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Memorandum to Clients

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Digital Radio Rules Released

FCC applies light touch to digital audio conversion

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After several months of anticipation, in June the Commission at long last released the text of the Digital Audio Broadcasting (DAB or Digital Radio) rules and a Further Notice of Proposed Rulemaking. As you may recall, the Commission adopted the rules in March, but didn't release the full text of the rules and proposed rules at that time. (This is a common occurrence – in most such instances, the intervening time is devoted to working out language changes requested by the Commissioners.)

In contrast to the Digital Television transition, where government-mandated deadlines and timetables reign supreme, the FCC is taking a very laissez-faire approach to the DAB transition.

A noteworthy aspect of the Commission's new DAB approach is its seeming reliance on market forces to determine the path of the Digital Radio transition. In striking contrast to the Digital Television transition, where government-mandated deadlines and timetables reign supreme, the FCC is taking a very laissez-faire approach to the DAB transition. The difference, of course, is primarily due to the IBOC technology selected by the FCC for the DAB system, which permits the embedding of the digital audio signal in-band, on-channel (hence the acronym IBOC – "**I**n-**B**and/**O**n-**C**hannel"). Since the IBOC approach means that radio stations can provide digital service on the frequencies which they have been using historically for their analog service, there is no urgent need for the FCC, or Congress for that matter, to fly-speck the transition in order to assure prompt and efficient relocation of a whole industry from one portion of the spectrum to another.

In keeping with its laid-back approach, the Commission declined to establish a mandatory conversion schedule at this time. Instead, the Commission committed to conduct periodic reviews of the service, and, perhaps more importantly, to monitor the adoption of the DAB service by the public.

While the FCC opted not to adopt rules to permit radio stations to fully convert to digital service, it did authorize the use of the extended hybrid mode, which frees up additional spectrum for digital use. If a broadcaster elects to provide digital service, it must provide at least one free digital stream that is the same (or better) quality as its existing analog service. Further, the broadcaster must continue to simulcast its analog signal on a free digital stream. The Commission will permit broadcasters to experiment with their digital streams and will not establish a minimum level of digital bandwidth to be used. The FCC also decided to permit AM stations to provide DAB service at night despite concerns about possible interference, since the potential benefits of nighttime digital AM service, at least in the FCC's view,

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FHH Launches Blog

Fletcher, Heald & Hildreth is pleased to announce that its blog site is now up and running. You can find it at:

www.commlawblog.com

FHH attorneys will be adding news and observations on current developments in broadcast regulation as well as a wide range of non-broadcast matters (including , wireless broadband, wireline telephone, VoIP, cable TV, license-exempt services) in a real-time environment. Readers will have the opportunity to chime in with their own perspectives on developments at the FCC.

Check it out!

Arbitrary, capricious, and probably unconstitutional

Second Circuit Bleeps Fleeting Expletive Policy

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In a long-awaited decision, the U.S. Court of Appeals for the Second Circuit finally dropped the hammer on the Commission's indecency policy. In an opinion issued on June 4, 2007, a three-judge panel (with one dissent) held that the "fleeting expletive" policy invoked by the Commission in 2004 and then again in the 2006 "Omnibus" indecency decision is arbitrary and capricious. In the court's view, the FCC's asserted justifications for the "fleeting expletive" policy were less than persuasive.

The "fleeting expletive" policy – as first announced in 2004 and then reaffirmed in 2006 – provided that any broadcast of the words "fuck" or "shit", in almost any context, would be deemed indecent. Historically, the Commission had been far more restrained, acknowledging that the occasional slip-up resulting in the broadcast of an isolated expletive should not warrant censure. But in the wake of the public uproar over the Janet Jackson/Super Bowl incident, the Commission suddenly reversed course and took an exceedingly hard line on indecency generally, and the use of those two words in particular.

The court's decision seems at first blush relatively narrow, finding only that the new "fleeting expletive" policy is arbitrary and capricious and thus inconsistent with the Administrative Procedure Act. But in a surprising six-page portion of the opinion, the court offers its very strong suggestion that the policy would not survive First Amendment analysis. (As a matter of practice, courts generally decline to delve into weighty constitutional issues if a case can be resolved on less radical grounds.)

The majority also indicates that the FCC's "profanity" policy – which first popped up in 2004 – essentially overlaps the indecency policy. Since the court finds that the indecency policy is arbitrary and capricious, we can conclude that it would find the profanity policy fatally flawed for the same reason.

The case has now been remanded to the Commission for further action consistent with the court's decision – but the court seems clearly to signal that if the Commission tries to shore up its policies on remand (as opposed to running up the white flag and abandoning them), the court anticipates yet another appeal, the result of which would not be favorable to the Commission.

In the wake of the court's decision, the FCC – as expected – vehemently disagreed with the court's reasoning. Ironically displaying no apparent reluctance to use the words which the FCC has found to be maximally unacceptable, Chairman Kevin Martin fired back at the court, stating, "I find it hard to believe that the New York court would tell American families that 'shit' and 'fuck' are fine to say on broadcast television during the hours when children are most likely to be in the audience. . . . It is the New York court, not the Commission, that is divorced from reality in concluding that the word 'fuck' does not invoke a sexual connotation." (Note: The Second Circuit is located in New York, but it is a federal, not a state court. Chairman Martin's insistence on describing it as a "New York court" is odd, to say the least – and possibly reflects an effort by him to suggest that New Yorkers have different standards than the rest of the country.)

Apparently embracing the notion that if life gives you lemons, you should make lem-

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Focus on FCC Fines

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FCC steps up efforts in the West – The Western offices of the FCC's Enforcement Bureau were busy this month issuing forfeitures to television and radio stations in their neighborhoods. Readers are reminded that the FCC maintains offices all around the country, which makes it easy for them to investigate complaints and inspect stations nationwide.

Hawaii office locates "main studio" in transmitter shack – The FCC's Honolulu office set out to inspect the main studio of a local LPTV station. The FCC agent realized that neither a phone number nor address for the station had been provided to the FCC. So the ever-resourceful agent picked up the phone book and called the station. He reached an answering machine.

Eventually someone from the station called back and told the FCC that the station's main studio was located at the same site as the transmitter. The FCC agent set out to get to the main studio (and the public file inside). The G-man started his quest by calling the site manager for the transmitter site (which happened to be an antenna farm) and arranging a visit.

On his way to the public file and the main studio, the FCC agent observed that he had to pass through two locked gates, a one-lane mountain road, another six-foot high fence, warning signs advising readers not to approach and, at the very end of this tortuous path, a locked door. The door led to a windowless building without a restroom, running water or landline telephone capability. Not surprisingly, the building looked more like, well, a transmitter shack than a main studio, but it did contain a filing cabinet and a single chair.

When asked if this was indeed the main studio, the licensee's representative (identified as its "Director of Marketing") later declared that he and the President of the company were present at this "studio" from 9 to 5, five days a week. So the Feds staked out the joint a few days later and found nobody there.

The FCC found the "main studio" story hard to believe. But even if the "main studio" really were staffed during regular business hours, the Commission noted that the station's local public inspection is supposed to be accessible to the public – and multiple locked gates, fences and RF exposure danger signs do not make for a convincing show of accessibility. Plus, the Commissionistas were unconvinced that the licensee had been maintaining a meaningful staff and managerial presence at the studio, as required by longstanding Commission policy.

The television station was fined $5,600.

San Francisco office calls the sheriff – When an FCC agent is unable to perform an inspection immediately, he can call for back-up. This is what happened to agents from the San Francisco office when they heard of a tower light problem.

The FCC's office received a complaint about a Cutler, California station that was supposedly not properly lighted. The FCC agent called the FAA to report a problem. The agent also called the local sheriff and asked him to drive by to see if the tower was indeed dark. The sheriff confirmed the outage.

The next day the agent hopped in his car to check out the situation for himself. Gazing into the night sky, he saw nothing: no lights, no strobes, no lamps. The tower was indeed dark. The next morning the agent contacted the station to discuss the problem. The upshot? The station faces a $10,000 fine.

Field (strength) trip for the L.A. office – The FCC's L.A. office received complaints about an El Rio, California FM station and its apparent lack of power control. The agents headed out to El Rio and set up measuring equipment seven kilometers from the transmitter site. The agents observed emissions and strengths in excess of the licensed levels.

The Federales took their work home with them that night. They spent the night at a local hotel and, perhaps unhappy with the in-room movies, set up an antenna and analyzer in their hotel room. They again observed transmissions at excessive power while hanging out in their hotel room.

The station stated now faces a $3,200 fine, while the FCC agents can look back on a fine trip to El Rio, California.

San Diego office punishes pirate's landlord – Finally, we close this month with the story of the very zealous folks in the FCC's San Diego office. While investigating a pirate radio station, the FCC's agents located a house in San

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Still trying to reason with hurricane season

Bill Would Upgrade Broadcasters To First (Responder) Class

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With the arrival of Hurricane Season 2007, Congress has looked back to Hurricane Season 2005 and proposed legislation aimed at avoiding at least some of the horrors encountered in the aftermath of Katrina and her meteorological siblings. The First Response Broadcasters Act is intended in particular to assist broadcasters in their efforts to respond to natural disasters for the benefit of their communities.

In 2005, only one television station in New Orleans stayed on the air throughout the Hurricane Katrina ordeal. WWL was able to do it by building a disaster-resistant physical plant and by keeping supplies at the ready so its news people could do their jobs when they were needed the most by their community.

A number of radio stations in the Big Easy fought hard to stay on the air, too. But throughout the region, planning and grit were not always sufficient. Broadcasters throughout the Gulf region complained that station personnel, including journalists, engineers and support staff, were kept from doing their jobs by government and security officials who treated them like employees of any other business – rather than as essential communications providers crucial to first response efforts.

Not only were essential broadcast personnel often prevented from carrying out their tasks – or even getting to their work places in the first place – but supplies needed to keep broadcast operations up and running were often embargoed or seized. Many stations that tried to bring in food, water, equipment, and fuel for generators and news gathering vehicles found their deliveries stopped at barricades or requisitioned for other purposes.

Of course, the trouble broadcasters had in providing their most important public service role was but part of a widespread failure that has cost the administrations in Washington, Baton Rouge, and even in some city halls, dearly in political capital. So with Democrats and Republicans both somewhat in the hot seat for Katrina-related failings, it is no wonder that bipartisan support is emerging for a legislative fix. And in light of the Federal Government's role in coordination and relief, Congress is now at stage center.

Although introduced in both the House and Senate, the First Response Broadcasters Act has gotten much more attention in the Senate. More than ten percent of the Senate has signed on as co-sponsors, while merely two of the 535 members of the House had co-sponsored the bill by mid-June.

The Act would classify broadcasters as essential first responders – a classification which would prevent broadcasters from getting trapped at roadblocks and having their fuel and sustenance shipments requisitioned or embargoed.

The Act would classify broadcasters as essential first responders, which would prevent broadcasters from getting trapped at roadblocks and having their fuel and sustenance shipments requisitioned or embargoed.

Credentials, of course, would be required. Some journalistic purists don't like credentialing because it smacks of "licensing" – especially these days when bloggers and other online sources are vying for equal treatment with longer-established media, but often denied equivalent access. On the other hand, many government agencies, at all levels, already issue "press passes" or similar credentials – so implementation won't be new, simply expanded.

The debate over who qualifies as a journalist is likely to continue for years, if not decades. But natural disasters don't wait for debates to be settled. So giving broadcasters status as first responders should seem like a no-brainer to most broadcasters, no matter where they stand on the meta-question of who qualifies as a journalist entitled to credentials.

A potentially more controversial aspect of the bill would provide dollar-for-dollar matching grants from Uncle Sam to stations that harden facilities against natural disasters. Doling out government cash to private enterprises always raises hackles. Broadcasters have long received criticism for long-term use of public airwaves without having paid directly for the privilege – at least in the pre-auction era. Serving the public interest has traditionally been viewed as *quid pro quo* for that privilege. Giving commercial broadcasters cash to better provide critical public services during times of disaster may seem, to some, like a breach of the industry's social contract.

This argument may appear somewhat logical, but the prac-

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FCC Re-vamps EAS

Common Alerting Protocol adopted

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Taking a significant step to advance proposals which were included a notice of proposed rule making almost two years ago, in late May the FCC upgraded and modernized the Emergency Alert System (EAS). The new EAS rules (the full text of which has not yet been released) are designed to facilitate delivery of emergency information across a variety of platforms in a digital format and to provide improved access for disabled persons.

The change likely to have the greatest impact on broadcasters is the FCC's adoption of the Common Alerting Protocol (CAP) for all EAS participants. The CAP system is a protocol which standardizes the delivery of text, audio or video alerts via broadcast, cable, satellite and other communications systems. The idea is that, when an emergency hits, the local, state or federal officials who need to get word of the emergency out to the public should not have to waste time configuring their alerts for multiple different delivery platforms. Rather, the goal should be to streamline their ability to get the notices out as quickly as possible to as many people as possible through as many communications means as possible.

The idea is that, when an emergency hits, officials who need to get word of the emergency out to the public should not have to waste time configuring their alerts for multiple different delivery platforms.

While the shift to CAP will require some adjustments on the broadcast side, that shift will not be made immediately. Participants will have to adopt the CAP system within 180 days of FEMA's adoption of CAP standards. That has not yet happened, so at a minimum, broadcasters will have until the end of the year (and possibly beyond) to take the necessary steps.

In addition to requiring the CAP, the Commission has also expanded the EAS requirement to mandate that EAS participants transmit alerts originated by state Governors or their designees. (Historically, that mandate has been limited to national announcements initiated by the President.) And further expansion may be in the works: the Commission is also seeking comment on whether EAS participants should also be required to transmit alerts from local and county governments.

Comments are also being solicited with respect to the provision of EAS alerts to non-English speaking people and persons suffering disabilities. The Commission is taking this opportunity to explore a wide range of areas in which the effectiveness of EAS can be enhanced for the benefit of all folks who might benefit from emergency alerts.

The Commission is also looking at (a) whether the effectiveness of the EAS system should be tested, and (b) the nature and extent of any reporting requirement, to permit after-the-fact assessment of how the system works in response to a disaster.

As part of the Further Notice of Proposed Rulemaking, the Commission has ordered the Public Safety and Homeland Security Bureau to convene at least one meeting on improving EAS service to disabled and non-English speaking persons. The stakeholders will have until the end of June to submit a progress report on these discussions into the record.

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ticalities of the matter point to different conclusions. The costs associated with hardening facilities in case of natural disaster can prove too great for many station licensees. This is all the more true in smaller markets where revenues can be lean. Such areas as the Gulf Coast and Tornado Alley include many lean markets – and for many stations, such federal grants could make the difference between hoping for the best and doing something proactive.

The eastern Hurricane Season is here, even if the political clock may run at a different pace. Momentum on the bill has been so far mainly limited to the Senate. The NAB, several state broadcast associations, and the Radio-Television News Directors Association have all announced strong support for the proposed legislation. Station owners, possibly partnering with civic groups or community leaders, can also lobby their local Senators and Members of Congress. Getting the matter on legislative – and political – radar screens can make the difference between something getting passed and nothing really happening.

Internet radio to join Buddy, Ritchie and the Bopper?

Countdown To Oblivion?

Few prospects for relief as effective date of new streaming royalty rates approaches

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To many rock 'n' roll devotees, February 3, 1959 was "The Day the Music Died". But to many Internet webcasters, that mournful moniker will be assigned to July 15, 2007. That, after all, is the day that new royalty rates for streaming copyrighted music over the Internet will go into effect.

We have addressed issues relating to the new rates in the last three *Memos to Clients*, and now we are truly on the Eve of Destruction: absent some extraordinary development, the new rates will go into effect on July 15 and many online radio stations will likely shut themselves down for good because they simply cannot pay the rates that will be imposed upon them retroactive to January 1, 2006, let alone the inflated rates that will apply for years 2007-2010.

Of course, imposition of the new royalty rates could be delayed (or possibly avoided altogether) if lightning were to strike in the form of : (1) a stay issued by a court; or (2) passage of the Internet Radio Equality Act by both Houses of Congress and signature by the President; or (3) a voluntary settlement agreement reached by the parties in the Copyright Royalty Board (CRB) proceeding.

The appellants have also requested a stay of the CRB's action pending resolution of their appeal. The court could rule on the stay request at any time.

Unfortunately, none of those is expected to happen, even though they have all been teed up to some degree.

On the judicial front, a number of parties have appealed the CRB's decision establishing the new royalty rates and related rules. Since that appeal was not filed until May, and since it usually takes at least 12-15 months to get a decision out of the court of appeals, the appellants have also requested that the court issue a stay of the CRB's action pending resolution of the appeal. The court could rule on the stay request at any time, but most observers are pessimistic about the outcome. A stay is very difficult to obtain, as it requires demonstration that (among other things) the appeal is likely ultimately to be successful on its merits and that there will be irreparable harm caused in the short term if the stay is not granted. Likelihood of success and irreparable harm are particularly difficult things to prove.

On the legislative front, the Internet Radio Equality Act was introduced in the House of Representatives in April. It has been referred to the Committee on the Judiciary and the Committee on Energy and Commerce. A companion bill was introduced in the Senate in May and has been referred to the Senate Judiciary Committee.

These bills would accomplish three things. They would:

- Invalidate the CRB's March and April decisions;
- Propose a rate structure (similar to that in place for satellite radio) which imposes a minimum annual fee of $500 per provider of services, allows commercial webcasters to choose between paying $0.0033 per aggregate tuning hour or 7.5 percent revenues directly attributable to streaming for the year, and allows non-commercial webcasters to pay 1.5 times the amount paid to ASCAP, BMI and SESAC for use of the underlying musical compositions;
- Rewrite the way in which royalties are calculated in the future to further align this method to the satellite radio model and prevent repeating this controversy when the CRB convenes again to determine rates for the years 2011 and beyond.

The House version quickly garnered 119 co-sponsors. A hearing was scheduled for late June in the House Committee on Small Business to look at the general issue of Internet radio royalties and the impact of the CRB decision on small webcasters. (It can be assumed that the Internet Radio Equality Act is also on the menu.) To build support for this issue, webcasters held a "Day of Silence" on June 26.

Despite this momentum, it is very unlikely that the Internet Radio Equality Act will be enacted into law by July 15. The best hope for the webcasting community is that the introduction of this bill could somehow influence the Court of Appeals' decision to issue a stay of the CRB decision, after which the legislation could continue to move forward prior to any court ruling.

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From the pages of Radio Ink

Trends in Hispanic Radio

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Hispanic media – and Hispanic radio, specifically – are ***white hot*** in the 21st century. Anyone who tracks the broadcasting industry can't help but notice the volume and scope of the transactions being seen in Hispanic media. In just the past five years, we've seen NBC purchase the Spanish TV network Telemundo for $1.98 billion in cash and stock, and the assumption of $700 million in debt. Next, Univision, the number one Spanish television network, acquired Hispanic Broadcasting Corporation, the then-largest Spanish radio group, in a stock transaction valued at roughly $3.5 billion. Now, Univision itself has been sold in a transaction valued at approximately $13.7 billion, including the assumption of $1.4 billion in debt. In 2005, two of the radio companies that had the greatest number of deals nationwide were Spanish radio groups: Davidson Media with 24 and Bustos Media with 14. In fact, while revenue for much of the radio industry has been flat, Hispanic radio has been experiencing growth, and is expanding into new markets and formats.

The Shift Is On

As a result, the market has seen a widening of the pool of radio groups eyeing and entering Hispanic radio. Likewise, Hispanic radio has expanded into newly emerging markets and formats. Along with the growth of new and existing Hispanic radio groups, such as Davidson Media, Bustos Media, Border Media Partners, Liberman Broadcasting, Norsan, Lazer Broadcasting, and Moon Holdings, the number of general-market broadcasters moving into the Hispanic radio market has increased.

In what was considered one of the more dramatic format (and language) changes in recent years, Infinity Broadcasting in 2005 flipped its established DC-based alternative rock station, WHFS, to Spanish-language. Likewise, Clear Channel has shifted to Hispanic formats in roughly 28 markets since 2004. To roll out its strategy for entering into the Hispanic market, Clear Channel brought in Hispanic radio veteran Alfredo Alonso, founder of Mega Communications and former publisher of *Radio & Musica* magazine.

The decision by general-market broadcasters to enter the Hispanic radio market and adopt newly-minted bilingual formats is largely driven by a desire to reach younger and more affluent U.S. Hispanics. In explaining this trend, Alonso notes, "Clear Channel Radio recognizes that in order to provide advertisers with product solutions, the growing Latino population needs to be addressed. Over the last years the Latino population has grown from a top 10 marketplace to well over 40 markets of consequence."

Another aspect of the surge in Hispanic radio has been the refocusing from the traditional Hispanic radio strongholds like Miami, New York, Los Angeles, and Chicago to rapidly emerging Hispanic radio markets. In fact, some of the fastest growth in Hispanic radio has been in the Southeast (Raleigh, Charlotte, Greenville, Nashville, Little Rock, Richmond), the Midwest (Milwaukee, Cincinnati, Detroit, Minneapolis), and the Northwest (Portland, Seattle, Boise, Salt Lake, and Denver).

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The Town Crier

The success of Hispanic radio outside of traditional Hispanic markets can be traced to the migration of Spanish-speaking immigrants, says Felipe Korzenny, professor of communication, advertising, and integrated marketing at Florida State University. "Radio is a voice that has many functions in the Hispanic community," Korzenny says. "It has become the town crier, the watering well . . . Latin America has a heritage of small-town radio stations where radio is the community, and it has been largely replicated in the U.S.," Korzenny says.

Aside from this migratory trend, other dynamics are shaping the Hispanic radio market. The U.S. Census Bureau predicts that Hispanics are becoming the largest teen minority group in the country, and will account for 20 percent of teens by 2015. There's also an increasing number of young second- or third-generation American-born Latinos who speak English more than Spanish and have grown up listening to urban radio and music.

To reach this coveted demographic, Hispanic radio has evolved with new formats that are attractive to this younger Latino audience, such as Hurban and Reggaeton, in which hosts talk to listeners in both Spanish and English. Hurban, shorthand for Hispanic urban, is becoming one of the hottest sounds on Hispanic radio. Reggaeton, a Puerto Rican hip-hop offshoot, is a mix of salsa, Jamaican dancehall, and hip-hop.

As new Hispanic markets and formats continue to thrive in the radio industry, we can expect to see continued interest

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outweigh any interference concerns.

The Commission will permit licensees to divide their signals into multiple streams without requiring separate authorizations from the FCC for each stream. And the Commission will permit licensees to enter into time brokerage agreements for these streams. The FCC did clarify, though, that such arrangements will be attributable under the Commission's local radio ownership rules if the programmer brokers more than 15% of the brokered station's particular digital stream. Finally, the Commission decided to let LPFM stations provide digital streams if they are technically capable of doing so.

With respect to the programming and public interest obligations placed on DAB licensees, the FCC determined that the same public interest requirements currently placed on analog stations will also apply in the digital realm. That means that digital streams will be subject to the full panoply of political broadcasting, sponsorship ID, contest, indecency, etc., etc. rules that currently apply on the analog side. Further, the Commission will require DAB stations to identify each digital stream at the beginning and end of the transmission, and also on an hourly basis, with the following information: (i) call sign of main station; (ii) community of license; (iii) frequency; (iv) channel number; and (v) programming or network provided on the digital stream. Finally the Commission will also require all data streams to transmit local, state and national EAS alerts if the main station participates in the EAS program.

The Commission will permit licensees to enter into time brokerage agreements for their streams, but such arrangements will be attributable under the local radio ownership rules under some circumstances.

While addressing the general question of "public interest", the FCC slipped in a couple of suggestions that are, to say the least, a bit of a stretch beyond what most of us may have expected in this proceeding. First, the Commission announced that it is considering whether "the current requirements for radio stations' public inspection files are sufficient to ensure that the public has adequate access to information on how these stations are serving their communities". Exactly how the issue of local public inspection files managed to find its way into a technical item on DAB is not entirely clear. But the upshot is that the Commission is considering requiring radio licensees to use a "standardized form", to be completed quarterly, to track their public service. And the FCC's musings go further to include a potential requirement that that form – as well as all other contents of the public file – would have to be made available on the station's website (or at least on the website of a state broadcast association).

Second, comment is invited on whether the Commission might want to re-think its approach to unattended operation of stations, particularly in light of the need to assure proper awareness of EAS and law enforcement transmissions that might come in at any time of the day or night. While the FCC has provided no specific proposals in this area, the suggestion seems to be that the Commission might be thinking about returning to a requirement that each transmitter be attended to by a live and qualified person during all hours of operation.

The public file and attended operation proposals are not at all specific, and it is doubtful that the Commission would be able to take any concrete steps in the direction of adopting such rules without further procedural steps (such as a further notice of proposed rule making in which more specific proposed rules would be set out for comment). Still, the fact that the Commission even took the initial step of floating these particular trial balloons provides us with a red flag alert that should not be ignored.

The FCC delegated to the Media Bureau the authority to work out the nitty-gritty details of developing the forms and other procedures to authorize the DAB service. This means that we will need to stand by for further guidance from the Bureau, most likely in the form of public notices, to determine how, in practical terms, the further implementation of DAB will unfold.

The Commission also teed up several questions for further comment. First, the Commission is considering a rule that would limit the amount of spectrum set aside for subscription services. The FCC perceives the possibility that the digital conversion – what with its multi-channel capacity – could lead to the eventual abandonment of the free, over-the-air radio service. To avoid that, the FCC is seeking comment on how much spectrum should be set aside for free services in the future. Along that same line, the Commission is also considering imposing an ancillary fee to be paid from any revenues derived from DAB service. This would be similar to the fee imposed on digital television licensees that receive revenue from providing ancillary services on their digital television stream – similar, that is, except for the fact that, on the television side, there is a statutory provision specifically authorizing the Commission to collect such fee. There is no corresponding Congressional go-ahead on the digital radio side. Because of that, the Commission is looking for comments on whether it has the authority to impose the fee and also (assuming that such authority is in place) whether such a fee should be imposed at this time.

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onade, Chairman Martin also used the Court's decision as an opportunity to press the case for requiring cable companies to sell programming on a channel-by-channel (or "à la carte") basis. Mirroring the arguments made in the FCC's recent report on televised violence, the Chairman suggested that requiring an à la carte programming option "may prove to be the best solution to content concerns" because it would allow parents to limit children's exposure to inappropriate programming by not buying channels that tend to contain inappropriate programming. Martin, of course, has long been an advocate of the à la carte approach. However, the fact that he chose to raise it in this particular context is somewhat unexpected, since the indecency policy relates to over-the-air broadcast content, while the à la carte approach affects subscription services (*i.e.*, cable- and satellite-delivered programming) which are *not* currently subject to indecency constraints.

Embracing the notion that if life gives you lemons, you should make lemonade, Martin used the decision as an opportunity to press the case for requiring cable companies to sell programming on a channel-by-channel (or "à la carte") basis.

The FCC has not yet announced its next move. Some commentators have suggested that the FCC could appeal the ruling directly to the Supreme Court. This seems unlikely for a few reasons. For starters, the Supreme Court is unlikely to take the case. The Supreme Court typically takes cases that involve a question of constitutional importance or present a conflict between different appellate courts. The Second Circuit, however, was careful to point out that it was deciding the case on the basis of administrative law, not constitutional law. In addition, the Janet Jackson case is still pending in front of a separate federal court of appeals (in the Third Circuit, located in Philadelphia). If that case were to swing in the FCC's favor, the FCC would be in a stronger position both in terms of supporting its rules and in getting the case heard by the Supreme Court. A decision from the Third Circuit, however, is not expected until the end of this year, at the earliest. Thus, an appeal to the Supreme Court may be premature from the FCC's perspective.

A more likely path for the FCC may be to request an "en banc" hearing by the full Second Circuit. Initial decisions by federal appeals courts are made by three-judge panels. A circuit court, however, includes over a dozen judges and, in extraordinary cases, the court may consent to re-hear a case with all of the judges of the circuit. This is known in lawyer-speak as an "en banc hearing." This may be a more attractive option for the FCC. As noted above, the decision was made on a 2 to 1 vote. The dissent characterized the case as "a difference of opinion between a court and an agency." Additional votes could sway that opinion in the FCC's favor. Moreover, in the time it would take to receive an "en banc" hearing, the Third Circuit may have decided the Janet Jackson case, which will certainly affect the playing field (although not necessarily in the FCC's favor).

Another option would be for the FCC to do what the court suggested and seriously rethink and reformulate its indecency rules and policies. This would be the most difficult path for the FCC but could be the most successful in the long run. As the court noted, the networks and other parties seem likely to continue to appeal any application of the rules as they are currently structured and enforced. If the FCC could develop a well-supported, clearly stated definition of indecent material and find a consistent way of applying it – and on the basis of several decades of experience, neither of those is likely to happen – it would go a long way toward addressing the court's problems with the current rules.

In the meantime, broadcasters should be careful to note that the court's decision did ***not*** invalidate the FCC's indecency rules as a whole. Indeed, FCC Commissioner Michael Copps promised that the FCC would continue to rigorously enforce the FCC's indecency rules, adding, "any broadcaster who sees this decision as a green light to send more gratuitous sex and violence into our homes would be making a huge mistake." In addition, broadcasters should note that the new, increased fines of $325,000 per utterance were recently published in the Federal Register, officially enshrining that super-increased penalty level in the FCC's rules. Stations would be well advised to continue to actively police the content of their programs and refer any questions to communications counsel.

(Continued from page 8)

Comments in the proceeding will be due 60 days after the Order and Further Notice are published in the Federal Register, which has yet to happen. We will keep you informed when the Media Bureau releases further guidance on the authorization process, and when comments and reply comments are due.

(Continued from page 7)

by Hispanic and general-market radio groups looking to capitalize on the hottest segment of the media and broadcasting marketplace.

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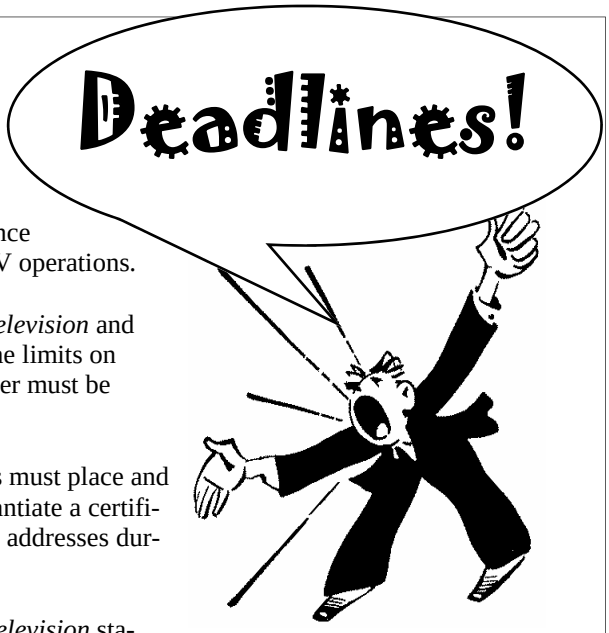
July 10, 2007



Children's Television Programming Reports - Analog and Digital - For **all** *commercial television* and *Class A television* stations, the second quarter reports on 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. Once again, information 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.

August 1, 2007

EEO Public File Reports - All *radio* and *television* stations with five (5) or more full-time employees located in **California**, **Illinois**, **North Carolina**, **South Carolina**, and **Wisconsin** 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 **North Carolina** or **South Carolina** 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 **California**, **North Carolina**, and **South Carolina** 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 **Illinois** and **Wisconsin** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323 or 323-E.

(Continued from page 3)

Diego. They traced the apparent pirate transmission to a garage in that house. However, the owner claimed that he rented out the garage.

When FCC agents finally were able to meet face-to-face with the landlord, he denied knowledge of the goings-on in his garage. Instead, he produced a lease, showed the agents a lock on the garage and indicated that he had nothing to do with the broadcasts. The Feds were not sympathetic. They concluded that the real estate belonged to and could be controlled by the landlord. Contrary to the landlord's claims of total ignorance (think Sgt. Schultz, saying "I zee nah-sing"), on at least one occasion the landlord had apparently thrown a circuit breaker to stop the broadcasts. The FCC said that this actually indicated how the landlord could be said to wield ultimate control over the unauthorized operation, and therefore hit the landlord with a $750 fine.

A word to the wise from Joe Di Scipio

A Twice-Tolled Tale?

FCC revises tolling agreement template to keep its options open

We have previously written in these pages that licensees whose renewals are held up because of pending complaints (about alleged transgressions involving indecency, sponsorship ID's and the like) may sign a tolling agreement with the FCC. Tolling agreements reflect a simple trade-off: in exchange for immediate grant of the pending (but held-up) renewal application, the licensee agrees to extend the statute of limitations for a period (usually two-three years). So the licensee remains under the gun for a possible forfeiture for a couple of years longer than would otherwise be the case, but it gets its renewal now rather than later.

A licensee would normally be motivated to enter into a tolling agreement not simply to get its renewal granted, but also to secure grant of a pending sale application (the FCC generally will not grant sale applications while license renewal applications are pending). We have previously opined that entering into such an agreement probably makes sense if there is a sale pending, and may make sense even if no sale application is pending – although there was considerable ambivalence on that point.

By entering into a tolling agreement in order to get your station license renewal granted, you give the FCC an unlimited amount of time to act on any complaints pending against your station.

The standard form tolling agreement offered by the FCC had a three-year tolling period which almost always was negotiated down to two years. The initial round of tolling agreements were signed just about two years ago, meaning that the FCC finds itself rushing toward the day after which, under the tolling agreement (and the relevant laws establishing statutes of limitations), the Commission will be precluded from whacking those particular stations with fines should it ultimately determine that some fine may be in order.

Faced with the consequences of its contractual obligations – and the consequences of its inability or unwillingness to act on the underlying alleged misconduct in anything remotely resembling a timely manner – the FCC has now changed the rules of the game.

Rather than specifying a definite time period – say, two or three years – after which the Commission would be foreclosed from issuing any fines, the tolling agreement template now being offered by the Commission contains the following language:

> For purposes of calculating the Statute of Limitations, the parties agree that any limitation period that would have expired after the date on which the Commission grants the Renewal Application (the "Renewal Grant Date"), shall be tolled for each case until either: (i) the date the FCC releases an NAL regarding any of the alleged violations described above; or (ii) the date the FCC informs the Licensee in writing that it has terminated the investigation.

This means that by entering into a tolling agreement in order to get your station license renewal granted, you give the FCC an unlimited amount of time to act on any complaints pending against your station. Other than getting your renewal granted now, you receive no other benefit for the FCC's inability to act.

Now, a very solid argument could be made that the FCC's refusal to act on pending license renewals merely because there are complaints pending about the renewal applicant is a violation of the Communications Act. Unfortunately, proving that point would require some interesting – and here, for most licensees' purposes, "interesting" can be read to mean time-consuming, expensive, and possibly irritating to the Commission – litigation, the outcome of which cannot be guaranteed.

The bottom line is this – if you have a sale application pending, you will likely have to enter into the "new and improved" unlimited tolling agreement in order to get the sale (and any pending renewal) acted on in the short term. If you have no sale application pending, you can still enter into a tolling agreement, but other than getting your license renewed now, you gain no particular advantage.

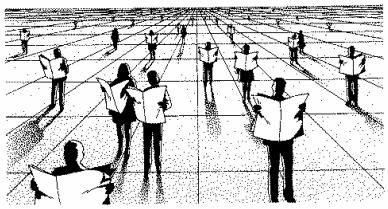
And if you would like to know more about how the FCC's approach here violates the Communications Act, let us know.

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

Updates on the News

Tate to re-up? – Commissioner Tate was first appointed less than two years ago to fill out a partial term on the Commission. Now it's her turn to re-up for a full term, and things are looking good for her. The White House has announced that it intends to nominate her for another spin on the FCC carousel. It's not clear why, if the White House already knew that it's going to nominate her, it didn't just go ahead and nominate her. But that's the way things work in Washington. Anyway, since the Prez intends to re-nominate her, we intend to congratulate her.

Trucker TV, trying to get back on the road – Last month we reported on the FCC's rejection of Truck Stop TV, a proposed system that would have used CARS channels to deliver video programming to truck stops. The intrepid truckers are apparently undaunted by that set-back, however. They have filed for further review, by the full Commission, of the Media Bureau's rejection. And they're not pulling their punches. According to the truckers, the Bureau's decision was "shockingly unbalanced and arbitrary", "woefully inadequate", "in blatant derogation" of the "comprehensive record", "fatally flawed" and "totally mistaken and inaccurate". Ouch. Our friends at the Society of Broadcast Engineers have filed an opposition to the truckers in which, as you might expect, they adopt a considerably more temperate (and persuasive) tone in support of the Bureau. It's probably safe to assume that this will not get acted on in the near future.



A move afoot to pay the recorded piper? – In March, we noted that a SoundExchange representative had made some noises about possibly trying to force broadcasters to pay performers copyright royalties simply for playing their songs on the air. That would, of course, disrupt the long-established system under which (a) broadcasters are exempt from such royalties and (b) record companies are not required to compensate broadcasters for the *de facto* advertising value of getting their product played on the air. But, presumably buoyed by the success they have enjoyed on the streaming royalty front (see, *e.g.*, the article on page 6 of this issue), the major record companies appear to be pushing ahead with their plan: their MusicFirst Coalition has announced that House and Senate Judiciary Committees will likely hold hearings on whether broadcasters should fork over royalties to musicians. That may just be wishful thinking on the part of the record companies, but it's still an indication of their ultimate goal.

And speaking of our pals in Congress . . . – While Congress may not have done anything to upset the applecart on the performance royalty front yet (*see* preceding story), that's not to say that the folks on the Hill have not been busy. Two members of the House have announced that they are planning to introduce a bill that would add "hundreds of low-power, community radio stations . . . across the United States." And thus the third-adjacent vampire springs back from the grave in which it been buried some time ago. The bill (H.R. 2802) would eliminate the third-adjacent spacing requirements for LPFM stations. Prospects for passage are decidedly unclear at this early stage.

And let's not forget about the "Fair Elections Now Act" (S.1825) which has been introduced on the Senate side. By "fair" elections, the bill's proponents seem really to mean "cheap election campaigns". The bill would cut political rates, if you can believe that – creating an LLUC, or lower-than-lowest-unit-charge which would be fixed at some 20% below a station's normal LUC. The bill would also expand the pool of advertisers entitled to the discount. Keep your eye on this one.

So long, electioneering ban – And speaking of political advertising, shortly before press time the Supreme Court tossed out the "electioneering communications" restriction of the McCain-Feingold Act. We plan to provide more detailed coverage of that development in next month's issue.

The wheels of justice . . . – The next time you find yourself up against some deadline imposed by the FCC, consider this. In 2004-2005, four Milwaukee TV stations filed renewal applications. In November, 2005, an individual filed an informal objection relative to the applications. The sole complaint was that the stations' news programming supposedly didn't "provide local viewers with information that enables [them] to be responsible viewers"; rather, the stations' news allegedly consisted mainly of "mayhem", "trivial stories", "weather" and "sports". That's it. That's the complaint. And yet it took the Commission's staff almost two years to crank out a two-page letter (well, in fairness to the Commission, there is a third page, consisting of one sentence and then the signature block and cc listing, but bear in mind that more than half of the first page is taken up with the address and "re" information) summarily rejecting the Objection. Of course, summary disposition was probably more than the Objection deserved, since the law is very clear that the FCC is not supposed to interfere with or sec-

(Continued on page 13)

FM ALLOTMENTS ADOPTED –5/22/07-6/21/07

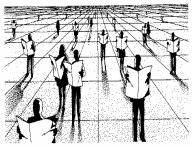
State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
CO	Akron	116 miles NE of Denver, CO	279C1	05-102	TBA
TX	Goldthwaite	116 miles SE of Abilene, TX	297A	05-151	TBA
CA	Cotonwood	146 miles N of Sacramento, CA	221A	05-131	TBA
CA	Shasta Lake, CA	168 miles N of Sacramento, CA	224A	05-131	TBA

FM ALLOTMENTS PROPOSED –5/22/07-6/21/07

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
OK	Clayton	184 miles SE of Oklahoma City, OK	263A	07-17	Cmnt: 7/16/07 Reply: 7/31/07	Accommodation Substitution
CA	Hemet	34 miles SE of Riverside, CA	273A	07-01	Cmnt: 7/30/07 Reply: 8/14/07	Noncommercial Reservation

Notice Concerning Listings of FM Allotments

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



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ond-guess a licensee's programming decisions – and that's just what the complainant was asking the Commission to do.

Meanwhile, in a separate and unrelated action, the Commission announced that it was rescinding certain interim procedures that authorized electronic filing (by fax or email) of certain types of pleadings that would otherwise have to be filed on paper. The interim procedures were first adopted in November, 2001 – almost six years ago – in reaction to the widely-publicized anthrax scare that occurred back then. It appears that the Commission is now satisfied that the coast is clear – or at least that its mail delivery systems are secure enough – so the now five-year-old "interim" procedures have been tossed.

Presumably the Commission took its own sweet time in dealing with these items because it had other, more important things to worry about. But you still have to wonder why it took not weeks, not months, but ***years*** to issue the total of maybe five pages' (and that's being generous) worth of text with which it finally handled these two items.

XM/Sirius merger update – Lest you think that the FCC moves slowly on everything, take heart. The proposed XM/Sirius merger is chugging right along. In late June, the FCC issued a notice of proposed rule making seeking comment on whether its clearly-stated, seemingly unequivocal prohibition against the merger of the only two satellite radio providers should be waived to permit the XM/Sirius deal – which involves, er, a proposed merger of the only two satellite radio providers – to go forward. We will address this notice in next month's *Memo to Clients.*

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First Class

(Continued from page 6)

Meanwhile, the possibility of some private resolution of the problem still exists. Because the CRB decision was essentially a trial verdict that is now under appeal, the litigating parties – essentially, SoundExchange (on behalf of the music industry) and the various webcasters, either individually or as represented by one or more industry groups – could theoretically agree to settle the case prior to an appellate court ruling. In fact, SoundExchange has put two settlement offers on the table.

Under pressure from the House Judiciary Committee to reach an accord, SoundExchange originally offered to reinstate the terms of the Small Webcaster Settlement Act of 2002 to allow small webcasters to pay royalties based on revenues earned. It then offered to reinstate the previous terms applicable to noncommercial stations which would allow them to pay $500 per webcaster (rather than per channel). Both were rejected by the webcasters.

Experience tells us that deadlines have a way of prodding adversaries closer together, so more settlement offers could be made or the webcasters could change their positions with regard to the original offers. But for right now, it can't be said that there is much cause for optimism on that front.

So as July 15 approaches, streaming radio stations should undertake once again the cost/benefit analysis of streaming on the Internet based on the current CRB royalty rate system. They should also be ready to file two forms with the SoundExchange on that date:

- ☹ A Statement of Account form which calculates the difference between that which has been paid for every month from January 2006 through April 2007 at the old rate that was applicable to the station and the amount that must be paid according to the new rate structure now in place.

- ☹ A Statement of Account form for May 2007 calculated according to the new royalty rates.

Of course, this is just an overview of the issue. You should contact an FHH attorney for more detailed information on any of these topics. We also are available to help you in completing this form and will report any last minute developments (likely in our blog, available at http://www.commlawblog.com).