction No. 70 to Begin March 7

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The FCC has put the final pieces in place to begin the auction of FM permits in Auction No. 70 beginning on March 7. On the block are 120 permits for stations located throughout the country. The opening bids established by the Commission for the permits range from a low, low $1,500 to a substantially pricier $200,000.

A total of 114 different bidders have submitted applications and payment to the FCC to participate in the auction. Twenty-three of those bidders have indicated in their initial filings that they want to bid on almost every market up for auction. However, those who selected all of the markets did not submit initial payments which would permit them to win all of them. This is because of the Commission's eligibility rules, which allow applicants to engage in gamesmanship by proposing to bid on all available permits, but then ponying up an initial payment sufficient to cover less than all. By doing this, the applicant is in a position to spread his bids around, jumping from market to market, in ways which may disguise what his true intentions are. If you have not participated in an FCC auction before but plan to do so in this go-around, you should be sure to consult with experienced counsel before jumping in.

The largest initial payment was from an individual who anted up $1,000,000 as an initial payment. Most bidders sent the FCC amounts between $10,000 and $100,000.

Of course, those initial payments merely buy the bidders a seat at the auction. Once the bidding starts, the sky is the limit on what any permit may sell for. Successful bidders do not have to submit funds to the FCC until after the auction closes.

The auction will begin with two rounds of bidding on March 7 and will speed up to four rounds of bidding the next days. FCC regulations prohibit most participants in the auction from discussing the auction amongst themselves. If you are an applicant, you should be ***extremely careful*** about ***not*** discussing the auction with ***anyone*** who could be involved in any way with a competing bidder. The Commission's anti-collusion rules are particularly strict, and the FCC has made clear that it intends to enforce those rules.

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freer reign.

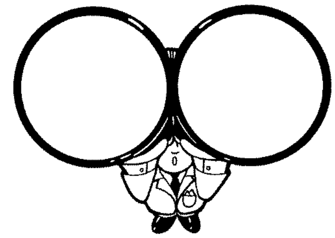
But all analogies to virility aside, it is clear that politicians of all stripes in many eras have calculated political benefit from attacking "the media". You might even call it a hallowed tradition that, like a college football cheer, creates emotional impact throughout the bleachers. After all, who doesn't feel that, at some time or another, "the media" have gone too far. This is true even if, like an ink blot test, what any individual sees in "the media" reflects subjective inner psychology much more than quantifiable, objective truth. Politicians are all for goodness, justice and community – and for forcing "the media" to act in the interest of their interpretation of such lofty goals.

Of course, the entertainment industry remains one of the Democrats' biggest and most reliable sources of campaign money. True, some parts of the entertainment community have interests on one side of the issue and others, such as those who hold licenses, may have interests on the other. But ultimately, in a world where even such leading Democratic presidential hopefuls as Hillary Clinton plan to forgo federal campaign money in order to tap into the copious amounts of private campaign money already chasing front-runners, it seems that broadcasting companies can keep political talk from becoming a regulatory walk by remaining deeply engaged.

With younger audiences getting their civics increasingly from new technologies instead of the mature broadcast medium, politicians may ritually go ballistic on the media powers-that-appear-to-be but, in reality, they too are well aware that their futures and fortunes will be made not by going ballistic on old media, but by going viral to reach core constituencies via the Internet.

While it makes good headlines to go after Rush, it may ultimately make more people happy to champion such causes as Net Neutrality. The broadcast deregulatory environment of the last decade is facing climate change. But it remains far from clear whether broadcasters will suffer more than the slings and arrows of outrageous rhetoric. The answer may lie not in the political stars, but in themselves, and how well the entertainment industries plays the political game under Washington's revised set of rules as the nation lurches toward the post-W era.

Report from the front of the line



New FM Allotment Rules Generate 134 Applications in First Round

By: *Lee G. Petro*
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As we have reported, the Commission adopted rules to change the process for AM and FM stations to change their communities of license. Previously, an applicant was required to file a petition for rulemaking, and run the risk that his simple change could be overwhelmed by some counterproposal involving allotments and/or reallotments over a wide area. Under the new rules, the applicant is permitted to file a minor modification application and supply sufficient information to ensure that the proposed change would serve the public interest. That application is "cut-off" – that is, immune to later-filed counterproposals – as of the date that it is filed.

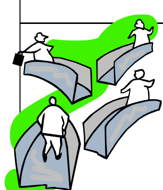
The first day for filing minor modification applications was January 19, and hundreds of applications were expected to be filed.

True so some expectations, it appears that there were at least 120 applications filed on January 19, with several more flowing in thereafter. The Commission has released a public notice in the Federal Register on February 14 listing the initial batch of applications (as required by the new rules); comments from the public on applications included in the first set of 134 applications contained in that public notice are due on April 16.

It is likely that these applications will be reviewed and preliminarily processed by the Commission's staff during the 60-day Federal Register Notice period. Assuming that there are no objections filed by the April 16 deadline, many of these applications should be ready to be granted a short time thereafter. The Commission's staff will be required to ensure that the proposed changes comply with the allotment principles once applied during the rulemaking stage, so it is possible that some applications – particularly those which present thorny questions, such as whether the proposed community is sufficiently independent from a nearby urban area – may not be processed as quickly.

Assuming that there are no objections filed by the April 16 deadline, many of these applications should be ready to be granted a short time thereafter.

If you would like to review the list, or if you have any questions relating to particular application, please let us know.



FHH - On the Job, On the Go

In February, **Frank Jazzo** attended the satellite industry's SPI Gala and Satellite 2007 convention in Washington, D.C.

Also in February, **Joe Di Scipio** lectured on "Negotiating the Deal" at the NABEF Broadcast Leadership Training Program session. Next month, **Joe** is scheduled to appear as a panelist at the Second Annual Communications Law and Policy Society Spring Symposium in Syracuse, New York. And **Joe**'s a busy guy, because in April, he will serve as a moderator at the 26th Annual ABA/NAB/FCBA continuing legal education program ("Journey to the Legal Center of the New Media World – Representing Your Local Broadcaster") in Las Vegas. He'll be on a Regulatory Compliance panel.

In March, **Lee Petro** will appear on several panels at the Calvary Chapel Radio Ministry Conference in Murrieta Springs, California.

Frank Montero has been named to the Advisory Board of *Radio Ink*'s Hispanic Radio Conference to be held in San Antonio, Texas, on May 22-23.

And sharing the spotlight as Co-*Media Darlings of the Month* this month are **Bob Gurss** and **Kevin Goldberg**. Bob was quoted in the *Wall Street Journal*, commenting on a proposed plan to improve public-safety communications. **Kevin** was the subject of an "up-close-and-personal" feature piece in *Washington Jewish Week On-Line Edition.*

Stealing a page from the Spitzer songbook?

Payola Settlement In The Works?

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It looks like the FCC may be entertaining the notion of proposing terms of a consent decree to Clear Channel, CBS Radio, Entercom, and Citadel for alleged payola violations. These supposed violations were initially uncovered by former New York Attorney General Elliot Spitzer, who threatened to sue a number of big record companies – and who ***did*** sue Entercom – claiming that they had violated New York business laws with their payola activities. As we have reported here over the last year or two, Spitzer's alchemy somehow managed to produce pure gold – in the form of several multi-million dollar settlements – out of the straw-like claims he started out with.

Now, according to a number of published reports, it appears the FCC may be trying to do the same thing to a number of big broadcast groups whose names featured prominently in Spitzer's various charges.

According to one report, an FCC-endorsed settlement would have the broadcasters involved in the deal donate several million dollars worth of airtime to "independently produced" music, and in addition make a cash contribution of another $3 million to an NAB fund for training to prevent future payola violations. In return broadcasters would not have to admit any wrongdoing.

[Editorial note: No, we don't know exactly what "independently produced" music is. And we don't know how the FCC might eventually define it. Nor do we know how compliance with some settlement-mandated "independently produced" music set aside could be reliably monitored or gauged. Nor do we know how such a set aside would work with respect to musical acts which start off as "independently produced" but then get seduced by those evil temptresses, the "big record companies". And finally, we also don't know why anyone at the FCC would even begin to think that it would be a good idea for the agency to get anywhere close to these questions.]

Another version of the settlement would involve a straightforward payment – in the range of $10-15 million – directly to the U.S. Treasury. This approach would avoid the questions apparently raised by some concerning whether the FCC has the statutory authority to require the proposed "donations" outlined in the first version of the deal.

Under both proposals, the broadcasters would have to implement a compliance plan for avoiding future violations of the payola rules. Presumably that would involve regular reminders concerning the scope and requirements of the payola rules, as well as imposition of routine monitoring for violations (through various means, including the time-honored method of requiring station staff to sign payola affidavits at routine intervals).

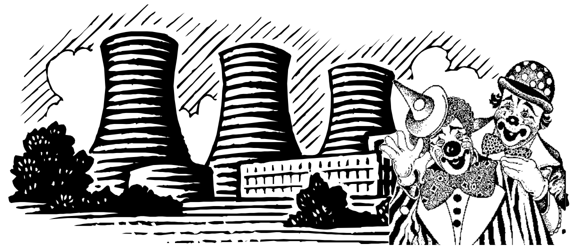
The fact that reports of the possible settlement are based on anonymous sources suggests that somebody, possibly inside the Commission, is trying to test-fly some of these settlement notions.

Of course, this is just the kind of issue that is ripe for political posturing and righteous indignation. Some think this is too good of a deal for broadcasters – like Senator Russ Feingold who wrote an open letter to Chairman Martin. Feingold would like to see an admission of wrongdoing by the broadcasters and a weekly airtime commitment for "independent" labels. Other groups – like the Future of Music Coalition – would go even further, asking for increased fines for future violations, third party review of broadcasting practices, filing playlists with the FCC, and required airing of "independent" music.

Bear in mind, now, that the FCC has not in fact taken ***any*** action here yet. These somewhat wild-eyed ravings are reactions to third-hand reports of what some people in the Commission may or may not actually be thinking. And, of course, no word has been heard from the broadcast companies who may or may not be willing to sign off on any such "settlement", even if the FCC formally were to make the offer.

The fact that any of this has made it into "published reports" – anonymously-sourced published reports, but published reports nonetheless – suggests that somebody, possibly inside the Commission, is trying to test-fly some of these settlement notions. While the broadcasters in question could in fact be willing, even eager, to put this whole mess of allegations behind them, it is far from clear that the type of settlement which has been described makes much sense . . .but then, you never know. Stay tuned for further developments.

Just say "d'oh"



We Have Met The Enemy, And He May Be Us

By: *R.J. Quianzon*
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Americans, jittery after September 11 and Hurricane Katrina, can now rest assured that crack troops from the FCC's new Bureau of Homeland Security will tackle any issue threatening immediate, instantaneous catastrophic loss of life and property in no more than a couple of years. As columnist Dave Barry would say, we're not making this up.

In December of 2004, a nuclear power plant applied to the FCC seeking authority to operate a 900 MHz mobile system (a walkie-talkie system) as part of its safety regime. The request was submitted in response to a series of orders from the Nuclear Regulatory Commission directing power plants nationwide to increase security and safety at nuclear power facilities. While the slow processing of applications is hardly a noteworthy occurrence, the potential side effects associated with the FCC's slow action in this instance are illuminating. The nuclear power plant needed a license for a new walkie-talkie system because its current walkie-talkies had the potential for "spurious actuations" at nuclear reactors.

Imagine Homer Simpson playing around on a walkie-talkie that keeps turning the nuclear meltdown button on and off.

The Nuclear Regulatory Agency has warned power plants that several events "have caused concern in the NRC staff" about the use of walkie-talkies at plants. More specifically, operations at 451-456 MHz seem to be the most troublesome. The NRC highlighted instances where walkie-talkie systems caused the shut down of cooling loops, spuriously activated a pressurizer, and tripped a differential relay. At Three Mile Island, the use of walkie-talkies triggered a false alarm warning of combustible gasses. The NRC surmises that solid state devices are picking up and amplifying walkie-talkie signals which then actuate the nuclear power equipment. Although this sounds suspiciously like the plot line for an episode of "The Simpsons"(imagine Homer playing around on a walkie-talkie that keeps turning the nuclear meltdown button on and off), it's not.

In its application to the FCC, the nuclear power plant notified the agency of the potential problems with the old frequencies and the security upgrade ordered by the NRC. In response, the FCC sent the power plant a form letter. The plant responded to the FCC form letter immediately and the FCC replied with another form letter. Unfazed even by the potential problems that "spurious actuations" at a nuclear power facility could cause, the FCC eventually approved the application after two years. The reactors' struggle with the FCC paperwork reminds us of the observation once made by famed rocket scientist Wernher von Braun: we can lick gravity, but sometimes the paperwork is overwhelming.

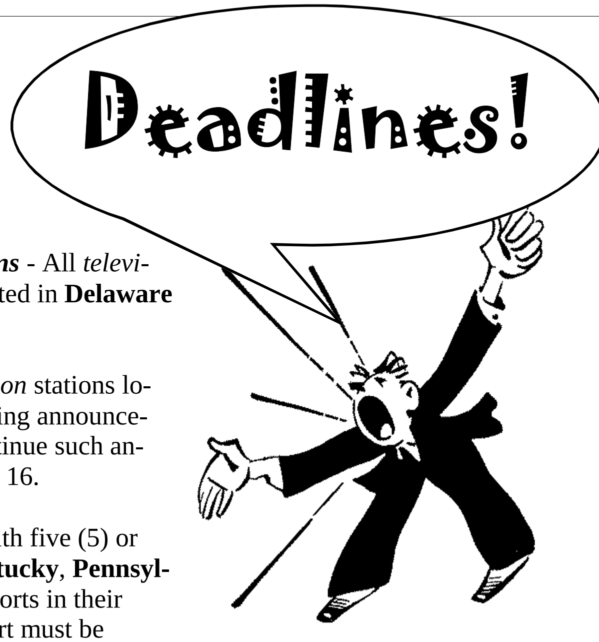
(Continued from page 3)

source of the excess RF and so they issued several fines. The FCC's policy is that if a station contributes ***more than 5%*** of the problem the station is on the hook. An FM station faces a $20,000 fine and an LPTV station is looking at a $25,000 fine.

Readers who operate at shared locations or antenna farms should be aware that the FCC will look at the totality of the problem at a site and then will decide who to fine. While an individual station's output may be marginal, that station's contribution to the site's overall RF may be enough to trigger liability.

Listener comes to the aid of actress – Typically, fines for broadcasting a telephone conversation are initiated by the person who unexpectedly gets a call from a radio or TV station. However, a listener in Florida wrote to the FCC to complain about a radio station calling up an actress without notifying her of the call.

A Tampa FM station phoned "Desperate Housewives" star Nicollette Sheridan to discuss a controversy arising out of a promotional spot that she had appeared in for ABC sports. Although the radio station told Ms. Sheridan that she was on the air during the conversation, FCC rules require that she be notified of the broadcast prior to the conversation ***and*** that she consent to the broadcast at that time. The station argued that Ms. Sheridan had not complained about the call. To which the FCC responded, so what? Prior notice and consent were required, and the station effectively admitted that it had not provided either. As a result, the station got spanked to the tune of $10,000 for broadcasting the phone call.



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 **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, **Tennessee**, and **Texas** 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 **Texas** 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 **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, and **Tennessee** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323 or 323-E.

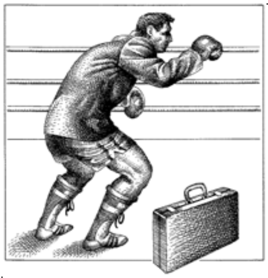
April 10, 2007

Children's Television Programming Reports - Analog and Digital - For all *commercial television* and *Class A television* stations, the reports on newly revised FCC Form 398 must be filed electronically with the Commission, and a copy must be placed in each station's local public inspection file. For the first time, separate reports will be required for both the analog and DTV operations.

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.

Website Compliance Information - *Television* station licensees must place and retain in their public inspection files records sufficient to substantiate a certification of compliance with the restrictions on display of website addresses during programming directed to children ages 12 and under.

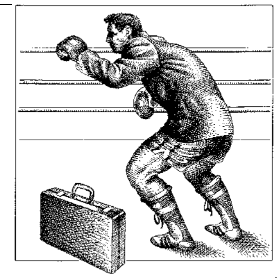
Issues/Programs Lists - For all *radio*, *television*, and *Class A television* stations, a listing of each station=s most significant treatment of community issues must be placed in the station's local public inspection file. The list should include a brief narrative describing the issues covered and the programs which provided the coverage, with information concerning the time, date, duration, and title of each program.



Super Sunday saves the day!

Sinclair and Mediacom: Ready To Make Nice

Terms of settlement not disclosed



By: *Steve Lovelady*
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Almost immediately after last month's issue of the *Memorandum to Clients* hit the newsstands, Sinclair and Mediacom settled their fight over retransmission consent compensation. Not coincidentally, the parties reached agreement late in the day on the Friday before the NFL Super Bowl game. After almost a month's absence, Sinclair's local stations were restored to Mediacom's cable system in time for Mediacom's loyal customers to enjoy the most-watched television event of the year. The new deal runs through December 31, 2009.

Financial terms were not disclosed, so we don't know how much Mediacom finally agreed to pay Sinclair for the right to carry Sinclair's stations. According to news reports, the payments could be as high as 50 cents per month for each cable household to which the Sinclair stations' signals are delivered. Part of the settlement also included Mediacom's withdrawal of an antitrust lawsuit against Sinclair.

Two weeks later, Sinclair announced quarterly financial results for the publicly-traded Sinclair Broadcast Group, and estimated that 2007 revenue from retransmission consent deals will be $48 million, up from $25 million in 2006. Times are so good that Sinclair's board voted to increase the company's annual dividend by 10 cents per share.

But Sinclair is still negotiating with another cable company many times larger than Mediacom – Comcast Cable. The current retransmission consent agreement between them has expired, but Sinclair gave Comcast a short-term extension that will end on March 1st.

Meanwhile, Mediacom blames FCC Chairman Martin personally for allowing the retransmission consent fight to escalate to the level it did between Mediacom and Sinclair. Mediacom's chairman, Rocco Commisso, believes that before broadcasters yank local stations from cable systems, the FCC has the power to step into such disputes and force the parties into binding arbitration. The FCC refused to take that step in the Sinclair/Mediacom fight, and merely urged the parties to voluntarily agree to arbitration. Senator Daniel Inouye of Hawaii, one of the original authors of the 1992 Cable Act (the federal law creating the whole TV retransmission consent system), backs Mediacom on this point. Mr. Commisso is quoted in *Multichannel News* as saying, "Just change the Chairman [Martin], and you'll see what different results you would have gotten."

The American Cable Association, an association of independent cable operators, has picked up this banner and is actively urging members of Congress to force the FCC to intervene when cable operators and local broadcasters reach an impasse in retransmission consent negotiations. Alternatively, the ACA wants federal law to change so that cable systems are not forced to carry local TV stations on basic programming tiers. In a statement issued shortly after the Sinclair/Mediacom settlement was announced, the president of the ACA, Michael Polka, claimed that Sinclair used federal laws to harm the cable consumers. Polka also got in a few digs at FCC Chairman Martin, too, saying that Martin "did nothing . . . to protect the same consumers the Chairman holds out when bashing cable about consumer rates."

Adventures in Lilliput

Livin' Large In Lo-Po Land

Grab-bag of goodies given out by eager-to-please FCC

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Back when it was first proposed, the low power FM service appeared to be destined to be little more than a wireless version of carrier current stations that used to (and possibly still do) serve college dormitories by transmitting signals through the building's electrical system. LPFM stations would have extraordinarily small service areas, virtually zero protection from interference, and no profit potential – since they could not be operated commercially ***and*** (at least as originally envisioned) they could not be sold. Plus, LPFM licensees were to be limited to non-profit organizations.

As it turns out, LPFM may be the most free-wheeling area of broadcast regulation just now. Want proof? Check out these three cases.

You may have thought that folks who operate pirate radio stations would not be greeted with open arms at the Commission. There again you would be wrong.

First, there's the story of the Hoyt Sherman Place Foundation (HSPF), an organization in beautiful downtown Des Moines, Iowa, which was created for the preservation of the Hoyt Sherman House, Museum and Auditorium. (Interesting factoid: Hoyt Sherman, as it turns out, was William Tecumseh Sherman's brother.) In 2004 HSPF got itself an LPFM construction permit. A week or two before the permit was set to expire, HSPF asked for more time. It got it. Then, several months later, it asked to transfer its permit to another Des Moines organization ("Employee and Family Resources, Inc."). A protest was filed by Florida Public Radio, Inc. (we're not making this up), which argued that assignments of LPFM permits were not supposed to be permitted absent extraordinary circumstances.

The Audio Division granted the assignment application. As the Division pointed out, while the LPFM rules originally adopted in 2000) prohibited – and continue to prohibit – assignments, in 2005 the Commission decided to think about that some more. And the Commission said that, while they're thinking about (which they presumably still are), they would authorize the Media Bureau to waive the prohibition if it was convinced that the circumstances so warranted. And sure enough, the Division was convinced here. But the basis for the proposed assignment was HSPF's claim that it couldn't afford to build the station, and as the objector pointed out, in its request for extension of the permit HSPF had apparently not mentioned anything about such an inability.

The objector also pointed out that, when the Commission authorized the Bureau to waive the rule back in 2005, it looked like the Commission was authorizing waivers relative to licenses and existing stations – not mere permits for unconstructed facilities. Since the Commission has made a big deal for almost a decade about how it does not intend to extend construction permits for full service stations, the objector's argument seemed to have some validity. No way, the Division countered – the waiver authority covered licenses *and* permits.

The bottom line here is that, even though the FCC originally said that LPFM permits could not be assigned, that's no longer the case, at least for the time being.

You may also have thought that folks who operate pirate radio stations would not be greeted with open arms at the Commission. There again you would be wrong.

Last June the Feds started proceedings to shut down an unauthorized FM operation (that sounds so much more genteel than "a pirate station") in Goldfield, Nevada. There apparently is no question but that the station in question was a pirate – and, unlike many pirates, he shut himself down. But then, in December (about six

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months later), he (or more accurately, a corporation of which Mr. Pirate is the 75% owner) filed a request for special temporary authority to crank the station back up. According to the "Mission Statement" included with that STA request, the purpose of the proposed broadcast service is "to promote 'Nationally recognized Goldfield, Nevada's History", as well as Western Nevada". It also said that it would "educate the current population the importance [sic] of fire safety as well as providing early Warning broadcasts in case of future fires or floods." In a cover letter of sorts, the applicant also mentioned the area's need for road condition information, as well as "reliable information on local law enforcement; public safety; school activities, as well as information for a large population of elderly people."

Note that no details about any of these asserted needs were provided.

Nevertheless, a month after the STA request was filed it was granted!

The FCC's letter (which you can read for yourself, if you don't believe us – check it out at: http://svartifoss2.fcc.gov/prod/cdbs/forms/prod/getimportletter_exh.cgi?import_letter_id=1580) merely says that the applicant said that "the station provides current road conditions, information on local law enforcement and public safety". (Apparently the Commission's staff didn't get the message that the station had ceased operation back in June.)

If we had to guess, we would say that the most persuasive aspect of the STA request was the letter to the FCC from Senator Harry Reid in support of the request. But whatever may have swayed the staff, this case now stands as precedent for the notion that LPFM STA's are available, even to pirates.

If we had to guess, we would say that the most persuasive aspect of the STA request was the letter to the FCC from Senator Harry Reid in support of the request.

And finally, there's the story of Kilgore, Texas. A noncommercial station there was providing classical music, but the licensee proposed to assign the station to a group that was not likely to continue to offer classical programming. The good citizens of Kilgore – well, at least 263 of the good citizens of Kilgore – objected to the assignment application, pointing out that the loss of the classical music format would be contrary to the public interest.

The Audio Division rejected those arguments handily – since the Commission has declined to consider programming formats in connection with assignment applications for decades, and has been specifically upheld in that regard by no less an authority than the Supreme Court. So the denial of the objection and the grant of the assignment was no big surprise.

But then the Division turned around and expressed concern about the "strong interest" that exists "to retain an outlet for [classical music] programming." And so, without batting an eye, the staff announced that, for the next 90 days, it would accept applications for new LPFM stations in Kilgore. It even noted that at least one channel (Channel 246) would work at certain coordinates the staff also provided – but the invitation to file new applications was not restricted to that suggested channel, so it's possible that more than one new operation may be proposed.

This is an extraordinary step for the Commission to take. LPFM applications have historically been restricted to limited "open window" filing periods. The opening of a specific, limited window for LPFM stations in a particular community is unprecedented, as far as we can recall. And while the goal of the special window appears to be to assure that a classical music service is still available in Kilgore, the Commission has not explained what will happen if two or more applicants file, and if one or more of them propose something other than classical music.

So the sleepy little LPFM service appears to be the place to be if you want immediate gratification. If there are rules in the way, they will be waived. LPFM is a happy place where everybody seems to get what they want.

Of course, the inescapable suspicion here is that the Commission has taken these actions – at least the Goldfield STA for sure, and possibly the Kilgore special window – because of political pressure. Whatever may be the reason for the actions already taken, the fact is that, having taken those actions once, the Commission may be hard-pressed to explain why it should not take them again elsewhere. And the ad hoc, here-and-there, authorization of service – whether by STA or by special filing opportunities – appears to be a recipe for disaster as far as the orderly processing of applications is concerned.

Update from Planet Kidvid

FCC reportedly ups the ante from 0 to $24 mil

Children's TV Problem May Cost $24 Million To Fix

FCC reportedly disagrees with licensee program descriptions

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Having squeezed thousands of dollars in fines and forfeitures out of broadcasters for such mundane matters as public file violations and late-filed renewal applications, the Commission is reportedly setting its sites on more lucrative turf. In particular, according to published reports, the FCC has decided to mine the children's programming field, and its first effort appears to have hit pay dirt big time. Chairman Martin was quoted in the New York Times as acknowledging that the Commission is gearing up to extract $24 million from Univision for children's programming problems at its 24 stations. The $24 million would apparently be paid to the government in connection with a consent decree which would lead to approval of the pending private buy-out of Univision, which is worth about $12 billion. It's probably not a bad guess to conclude that, given the value to the parties of getting the $12 billion deal closed, they likely viewed the $24 million as a relatively minor cost of making that happen.

> *By waiting for a target broadcaster to need some favorable FCC action, the Commission is in a position to extract the $24 million payment in a way which assures the avoidance of effective judicial review. Sure, it's a form of extortion.*

The basis for the imposition of the fine (or voluntary payment – often a consent decree will provide that the "guilty" party will decline to admit that it has violated any rules, but will nonetheless make a "voluntary payment" to the government) is said to be Univision's characterization of some of its shows as "educational". The Commission reportedly concluded that the programs in question – mainly telenovelas – were more in the nature of adult-oriented soap operas which could not appropriately be claimed as educational. Since the programs ran on all 24 of Univision's stations over a 116-week period, it's easy to see how the total cost – whether or not you characterize it as a fine – added right up into eight digits real quick.

If the published reports prove accurate – and, since they appeared in both the New York Times and the Washington Post, there is at least some reason to believe that they are likely true – a couple of observations are warranted here.

First and foremost, the Commission appears to be ready to engage in the substantive evaluation of children's programming. Historically, the Commission has tended to limit itself to enforcement of the excessive advertising and routine reporting provisions of the children's TV rules. By so doing, the Commission avoided having to make judgments about what should or should not properly be deemed "educational" programming. In the view of many, such judgments should be left to the discretion of individual licensees, and should not be second-guessed by unelected bureaucrats who have been unwilling or unable to provide a workable definition of "educational" for these purposes.

The FCC apparently disagrees, and is now willing to wade into the murky waters of substantive program evaluation as part of its enforcement of the children's TV rules. Because of this, all television licensees may wish to take a second or third look at their own children's programming to assure that it can withstand such governmental second-guessing.

Second, it bears noting that, by using the consent decree route, the Commission is effectively immunizing its evaluation of Univision's programming from effective judicial review. Since the $24 million payment is apparently going to be made voluntarily, it is virtually certain that nobody is going to appeal it, so no court will ever have the opportunity to look over the FCC's shoulder to confirm that it is acting lawfully and constitutionally.

This is not a minor consideration.

The children's television rules potentially thrust the FCC directly into sensitive editorial decisions relative to program content. Thus far, as noted above, the Commission has declined the opportunity to get involved in such decisions, but in the Univision case it appears to have overcome that reticence. But if the Commission is going to engage in content evaluation – an activity which raises clear First Amendment implications – such activity should be subject to judicial review to assure that the Commission is acting within proper constitutional limits.

By waiting for a target broadcaster to need some favorable FCC action – as the parties to the $12 billion Univision buy-out do – the Commission is in a position to extract the $24 million payment in a way which assures the avoidance of such judicial review. Sure, it's a form of extortion. The FCC might say to the Univision parties, "say, that's a nice little deal you've got working there. It'd be a pity if it cratered be-

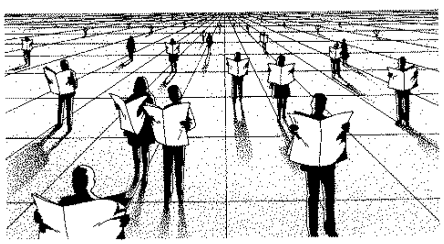
(Continued on page 16)

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

Updates on the News

For whom the FCC tolls **–** The FCC has advised that licensees whose renewal (and, in some cases, assignment) applications are being held up because of pending investigations concerning complaints relative to, *inter alia*, indecency may be able to get action on those pending applications if the licensees are willing to sign "tolling" agreements by which the licensees agree to waive the statute of limitations which would otherwise apply to the alleged violations.

Under the Communications Act, if a broadcast licensee violates a Commission rule, the Commission may fine the licensee. But to do so, the FCC must first issue a "Notice of Apparent Liability" ("NAL") outlining the nature of the alleged offense. The NAL can be issued at any time during the license term during which the alleged offense occurred BUT, if the FCC grants the licensee's renewal application before the NAL issued, then the FCC must issue the NAL within one year of the alleged offense or lose the opportunity to penalize the licensee for the alleged misconduct.



The "tolling" agreement provides that the licensee can get its renewal granted, but to do so it has to agree to give the FCC three years from the grant to issue any NAL. The bargain is pretty straightforward: the licensee gets its renewal granted sooner rather than later, but it gives up the protection that the statute of limitations would otherwise have provided.

In this situation, the FCC clearly holds the superior bargaining position. If the licensee does not opt for the "tolling" agreement, the FCC simply declines to act on its renewal application until an NAL is issued (or, alternatively, the FCC decides that no NAL is warranted). From the licensee's position, rejecting the "tolling" option merely leaves its position unchanged: its renewal will likely remain pending until the allegations have been examined. Accepting the "tolling" option increases the chances – but does ***NOT*** necessarily guarantee – that the renewal will be granted in the short term, but in return the licensee agrees to have the threat of an NAL hang over its head for three more years than would otherwise be the case.

If the licensee has some specific interest in getting its renewal granted sooner rather than later, the "tolling" approach makes sense. For instance, if the licensee is trying to sell the station, or is looking to re-finance, and as a result needs to have clean, renewed authorizations, then "tolling" should get them what they need. Whether or not tolling makes sense in any particular situation is something which the licensee should discuss with its counsel.

Program access rules under the microscope **–** The Commission is reviewing its rules which prohibit exclusive programming deals by cable operator-owned networks. Those rules are currently set to expire this October. The FCC wants to know how those rules have been working lately. Also likely to be looked at, but probably in a separate proceeding, is the proposed exclusive deal between Major League Baseball and DirecTV for an out-of-market baseball package. Senator John Kerry has questioned the deal, which would give DirecTV an exclusive over cable operators. He asked Chairman Martin to look into it, and the Chairman has reportedly agreed to do so.

Hey, isn't that near Three Mile Island? **–** If you happened to be in Harrisburg, PA, on February 23, you could have sat in on the FCC's third public hearing on media ownership issues. We're sure that a fine time was had by all.

For the birds (redux) **–** You may recall that, last year, the FCC dismissed a petition by a bunch of (for lack of a better term) birders who wanted the Commission, among other things, to require a detailed environmental analysis of just about every communications tower in the Gulf Coast Region. (*See* our April, 2006 *Memo to Clients*.) The birders have flown into court to challenge the FCC's decision, and the NAB, along with a number of other groups, has joined the fray on behalf of the Commission.

A small price to pay for excellence . . . **–** It's that time of year again, when the President sends his budget to Congress. This year, our fearless leader has proposed a whopping $313,000,000 to fund the FCC. Included in the activities to be covered by that amount would be "an outreach campaign to educate consumers about the impact and benefits of the transition to Digital Television". Additionally, we are assured (by the FCC's press release, which says so) that the money would also "allow the Commission to combat waste, fraud, and abuse, in the Universal Service Fund" and "strengthen management and oversight of the Commission's financial and accounting processes".

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First Class

Update from Planet Kidvid

(Continued from page 14)

cause of some programming problems", to which the Univision parties might respond, "gosh, we didn't realize there were any problems, but perhaps we can work together to figure out a way to make them go away", to which the FCC might respond, "well, perhaps if you were to make a $24 million contribution to the U.S. Treasury and agree to beef up your children's programming in ways we like – but only voluntarily on your end, of course – we might be able to get your buyout approved." And voilà, the FCC gets to dictate program standards ***and*** collect $24 million ***and*** strike the fear of multi-million fines in the rest of the TV industry, all without really getting its hand dirty.

Of course, you can't fault the Univision parties for availing themselves of this opportunity. While true blue First Amendment advocates might like to think that, given the opportunity, they would take a hard and fast stand based on traditional free speech principles, most First Amendment advocates would seldom be putting $12 billion of their own money at risk in so doing.

The take-home lessons are these: the FCC is prepared to engage in the substantive evaluation of children's programming; it will now have at least one precedent to point to when it goes after other licensees; that one precedent will in all likelihood not have been reviewed by any court, so the legitimacy of the FCC's approach to this area will still not have been firmly established.