FLETCHER, HEALD & HILDRETH, P.L.C.

Memorandum to Clients

April, 2007 | *News and Analysis of Recent Events in the Field of Communications* | No. 07-04

Another harbinger of global warming?

Noncom Thaw:

Long-pending MX Applications Move Ahead, New NCE-FM Window slated for October

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

Finally! After years – in many instances, a decade or more – of inaction, the Commission managed to take at least a preliminary step toward resolving the fate of almost 200 noncommercial educational FM applications, some of which have been languishing in the FCC's files since 1989. While the FCC's announcement of the tentative disposition of 76 mutually exclusive (MX) groups of applicants did not necessarily complete the process for those affected applications, it at least started the ball rolling. And, perhaps more importantly, the Commission seemed sufficiently satisfied with its progress in clearing out the backlog of NCE-FM applications that it also announced that a filing window for new and major change NCE-FM applications will be opened in October (*see* below for details).

Since this will be the first opportunity to file such applications in years, a large volume of applications may be expected. Those interested in filing in the October window should start as soon as possible to prepare the necessary applications.

The long, cold history of the NCE freezes

If you have been wanting to file for a new NCE-FM station (or a major change to an existing NCE-FM station), you've been out of luck since 2000. That's when the Commission announced that it would put a freeze on such applications. But the cold truth about NCE-FM freezes extends well before 2000.

The problem started in the early 1990s, when the Commission's comparative hearing process was tossed out by the Court of Appeals because the process was arbitrary and capricious. That left the FCC without a mechanism for deciding among MX applications. Accordingly, since 1994-1995, new and major change NCE-FM applications which were MX with each other have not been processed.

The Commission tried, without success, to come up with alternatives to the comparative process, but it was not until 1997 that Congress came to the rescue by authorizing the auction of broadcast spectrum. Unfortunately for NCE-FM applicants, however, the auction option did not help them, as Congress exempted NCE-FM spectrum from the auction process.

Finally, in 2000, the Commission adopted a "points system" pursuant to which each MX NCE-FM applicant is required to file a showing relative to five relatively narrow questions, with a certain number of points to be awarded to each applicant based on its showing. (*See* below for further discussion of the points system.) While the adoption of that system gave hope to the long-stalled NCE-FM applications (as of 2000, there were more than 500 NCE-FM applications pending), the wheels of the FCC grind slow. Reconsideration of the system was sought, and an appeal was ultimately taken. The FCC won that appeal in May, 2004.

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The Scoop Inside

The oracle speaks, sort of

FCC Provides Guidance On New FM Application Processing Approach

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

In November, 2006, the Commission adopted rules to permit certain community of license changes to be sought through minor modification applications, rather than through the far more cumbersome and time-consuming rulemaking process which had previously been *de rigueur*. One anticipated benefit arising from this change is the elimination of the risk of counterproposals. In the rulemaking context, a simple proposed channel change could (and frequently was) hijacked by counterproponents, to be combined into a larger proceeding that would redraft the channel allotments covering vast geographic areas. By avoiding that pitfall, the Commission hopes for a more rapid roll-out of changes to serve the public interest.

When it released its decision last November, the Commission promised to release, before the effective date of the new rules, a helpful explanatory public notice to guide prospective applicants in their effort to jump through all the freshly-minted hoops. The rules became effective on January 19th – but no public notice was released. As winter snows turned into spring nor'easters, we all waited patiently for the public notice. (Reports are that the public notice was lost in the vortex that exists between the 2nd and 8th Floors at the FCC.)

On April 10th, the Commission released the long-awaited public notice. As a general matter, it reminds everyone that all minor modification applications require a filing fee to be submitted, and all community of license changes require the submission of a schedule demonstrating that the proposed change would serve the allotment principles outlined in Section 307(b) of the Communications Act. The notice also provided a number of illustrative examples of situations which potential applicants might encounter. We thought it would be helpful to highlight a few interesting examples for future planning purposes.

First, the Commission will ***not*** permit a change of community of license and a non-adjacent channel change at the same time. Instead, a licensee *may* file a minor modification application to change channels *first*, and then upon commencement of program tests and the submission of a license to cover application, the licensee may submit a new minor modification application specifying the new community of license.

Second, if there are involuntary channel substitutions involved, the Commission will first require the submission of the triggering minor modification application, and then, only if an order to show cause is released, will the target of the involuntary substitution be required to submit a minor modification or license application. If a rulemaking petition for a new allotment is involved, then it must be filed with the triggering minor modification application, and each must reference the other.

Third, if a winner of a new FM allotment in the recent auction seeks to change the community of license, it must submit a complete construction permit application (including the auction certifications, a 307(b) Showing, and the filing fee for a new FM station), and file it in accordance with the post-auction closing public notice. Additionally, any coordinated filings with other licensees, or involving co-owned stations, including upgrades, downgrades, community of license changes, or petitions for new allotments, ***must*** be filed ***on the same day***, and ***must*** reference one another.

Finally, if an AM licensee or permittee seeks to change the community of license of a

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Fletcher, Heald & Hildreth
A Professional Limited Liability Company

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

Supervisory Member
Vincent J. Curtis, Jr.

Co-Editors
Howard M. Weiss
Harry F. Cole

Contributing Writers
Anne Goodwin Crump, Joseph Di Scipio, Jeffrey J. Gee, Kevin M. Goldberg, Mitchell Lazarus, Patrick P. Murck, Lee G. Petro, R.J. Quianzon, and Michael Richards

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Focus on FCC Fines

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

FCC to TV licensees: "Tsk, tsk" -- Readers may recall that the February installment of this column told the tale of broadcasters who admitted mistakes to the FCC in renewal applications and faced thousands of dollars in fines. This month, the FCC has taken a different approach. Rather than taking away the broadcasters' toys (or thousands of dollars), the FCC has decided to sternly tell broadcasters that they shouldn"t make mistakes with children's programming.

More than 20 television stations across the nation were admonished by the FCC for violating children's television programming rules. Those lengthy and detailed rules limit the amount of advertisements and the types of advertisements that can be aired during children's television shows. The rules also require stations to maintain logs of their kids' programming and take affirmative steps to alert the public to the availability of information about that programming at the station. As part of their renewal applications, television stations must certify that they complied with the rules and report any violations.

Many stations checked the box on their renewal form to alert the FCC that there had been violations of the rules. In some instances, the violations involved showing a mere second of a character from a program during a related commercial; in other cases, stations failed to announce that they were keeping a public file with children's programming information. Several of the cases involved a public file which was not complete because it did not contain the required children's programming information. In all of the instances, the FCC chose merely to admonish, rather than fine, the stations.

The admonitions consist of a sternly worded letter from the FCC telling the station that they violated the rules. Notwithstanding the fact that the stations were well aware of the rule violations – after all, it was the station's themselves who voluntarily reported the violations to the FCC in the first place – admonishing the station allows the station to move ahead without paying a fine. The choice by the Video Division of Media Bureau to admonish the stations is in contrast to the actions taken by the Enforcement Bureau (and the Audio Division of the Media Bureau, for that matter) for very similar violations. Both Enforcement and Audio have made a habit over the past year or two of hitting licensees with thousands of dollars in fines for similar record-keeping lacunae. (If you don't believe us, check out the next item, below.) The disparate treatment of similar transgressions seems at least arguably arbitrary and capricious. It will be interesting to see whether any aggrieved licensee elects to ask the Commission about that disparity.

Fines for public file violations – The Enforcement Bureau came down hard on stations in Alabama, Texas and Nevada for not having complete public files. The Nevada station got stuck with a $6,400 fine for, among other things, not having children's programming materials for several quarters. The FCC's Enforcement Bureau noted that in other cases – like, say, the 20+ cases reported above – the stations self-reported their violations to the FCC. In this case, the FCC found the missing paperwork while conducting an inspection. The FCC gave the station a break for being a first time offender but still hit it with a significant fine for some of the very same violations for which other stations were allowed to skate with a mere admonition.

Three Alabama stations are looking down the barrel of a $12,000 FCC fine order for failing to maintain their public file. An FCC agent showed up at the shared main studios of the station and asked to see the public file. The owner of the station handed over a single folder containing FCC licenses, applications, reports and other documents. The FCC noted that its rules require a separate file for each station – but the FCC did not fine the station for that. Instead, the FCC agent asked for additional information from the station owner. The station reports that its owner was nervous because of the inspection and did not know what the agent was asking for and therefore did not produce the materials. The FCC wasn't buying what the licensee was selling, though – mainly because the FCC agent gave the owner examples from the station's own public file of what he needed to see, so the owner could not possibly have not known what the agent was after.

Finally, a Texas station was hit with an $11,000 fine for public file violations and for operating a two-tower directional AM station from a single omni-directional tower. The operation of the station with an unauthorized antenna set-up speaks for itself and accounts for the majority of the fine. The public file violation is worth reviewing as the station claimed that it really did have all of the materials that should have been in the public file – it's just that those ma-

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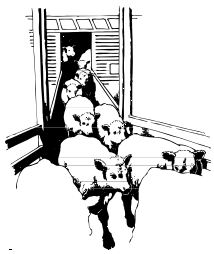
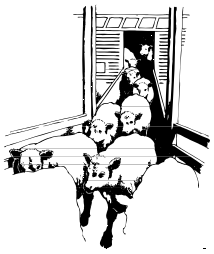


On the march toward February, 2009

Movement on Must-Carry and Multicast



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

As the February, 2009, transition to all digital television broadcasting approaches, two separate proposals are being reviewed by the FCC that may change the relationship between cable operators and TV stations. In one proposal, cable operators would be required to carry local television in both analog and digital after the February 2009 transition. In a second proposal, independent programmers would obtain "must carry" rights on cable systems by leasing spare "multicast" digital streams from local television stations. Both proposals have drawn widespread interest from broadcasters and widespread condemnation from cable operators.

Under current rules, cable operators are required to carry only the analog signal of local TV broadcasters. TV stations' digital signals have no must carry rights unless the station is already operating all-digital, and, even then, only a single, primary programming stream will be entitled to mandatory carriage. The two recent proposals would change this situation, opening the door to significantly increased carriage obligations for cable operators and increased carriage opportunities for broadcasters and independent programmers.

The dual carriage proposal is championed by FCC Chairman Martin, who has earned a reputation as being less than friendly to the cable industry.

The first proposal addresses the question of how digital-only television stations will be made viewable by analog cable subscribers after the transition. The FCC announced this proposal in its April 25th meeting, although actual text of the proposal was not available as of this writing. According to the FCC's news release and various trade press reports, the proposal would require that cable systems that have not converted to an all digital system carry local TV signals on both the analog and digital tiers to ensure that analog cable subscribers can continue to view their local broadcasters. Alternatively, the cable operator could carry the station solely in digital but provide analog customers the converters necessary to view digital signals.

Boosters of the plan argue that without a dual carriage requirement, those cable subscribers that lack a digital cable box or a DTV cable-ready TV could lose access to local broadcast stations. Cable operators, however, have blasted the plan, arguing that such a requirement would effectively force subscribers to rent digital set top boxes they might not want. Smaller cable systems also expressed the concern that they don't have the capacity to offer broadcast stations on both analog and digital without losing other programming.

The dual carriage proposal is championed by FCC Chairman Martin, who has earned a reputation as being less than friendly to the cable industry. At least two other FCC Commissioners, however, voiced reservations about the proposal. Democratic Commissioner Adelstein noted that the FCC previously rejected dual carriage proposals and called for a more complete public vetting of other alternatives before focusing on the dual carriage option. Republican Commissioner McDowell also suggested that, at this stage in the process, building a more complete record regarding marketplace solutions would have been preferable to putting forward specific proposals. McDowell also questioned whether the FCC possessed the necessary authority to require dual carriage. Democratic Commissioner Copps's statements on the proposal were generally positive. Republican Commissioner Tate's statement was not available as of this writing.

With respect to the multicast proposal, FCC Chairman Martin has proposed that independent programmers should be allowed to lease "multicast" digital streams from local television stations. In return for complying with many of the same public interest obligations imposed on commercial TV stations, the independent programmers would have the right to require local cable operators to carry their programming stream. Martin is promoting the plan as a way to increase media diversity by giving minorities, women, and small business a way to obtain the exposure of cable carriage without the high costs of full TV ownership. The FCC has not officially released the proposal for public comment yet. Thus, the details of the plan are far from certain. In public statements, however, Martin suggested that programmers would need to meet certain eligibility criteria to quality. The other FCC Commissioners have voiced tentative but positive reactions to Martin's plan.

While neither the multicast proposal nor the dual carriage proposal is certain to pass, it does seems certain that some change in the current status quo will be needed to avoid the loss of local broadcast service after the digital transition. February, 2009, is closer than you think.

White space: The Final Frontier

ISO: Reflections on Reception Rejection Connection

By: Mitchell Lazarus
703-812-0440
lazarus@fhhlaw.com

The FCC has requested comment on a technical study it recently conducted as part of its "white space" proceeding. Readers just in from Neptune will want to know this is the FCC's attempt, with prodding from Congress, to allow wireless devices onto the several TV channels that are vacant in every local area. These typically show up as white spaces on a map of channel usage.

The possible coexistence of TV and wireless signals raises two distinct technical challenges. Most of the attention so far has centered on the "same-channel" issues – the problem of keeping wireless devices off a TV channel being watched nearby. The FCC has laid out a number of possible solutions to this problem. White-space advocates assure us these will be completely effective, while opponents predict massive interference to TV reception.

Equally important, though less discussed, is the question of interference from an adjacent channel. Assume a wireless device transmits on, say, Channel 23, which is free of TV stations (we will suppose) for hundreds of miles around. Suppose further that a viewer next door is watching a program on Channel 24. Considering these are different channels, one might expect interference between them would not be a problem. Alas, spectrum issues are rarely that simple. A receiver always picks up some signal from the next channel over. Especially if the "desired" incoming TV signal on Channel 24 is weak, and the "undesired" wireless signal on 23 is strong, the TV viewer may experience visible interference.

The severity of adjacent-channel interference depends largely on the quality of the TV receiver. All receivers reject unwanted signals to some extent, but none does so perfectly. In principle, one could manufacture a receiver with any desired level of adjacent-channel rejection. But better rejection requires more circuitry, and that adds cost. The TV receiver industry being highly competitive, manufacturers are understandably reluctant to spend more on adjacent-channel rejection than they have to. Here they are aided by an FCC rule that requires TV stations on adjacent channels to be spaced well apart. This reduces the strength of the adjacent-channel signals, letting manufacturers get away with relatively poor rejection. But rejection good enough to deal with a far-away TV signal may not be adequate to screen out a wireless device across the street.

To assess the magnitude of the problem, the FCC lab in Columbia, Maryland carried out extensive testing on the adjacent-channel rejection (and certain other properties) of eight consumer digital TV receivers. The results make up a fat book (200+ pages) of tables and graphs. (You can check it out in its entirety at http://www.fcc.gov/oet/info/documents/reports/DTV_Interference_Rejection_Thresholds-03-30-07.pdf.)

Adjacent-channel rejection good enough to deal with a far-away TV signal may not be adequate to screen out a wireless device across the street.

Despite its volume, the report offers no conclusions. In particular, the author declines to judge whether the data show white-space operation is perfectly compatible with adjacent-channel broadcast TV, a complete disaster, or something in between. To help make that determination, the FCC has asked for the public's take on the data. Given the strongly polarized views that have characterized every other aspect of this proceeding, a swift consensus on the adjacent-channel problem seems unlikely. Perhaps hoping to limit the influx of responsive comments, the Commission imposed a tight 30-day comment period for those wishing to chip in their two cents' worth – and since the initial notice of the deadline was issued on March 30, that deadline is April 30. But reply comments may be filed until May 15, 2007.

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facility that was obtained pursuant to a dispositive 307(b) preference, the applicant must demonstrate that the proposed community is comparatively superior to those applications in the original pool of mutually-exclusive applications.

As the Commission notes in the Public Notice, we would be remiss in not mentioning that these examples are not binding precedent, but merely offered to provide guidance.

*What goes up **can** go down!!!*

Proposed 2007 Reg Fees: Trending Down

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

The Commission has released its Notice of Proposed Rulemaking on the Assessment and Collection of Regulatory Fees for Fiscal Year 2007. Are you sitting down? Contrary to the trend of the last several years – and contrary to the conventional wisdom that the only direction that such fees take is up – the proposed fees show a significant ***drop*** in the majority of categories. The list of broadcast-related fees (which would be due for payment later this year) is set out on the next page.

In the 61 categories of proposed fees listed in the accompanying table, only nine have been increased over last year's, while a whopping 32 have been reduced and the remaining 20 remain unchanged.

The big winners appear to be licensees of Class B, C, C0, C1 and C2 FM stations. The proposed fees for such stations in all markets declined by as much as 6.4%. AM Class A and B stations also declined for the most part (except for Class A's serving 75,000 or fewer people). AM Class C and D stations held firm at last year's levels, although the fee for all AM CP's would increase a mere $5, from $395 to $400. FM CP's would be unchanged.

Class A, B1 and C3 FM licensees serving more than 75,000 people would get hit with modest increases (under 2%).

Fees for TV licenses took a dive, from about 2% to almost 6% (in the case of VHF's in Markets 26-50), *except* for UHF stations in Markets 11-25 and VHF stations in markets below 100 – their fees are proposed to go up by just under 2%. Perhaps signaling the Commission's eagerness to "encourage" TV construction permit holders to build out their facilities, the fee for such permits would skyrocket by more than 50%, from $3,400 last year to a proposed $5,125 this year.

Since the proceeding is still open, the payment window has not yet been set. Historically, reg fees are due to be paid sometime between mid-August and the end of September. The Commission is expected to announce the deadline sometime this summer, after comments have been submitted and considered. We'll let you know when it does.

As usual, fee payments must be accompanied by a completed FCC Form 159 (Fee Remittance Advice). Fees can also be paid on line (in which case you can get the FCC's electronic filing system to generate a Form 159 automatically – otherwise, you will need to know the payment type code and other information for the particular fee you are paying). We will, of course, be happy to assist you in the filing of your fee(s).

*Under the "red light" system, a licensee which fails to pay the required reg fee is "red lighted". When that occurs, the licensee will **not** be granted **any** new authorization – including grants of assignment/transfer applications as well as new permits or licenses – unless and until the "red light" is cleared either by payment of the outstanding fee or the making of appropriate arrangements with the Commission for such payment.*

Note that you can expect to get hit with a 25% late payment fee if your reg fee is not received by the Commission prior to the deadline they will be establishing. That can amount to a hefty penalty in many cases, so it is prudent to take care to make timely payment.

And as we have reminded readers for a couple of years already, timely and full payment of reg fees is particularly important in light of the Commission's "red light" system. Under that system, a licensee which fails to pay the required reg fee is "red lighted". When that occurs, the licensee will ***not*** be granted ***any*** new authorization – including grants of assignment/transfer applications as well as new permits or licenses – unless and until the "red light" is cleared either by payment of the outstanding fee or the making of appropriate arrangements with the Commission for such payment. If a delinquent licensee files an application of any kind, that application will be dismissed if the delinquency is not clear up within 30 days. In view of this, we urge everyone who is subject to regulatory fees to be sure to get their payments made in full and on time.

Comments on the Commission's proposed regulatory fees are due to be filed by May 3. Reply comments are due by May 11. We expect the Commission to release its Report and Order with the final reg fee amounts by midsummer. The *proposed* 2007 regulatory fees are listed on the next page.

FEE CATEGORY	PROPOSED FY 2007 Annual Regulatory Fee (USD)
TV VHF Commercial Stations	
Markets 1-10	64,300
Markets 11-25	46,350
Markets 26-50	31,075
Markets 51-100	20,000
Remaining Markets	5,125
Construction Permits	5,125
TV UHF Commercial Stations	
Markets 1-10	19,650
Markets 11-25	19,450
Markets 26-50	10,800
Markets 51-100	6,300
Remaining Markets	1,750
Construction Permits	1,750
Low Power TV, TV/FM Translators/ Boosters	345
Other	
Broadcast Auxiliary	10
Earth Stations	185

Satellite Television Stations	
All Markets	1,100
Construction Permits	550

Commercial Radio Stations						
Population Served	**AM Class A**	**AM Class B**	**AM Class C**	**AM Class D**	**FM Classes A, B1 & C3**	**FM Classes B, C, C0, C1 & C2**
<=25,000	625	475	400	475	575	725
25,001 -75,000	1,225	925	600	725	1,150	1,250
75,001 -150,000	1,825	1,150	800	1,200	1,600	2,300
150,001- 500,000	2,750	1,950	1,200	1,425	2,475	3,000
500,001 -1,200,000	3,950	2,975	2,000	2,375	3,900	4,400
1,200,001- 3,000,000	6,075	4,575	3,000	3,800	6,350	7,025
>3,000,000	7,275	5,475	3,800	4,750	8,075	9,125
AM Radio Construction Permits	400					
FM Radio Construction Permits	575					

CRB hangs tough on on-line copyright liability

Revised Royalty Rates Reaffirmed

Rehearing Rejected, Remissions to Roll in May 15.

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

As webcasting advocates convened in Las Vegas to discuss the future of Internet radio, the Copyright Royalty Board (CRB) denied petitions for rehearing of its March, 2007 decision to increase the royalty rates for Internet streaming during the years 2006-2010. The decision has two practical effects: (1) ***webcasters should be prepared to pay increased royalty rates for the years 2006-2010 beginning on May 15, 2007***, but (2) ***the retroactive payments representing the increase over monthly payments made for January 2006 through February 2007 can be calculated on an aggregate tuning hour basis rather than a per performance basis***.

As reported in last month's *Memo to Clients*, the CRB released a decision in March that significantly increased the royalty rates paid by anyone streaming an audio signal – simulcast or otherwise – over the Internet. In addition to the sting of paying rates that would eventually double from 2005 levels, Internet radio operators were told that the new rates ***must*** be calculated on a "per performance" basis that takes into account the number of listeners accessing the Internet stream *during any given song*. Historically, many webcasters have found it easier to calculate listeners at larger increments (usually by the month, day or at the smallest, hour). Accordingly, it is expected that the new per performance requirement will place a further burden on an already-taxed webcaster. Moreover, the more finely-tuned measurement mandate may result in payment of an overall royalty amount higher than justified because the webcaster would likely have to account for listeners that had already stopped listening to the stream.

Those hardest hit by the CRB's decision are smaller commercial webcasters , who will no longer be able to calculate royalties as a percentage of revenues, and noncommercial webcasters, who (because they're noncommercial) will have little or no ability to raise the additional revenue which could be required to offset any royalty increases. The smaller webcasters and the noncoms were among the loudest voices raised in opposition to the new royalty rates when they were announced last month; their concerns were included in the petitions seeking rehearing of the decision by the CRB.

But those petitions for rehearing were denied on April 16, 2007. The CRB stated that rehearing is only proper where "(1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct a clear error or prevent manifest injustice." It found – surprise, surprise – that none of these justifications were present here. And making matters worse, the CRB refused to stay the implementation of the new rates. According to the CRB, it was Congress, not the CRB, which dictated that the new rates should become effective immediately – so, again according to the CRB, only Congress is able to authorize a stay of the new rates.

*The deadline for these royalty payments is **May 15, 2007**, but no forms have been made available by SoundExchange to allow for these filings.*

Absent a stay, ***the new payment structure begins with payment of royalties for March 2007 due on May 15, 2007***, even if appeals are filed in federal court (as we expect they will be). Of course, SoundExchange has still (at least as of this writing) not issued the new forms necessary to make these payments. As a result, the actual mechanics of how the royalties are to be paid are still unclear.

Webcasters should also focus on the fact that, as a result of the new rates (which are retroactive back to January, 2006), make-good payments will be required to cover the difference between monthly payments actually made for January, 2006, through February, 2007 (*i.e.*, payments calculated using the former rates), and payments for those same months based on the newly-announced rates. ***May 15, 2007 is the deadline for payment of amounts representing that difference.***

In its lone concession to webcasters, the CRB acknowledged that it would be unduly burdensome to require recalculation of all payments already made for the months back to January, 2006 if those payments were calculated according to the "aggregate tuning hour method." Thus, it will allow those who had elected aggregate tuning hour calculation during 2006 and the beginning of 2007 to calculate the back royalties according to this method as well, using the following rate structure:

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Tales from the FCC crypt

AM License Brought Back From The Dead!!!

Automatic expiration reversed to accommodate court ruling

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

The rumors of WRSM's death have been greatly exaggerated. The station, located in Sumiton, Alabama, had been off the air for well over the 12-month period that would normally lead to the automatic expiration of the license under Section 312(g) of the Communications Act. And, in fact, it did lead to the revocation of the station's license. But, on reconsideration, the Commission found that the very specific and peculiar circumstances that led to the station being off-air warranted reinstatement of the license under the discretionary provision added to Section 312(g) in 2004. (*See* the January, 2005 and March, 2006 issues of the *Memo to Clients* for discussions of that provision.)

This case arises as the estate of one deceased minority shareholder was caught up in litigation with the sole majority shareholder of the company that held WRSM's license.

The majority owner informally notified the FCC in February, 2003, that the station was off the air. Based on that telephone notification, the FCC sent an inquiry letter to the station, but no response was received – although the majority guy called the Commission again in March, 2003, to reiterate that the station really really was off the air.

Meanwhile, the minority shareholder's executrix notified the Commission – in writing, this time – that the station had resumed operation in January, 2004. She then filed a renewal application in March, 2004, but the majority owner responded (by phone again), advising the staff that the station had been off the air since prior to February, 2003. He claimed that he had notified the Commission of the cessation of operation in writing in July, 2002, and June, 2003. (In June, 2004, he provided copies of those "letters", but the Commission had no record of ever receiving them, probably because they were hopelessly misaddressed.)

In any event, in September, 2004, the intra-shareholder litigation was resolved when the court ordered that the minority shareholder's executrix could take control of the company so that it might be sold to an unrelated third party. The executrix then filed an assignment application (in early 2005).

With the renewal and assignment applications pending, the staff took a look at the file and asked again for clarification as to exactly when the station was being operated and when it wasn't. The executrix's response indicated that the station was silent at least from October, 2002, through January, 2004 – *i.e.*, significantly more than 12 months. In July, 2005, the staff concluded that the station's license had expired automatically under Section 312(g).

> *While the station may not be totally out of the woods, the ultimate goal – reinstatement of the station's license itself – was achieved.*

The executrix sought reconsideration, and the staff agreed. In the staff's view, the executrix's efforts to obtain renewal and assignment of the station's license were undertaken in furtherance of the local court's order approving the station's sale. Since the Commission has a longstanding policy of seeking to "accommodate" court orders, the staff concluded that some slack could be cut here and that the license could be reinstated. The staff went to some lengths to emphasize the narrowness of its decision, presumably in an effort to discourage a flood of requests for reinstatement of otherwise dead licenses.

While the Commission took the unusual step of reinstating WRSM's license, it is not clear that the station is totally out of the woods. The staff stopped short of granting the renewal and assignment – it merely reinstated them, and reset the public notice period for each, which means that both are subject to possible petitions to deny. Further, the staff reserved the right to issue a Notice of Apparent Liability and forfeiture for the late-filing of the renewal application. But all of those considerations are likely mere bagatelles in view of the fact that the ultimate goal – the reinstatement of the station's license itself – was achieved.

This case illustrates that the Commission does in fact recognize the "discretionary" provision of Section 312(g) and is prepared to apply it in certain rare circumstances.

(Continued from page 1)

In the meantime – both in 2001 and again in 2004 – the Commission gave the pending applicants opportunities to resolve their mutual exclusivities in a variety of ways. But that did not clear out the backlog, and there remained about 100 MX groups to be resolved.

The Points System

The points system which the Commission adopted and the Court upheld in 2004 gives the FCC the means of comparing applications in five particular areas.

307(b) Match-up – First up is the Section 307(b) analysis. Section 307(b) of the Communications Act requires the Commission to provide for "a fair, efficient and equitable distribution" of broadcast spectrum among the various states and communities. Since that is a mandate imposed by Congress, it gets special consideration. Since the goal of Section 307(b) is to spread service out "equitably" throughout the country, this criterion can result in a slam-dunk preference. That occurs if, in a given MX group of applications, only one application would provide a first or second NCE-FM service to at least 10% of the population (in the aggregate) within the proposed 60 dBu contour, as long as that the population served is at least 2,000 people. If only one applicant can do this, it wins on that basis alone.

If two or more applicants meet that threshold 307(b) test, one winner might still emerge at this early stage of the face-off. If one of the applicants which meet the initial 307(b) criteria would provide a first NCE radio service to at least 5,000 more people than any of the other applicants, that one applicant wins.

Point system contest – Any competitors left standing after the 307(b) preliminary round are next compared under three general categories, with "points" to be awarded for each of the categories. Seven points are up for grabs. The one with the most points wins.

The categories and points available are:

(1) ***Three points*** go to any applicant that is locally-based and has been local for at least two years. "Local" means that an applicant has a campus or headquarters or that 75 percent of its board members reside within 25 miles of the proposed community's official "reference point." Documentation of the basis for any claim of "localism" is required.

(2) ***Two points*** are awarded to any applicant proposing service that does not overlap contours with any other station in which the applicant, an officer, director or board member has an interest. The applicant's "governing documents" (*i.e.*, by-laws, constitution, or equivalent) must also include a provision to maintain such diversity on a going-forward basis. Special procedures exist for state chartered institutions, such as colleges, that may have a wide-area mandate, but will operate a station in one particular community. And similar provision is made for certain statewide educational networks, which are entitled to ***two points*** if they have overlapping contours with other related stations (a situation which would otherwise make them ineligible for the previous two-points).

(3) Finally, an applicant proposing the "best technical proposal" – meaning proposed service to the largest population and area (excluding substantial areas of water) – can get the last ***two points***. You get both points if your proposed 60 dBu service area *and* the population in that area are both at least 25% greater than the next best showing. You get one point if your areas/pops showing is at least 10% greater (but not 25% greater) than the next best applicant.

The Commission reviews the various applications, tots up the points, and voilà – we have a winner if one applicant ends up with more points than its competitors. This analysis is performed strictly on paper – there is no hearing at which applicants present their respective cases in person before an administrative law judge.

The Preliminary Tie-breaker – Of course, with such a non-granular evaluation system, it is to be expected that some, if not many, MX applicants will end up with the same total points. When that happens, the applicants with the highest number of points proceed to a tie-breaker (and the others go home). The deciding factor here is the number of other radio station authorizations already attributable to each applicant. The applicant with the fewest such attributable authorizations wins. If there is a tie on that score, the Commission then looks to the number of pending radio *applications* attributable to each applicant. Again, the one with the lowest number wins.

The Ultimate Tie-Breaker – And finally, if two or more applicants are *still* tied after all this, the Commission "rewards" them with the opportunity to share the contested frequency. That is, the still-surviving applicants will have to divvy up the use of the channel so that nobody gets a full license term of 24/7 operation – hardly an attractive reward.

This overall evaluation system was applied to the 76

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MX groups which the Commission reviewed in late March. It is entirely possible that at least some of the unsuccessful applicants there may seek reconsideration or judicial review of the decision, which could shed more light on the operation of the points system. Even though aspects of that system were upheld by the court in 2004, that decision left open a number of possible appeal points which may now be ripe for review.

The Next Open Window – It is unlikely that any reconsideration or review which may be sought will be resolved by next Fall. That is important because the Commission has announced that, ***starting on October 12 and closing on October 19, 2007***, a window for filing new and major change NCE-FM applications on the NCE reserved channels (*i.e.*, Channels 201-220) will be open. There are approximately 180 NCE-FM applications already pending which were filed before the 2000 freeze. Applications which are MX with any of those applications may be filed in the window, as well as applications which are not MX with any pending application.

Applications to be submitted during that window will be expected to include showings relative to the various criteria described above. Applicants already on file will be required to amend their applications electronically to provide such showings. More details about the filing window and related processes should be released in the coming months.

The FCC could legally limit the number of applications any one party could file, but it has not indicated that it intends to do so. Thus, since this will be the first opportunity to file such applications in years, it is possible that a large volume of applications may be expected. That is particularly so in view of the several months' lead time which the Commission has provided. Anyone who may be interested in filing one or more applications in the October window should start as soon as possible to prepare the necessary application(s) in order to assure that everything is in order and designed in a way to take maximum advantage of the points system as it presently exists. We will be happy to assist in that process.

FHH - On the Job, On the Go

On May 9, **Kevin Goldberg** will deliver the Jack Hagerty Lecture in Contemporary Media Issues at the University of North Dakota in Grand Forks. The topic of the Professor's lecture will be "Painted Into A Corner: The Only Way Out is a Federal Reporters Shield Law". **Kevin** will then travel on to Las Vegas, where he will speak on "Business Modeling on the Internet" at the Broadcasting and Cable Financial Managers Conference on May 22. And from there he will wend his way back eastward to the Puerto Rico Broadcasters Association conference, where he will speak on the topic of Internet radio on May 25.

Meanwhile, **Frank Montero** will attend the Radio Ink Hispanic Radio Conference in San Antonio from May 22-23. He'll be moderating a panel on "Hispanic Radio: Ownership, Economics and Opportunities." **Frank** serves on the Advisory Board for the conference. From there, he too will wend his way eastward to the Puerto Rico Broadcasters Association conference, where he will give his usual FCC-Washington update presentation on May 25. **Frank** is Washington counsel for the PRBA.

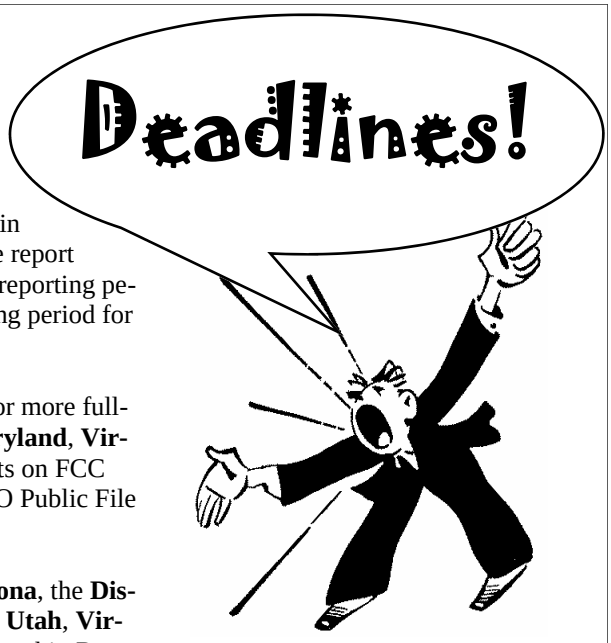
(Continued from page 3)

terials didn't happen to be where they were supposed to be when the inspector happened by. The FCC agent reviewed the public file and noted that no quarterly Issues/Programs list was in the file. According to the licensee, its regular office staff were not at the station at that time – which was too bad, because had the agent asked them for the information, it would have been produced. The FCC did not accept that excuse and fined the station. The FCC steadfastly noted that when its agent asked for the public file, everything should have been in the public file. Stations are reminded to update your public files frequently and ensure that all of your information is present.

Also piling up the miles next month will be **Frank Jazzo**, who will participate in the FCC Update session during the combined Mississippi Association of Broadcasters and Louisiana Association of Broadcasters "Convention @ Sea" confab on May 27.

And this month, we are proud to announce two (count 'em, two) *Media Darlings of the Month*!!! The **Franks** (**Jazzo** and **Montero**) have been selected as Washington DC Super Lawyers in the Communications field by Law & Politics, which has been publishing magazines for attorney audiences since 1990. A total of only 19 FCC specialists were so recognized. Selections were based on a poll of more than 35,000 active lawyers in the D.C. area as well as an independent candidate search and extensive review (including peer review by practice area).

June 1, 2007



EEO Public File Reports - All *radio* and *television* stations with five (5) or more full-time employees located in **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **Michigan**, **Ohio**, **Nevada**, **New Mexico**, **Utah**, **Virginia**, **West Virginia**, and **Wyoming** 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.

EEO Mid-Term Review - All *radio* stations with eleven (11) or more full-time employees and located in the **District of Columbia**, **Maryland**, **Virginia**, or **West Virginia** must file Broadcast Mid-Term Reports on FCC Form 397 and attach the two most recent (2006 and 2007) EEO Public File Reports.

Radio Ownership Reports - All *radio* stations located in **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **Nevada**, **New Mexico**, **Utah**, **Virginia**, **West Virginia**, and **Wyoming** 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 **Michigan** and **Ohio** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323 or 323-E.

June 1 - 10, 2007

Children's Television Programming Reports - Analog and Digital - *Date postponed from April 10* - 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. The FCC has indicated that it expects the new forms to be available online by approximately May 15, 2007.

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Broadcast Simulcast Programming:

- $0.0092 per aggregate tuning hour for 2006
- $0.0127 per aggregate tuning hour for 2007

Non-Music Programming (news, talk, sports or business programming):

- $0.0011 per aggregate tuning hour for 2006
- $0.0014 per aggregate tuning hour for 2007

Other programming (anything that is not simulcast music or news, talk, sports or business programming):

- $0.0123 per aggregate tuning hour for 2006
- $0.0169 per aggregate tuning hour for 2007

These rates are applicable to all commercial webcasters and those noncommercial webcasters that exceed 159,140 aggregate tuning hours per month. Again, the deadline for these payments is ***May 15, 2007***, but no forms have been made available by SoundExchange to allow for these filings. Those interested in further discussion of this issue can contact Kevin M. Goldberg at 703-812-0462 or goldberg@fhhlaw.com.

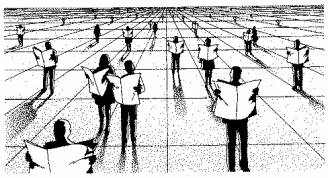
Stuff you may have read about before is back again . . .

Updates on the News

The kids are all right – or are they? – In an unusual public notice released in mid-April, the Commission has asked for "comment" on the "status of children's television programming". The precise deadlines for those comments (and later reply comments) have not been established as of this writing, but will be 30 and 45 days, respectively, following publication of the notice in the Federal Register.

The questions posed for comment are – how shall we say it delicately? – vast in scope, to wit:

- ? Are licensees complying with the Children's Television Act of 1990 (CTA)?
- ? Does the programming that licensees have reported as core children's programming generally meet the Commission's standards?
- ? Are the FCC's core programming criteria adequate to properly define educational and informational programming?
- ? Do these criteria fulfill the requirements of the CTA?
- ? Should the Commission consider additional criteria?
- ? Does the current level of preemption affect compliance with the CTA and Congressional intent?
- ? In what other ways are licensees complying, or not, with the CTA and the Commission's kidvid rules?



According to the Commission, this public notice merely follows up on a 2004 decision in which the FCC said it would, at some point, ask these questions. It's not clear why, precisely, the Commission has decided to ask them now, but the agency may be feeling some pressure from some segments of the public. The Commission in particular refers to its recent consent decree with Univision in which Univision agreed to cough up $24 million to resolve pending complaints about its children's TV practices. (*See* the February, 2007, *Memo to Clients*.)

But you have to wonder exactly what the Commission expects to receive in the way of responses. Broadcasters are likely to assert that they are in compliance and all is well, some "public interest" folks will probably take the opposite position, and that will be that. Of course, the Commission has for years required broadcasters to file reasonably detailed, quarterly reports of their efforts to comply with the kidvid programming rules, so it's not like the FCC doesn't already have a reasonably hefty stack of materials that it might want to analyze on its own. Why, after all, should licensees be required to submit such data, year in and year out, to the FCC if the agency is not going to consult it in an effort to resolve any questions the FCC might have? In any event, the FCC has solicited comments. Let us know if you would like any help in responding to the call.

Now available – Form 340 – As predicted in last month's *Memo to Clients*, the FCC has at long last announced that the revised version of Form 340 (for noncommercial construction permits) is now up and running on CDBS. That will come in handy if you might be thinking about filing for new NCE-FM authorizations when the next filing window opens next Fall. But it will also come in handy for anyone interested in taking advantage of the recent change in procedures which allow for changes in community of license through the application (rather than the rulemaking) process.

Silence is golden – While we normally steer clear of non-broadcast issues in these pages, the FCC did do something recently on the cellular side of the universe that warrants attention. Closing out (at least for the moment) a proceeding it cranked up in December, 2004, the Commission has decided ***not*** to lift the ban on using 800 MHz cellphones on airplanes in flight. There appears to be some difference of opinion at the FCC as to whether such use might actually create dangerous interference. (At least one entry on the FCC's web site (in the Kids' Zone) says that you should *never* use your mobile phone in an airplane, since that would create the possibility that "the airplane may not go the right direction or fly at the right height, or they may even crash!" At another FCC site (also in the Kids' Zone), an unidentified "veteran pilot" is quoted as saying that his understanding is that "cell phones and most avionics shouldn't conflict." Pity the poor kid who runs across these mixed messages . . .) Anyway, in terminating its proceeding, the Commission didn't rely on any high-falutin' type of technical mumbo jumbo. Instead, it shrugged its bureaucratic shoulders and announced that it would be "premature" to try to resolve this matter. While the FCC suggested that a variety of studies are underway in the private sector that might shed light on the question, our hunch is that the FCC really didn't want to look at any data which might support allowing cellphone use on planes – and that's because of the huge outpouring of comments ***against*** the proposal. It's bad enough being trapped in the uncomfortable confines of a cabin without having to sit there listening to your seatmate rambling on at length about who knows what.

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

First Class

FM ALLOTMENTS ADOPTED –3/20/07-4/18/07

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
OK	Millerton	228 miles SE of Oklahoma City, OK	265C2	05-328	TBA

Notice Concerning Listings of FM Allotments

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