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

Memorandum to Clients

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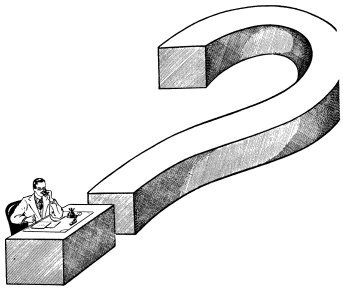

The law of unintended consequences?

Associations Ask Advice on Ad Auctions

Do low bids lower lowest unit charges?

By: Jeffrey J. Gee
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At the request of more than 40 state broadcaster associations, the FCC is considering whether ads purchased through Internet auction systems must be factored into the "lowest unit charge" that political candidates pay for broadcast advertising. Although the issue may seem technical and obscure, the FCC's decision could have a considerable impact on the bottom line of many stations in the coming election cycle.

As all broadcasters know, calculating advertising rates for political candidates is a complicated matter. The FCC's political rules require that broadcasters sell advertising spots to qualified political candidates at the "lowest unit charge" (or LUC) during the 45 days before a primary and 60 days before a general election.

If on-line auction sales of ad time must be included in the LUC calculations, the result can quickly become an administrative nightmare.

The LUC is the lowest rate the station charges for a particular class and amount of time. In calculating the LUC, stations must consider *every* ad rate that is in effect during the 45- or 60-day window, including package rates, bonus spots, and frequency discounts. In essence, political candidates are entitled to the lowest effective rate given to the station's most favored buyer for a particular class of advertising spot, regardless of how much (or how little) the political candidate is purchasing. Thus, generally speaking, a sales device that lowers rates for ordinary purchasers of advertising time will ultimately lower the amount that stations can legally charge political candidates.

Internet auctions of ad time, then, are a matter of some concern because they enable buyers to obtain spots at lower rates from participating stations. These programs, which include Bid4Spots, Inc., SoftWave Media Exchange and dMarc Broadcasting, Inc. (which is owned by Google), vary in their details. In general, however, such programs operate as online auctions, matching advertisers with affiliated stations. The advertisers set a fixed price they are willing to pay and the stations "bid" to provide advertising spots (usually last minute, unsold inventory) at the set rate.

While these programs are becoming increasing popular as a way clearing unsold inventory, the potential impact on stations' LUC calculations can be considerable. Of course, any sale of advertising at a lower rate affects the LUC. The more serious concern is that the rates charged through these systems can fluctuate on a daily basis. Thus, if these sales must be included in the LUC calculations, the LUC calculations may need to be revisited on a daily basis. The result can quickly become an administrative nightmare.

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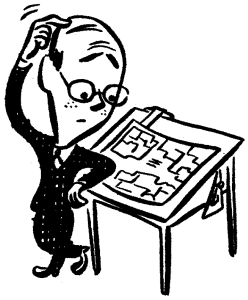
The Scoop Inside



Back to the drawing board for MTTV

FCC: No Tube In The Tube

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In the May, 2007, *Memorandum to Clients*, we reported on the Commission's rejection of a proposal to bring exclusive television programming to truck stops using frequencies in the Cable Television Relay Service (CARS).

This month we bring you news of a similar dismissal – this time involving television in mass transit rail systems. (Mass Transit Television? Perhaps the appropriate acronym would be "MTTV", pronounced "empty TV".) In a letter issued in late June, the Commission advised The Rail Network, Inc. (TRN) that its proposal to transmit signals to flat screen televisions in rail cars has been, er, derailed.

TRN's request for a waiver of Section 15.209 of the Commission's rules was dismissed without prejudice because TRN had not provided the FCC with sufficient information to permit the Commission to "fully evaluate the potential impact on the FM broadcasting service."

TRN was looking to operate in the FM broadcast band (*i.e.*, 88-108 MHz) at an emission level "significantly higher" than the 150 uV/m measured at three meters permitted in that band under the Commission's rules. TRN wanted to utilize up to seven channels in the FM broadcast band to transmit video signals to flat screens in rail cars; the accompanying audio could be accessed on any device receiving FM radio.

Both the NAB and NPR filed comments pointing out that TRN hadn't bothered to provide vital technical information illustrating protective measures to prevent unlawful interference to licensed stations operating in the FM band. Prodded by the NAB and NPR, the Commission had requested that TRN supplement its original proposal with additional information. (The Commission nevertheless did issue TRN an experimental authorization to permit testing of its system in September, 2005.) When TRN failed to provide the requested information, the Commission ixnayed the proposal.

The Commission was particularly concerned about TRN's failure to include sufficient data on how it would determine the channels on which its system would operate. According to TRN, the Commission really didn't need to know the exact channels on which TRN would operate, and such information "would be of limited value…in making long run conclusions of interference potential."

The Commission disagreed, noting that TRN had not made it clear *how* it would determine whether or not its system would cause harmful interference. In addition to the issue of TRN channel selection procedures, the Commission was curious about "whether and how [channel selections] are changed as trains move through the area", a not insignificant question given the fact that the rail cars in which the TRN system would operate would be, by their very nature, mobile and, therefore, likely to carry the TRN transmissions through different areas and, presumably, through the service areas of different licensed stations using different frequencies. The Commission labeled TRN's approach "ad hoc and unspecific" and, therefore, too much of a potential source of interference to justify approval.

The Commission also concluded that TRN had failed to establish that it would not cause interference to FM IBOC radio services which transmit analog and digital

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Focus on FCC Fines

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Radio station neighbors hear "voices" – The FCC requires stations to satisfy all complaints of blanketing interference during a one-year period that begins with the station's commencement of program tests. Neighbors of AM stations in Wyoming and Wisconsin were unaware of the one-year time limit and complained to the FCC about the nearby stations. But since both stations have been operating for more than a year, the rule no longer applied.

A Wyoming woman complained that every phone in her house experienced interference and broadcast the signal of a neighboring AM station. In another case, a veterinary clinic next to a Wisconsin AM claimed that it could not use its phones or send ultrasound or ECG images over its phone lines. In both cases, the FCC pointed out that the stations had been operating for more than a year, the blanketing interference rules no longer applied and the complaints were denied. However, in the Wisconsin case the FCC noted that after the complaint was filed, the station had modified its license; the FCC cautioned the station that the one-year period began again with the modified license. Also in both cases, the Commission included as an appendix to its decision a set of examples and guidelines relative to dealing with blanketing complaints. While the appendix makes clear that a station targeted by a complaint is financially liable only within the one-year period (and only if certain other conditions are met), stations are *still* expected to cooperate with complainants *after* the one-year period. While such cooperation is required by the Commission under some conditions, such cooperation may be prudent even if it is *not* technically required: after all, time and effort spent on solving a potential complainant's beef may serve to avoid the delay and expense of dealing with the Feds if the complainant takes the matter to the FCC.

Board of directors cause $5000 fine – Federal law prohibits more than a 20% foreign ownership or voting interest in a broadcast licensee. The import of this law is easily calculated by companies whose "ownership" is based on shares of stock or membership interests. However, some non-profit broadcasters may overlook the restriction because they are non-stock entities governed by a board of directors. In such cases, the entity is technically not "owned" by anybody, but is controlled by the board – and the FCC views the board to be "owners" for purposes of the alien ownership rules. A Texas non-commercial station found out about this the hard way when it turned out that two of its board members were foreign citizens.

The station was governed by a six-person board. One of those board members was a foreign citizen representing one out of six votes (or 16.7% control). However, for a two-year term, another foreign citizen also was elected to the board. The election of the second board member gave foreign nationals two out of the six votes, for an aggregate foreign vote exceeding the 20% control maximum. While the FCC noted that it could revoke a license for such a violation, it fined the non-profit station $5,000 instead. Each licensee (whether non-profit or for profit) should bear the 20% limitation in mind when reviewing its corporate control structure, and especially when the licensee plans to include a foreign citizen in that structure.

Children's programming age information must be circulated – The FCC requires television broadcasters to notify publishers of program guides about which shows are designed for kids ***and*** the age groups that those shows target. When renewing their licenses, television broadcasters must certify that they are complying with this and other children's programming rules. Several Massachusetts stations admitted to the FCC that, while they *had* been providing programming information to publishers, they had omitted the age group information. The stations also pointed out that the print guides usually do not publish the information anyhow. The FCC was not persuaded by the "nobody is using it" excuse, notwithstanding the compelling logic of that excuse – after all, if it is clear that providing certain information (like target age groups) is a completely meaningless activity because the publishers to whom that information is given simply ignore it, what purpose is served by requiring broadcasters to provide the information in the first place? Fortunately for the stations involved, the Commission ultimately declined to whack them with a fine, choosing instead simply to admonish them (although the FCC did shake its regulatory finger sternly at the licensees and warned them that, if there is a next time, "severe sanctions" would not be ruled out).

On the topic of children's programming rules, the juggernaut of FCC fines against licenses churns on inexorably. The same renewal applications requiring disclosure of the age group information discussed above also require disclo-

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Coming soon to a DTV station near you?

Beware the Incredible Shrinking Contour!!!

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An anomaly has come to our attention which may provide an unpleasant surprise to TV stations planning to utilize their current analog channel for digital operations once the DTV conversion is complete. Some licensees in that situation are finding that the parameters proposed in the DTV Table of Allotments substantially limit the DTV coverage that their stations will be able to provide as a practical matter once they start operating digitally on their currently analog channels.

The problem generally arises because of a conflict between the proposed DTV Table of Allotments, which currently specifies directional operation in many cases, and a station's actual analog operations, which often are non-directional. Since the Commission has stated that stations may not expand their coverage outside of the footprint specified in the proposed DTV Table of Allotments, stations are left trying to shoehorn their analog operations as converted to digital into the digital allotment parameters.

Appendix B to the FCC's Seventh Further Notice of Proposed Rule Making in the DTV proceeding, released last October, consists of a table of all proposed DTV allotments, including the basic information about each station's proposed post-transition digital facilities (*i.e.*, channel, effective radiated power, height above average terrain, antenna ID, latitude and longitude). The antenna ID number turns out to be a key factor, as each such number corresponds to a particular *directional* antenna pattern in the FCC's antenna database. A review of Appendix B shows that the majority of the proposed allotments specify an antenna ID number, which means that the majority of proposed allotments have directional characteristics.

But stations planning on using their present analog channels for their post-transition DTV operation may find that the directional antenna specified in the Appendix B table is different from what the station is otherwise planning to use post-transition. Stations returning to VHF analog channels from UHF DTV channels may have particular difficulties, since the design of digital patterns is less flexible for VHF channels, and some of the minima specified are quite low. Since the FCC currently requires that such stations not exceed their Appendix B coverage footprint, those stations which might want to use their existing non-directional antenna may well find that a reduction in ERP is necessary to meet the FCC's requirement. And, of course, reduction in ERP results in reduction of service area. In some cases, that reduction would be quite severe.

Stations returning to VHF analog channels from UHF DTV channels may have particular difficulties, since the design of digital patterns is less flexible for VHF channels.

The Commission's recent notice of proposed rule making in its further review of the DTV process, however, gives an indication that it recognizes this potential problem. One solution would be to allow stations making a transition back to their analog channel to exceed their proposed DTV allotment footprints so long as they do not cause any interference. We would encourage stations that have selected their current analog channels as their post-transition channels to examine this issue and, if a problem appears, to consider filing comments with the Commission. Those comments are due on August 8, 2007.

If you would like further information concerning this matter, please contact us here at FHH.

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broadcast signals simultaneously on the same frequency. And the Commission was not satisfied that TRN had conclusively established the interference potential of its system.

The Commission's denial was without prejudice, which means that TRN may not yet have reached the end of the line. And the fact that the Commission had initially issued TRN an experimental authorization and had conferred with TRN (and given it ample opportunity to supplement its request) may signal that the Commission is not absolutely opposed to the TRN concept. If TRN were to ship a more thorough and (in the FCC's eye) more responsive showing in to the Commission, TRN's proposal might get back on track. But for now, it's jumped the rails.

Two-minute warning? How about 45 seconds?

NFL Clips Clips

By: Kevin M. Goldberg
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Clipping

For years, many have joked that "NFL" is an acronym that stands for "No Fun League" rather than "National Football League", mainly because of the League's clamp down on on-field celebrations and other aspects of player behavior. But now many media outlets have their own reason to bemoan heavy-handed controls imposed by the NFL Commissioner's Office. New League rules relating to credentialing of media outlets covering the league are considered by radio, television and newspaper reporters to be no laughing matter.

The NFL, like other professional sports leagues, has long exerted close control over its content. The league has exclusive contracts with television and radio networks to provide live broadcast feeds of its games. There are restrictions on the amount of game footage that can be shown on local and national news programs. League rules even range beyond these areas to cover access to league and team facilities, players and coaches. They also include restrictions on the amount and style of the presentation of content that is accumulated in accordance with league rules.

Let's face it: 45 seconds is barely enough time to interview a couple of players and show a play or two from practice.

As sports coverage moves beyond just radio, television and newspapers, the NFL has continued to re-examine and re-invent its media credentialing process. In 1995, the league forbade media outlets to put "game information" online, except for television stations which were simulcasting a signal online in its entirety. This meant no highlights and no interviews could be put online unless they were part of a simulcast of the authorized game feed or news program. The league has continued to refine its rules relating to online video in the past two years and recently announced rule changes which will further affect those – including broadcasters – who wish to cover their local NFL team. The changes fall into two broad categories: (1) Sideline Media Access and (2) Online Use of Interview/Press Conference/Practice Video and Audio.

In 2006, the NFL established rules governing sideline access of non-network television video crews during games. It concluded after the 2006 season that the rules effectively reduced sideline congestion and improved safety for players and sideline personnel. In fact, the rules worked so well that the league decided to expand sideline access. The 2007 season will see an increase in the number of television video cameras on the sidelines. Up to five local television station cameras from each team's local market will be allowed on the sidelines during the game to serve as a "pool feed" which must be made available upon request to other stations and to the NFL or the teams for their own use.

This means there will be ten cameras total; if fewer than five cameras from stations from the local market of a team playing in the game request access, more than five cameras from the opposing team's market stations will be allowed. This is in addition to the network cameras and NFL and club cameras that also have sideline access. It is important to note that these cameras may shoot video *only* for use in their broadcast feeds – *no online use of this footage is permitted.*

It is this last restriction on online video that leads to the second, and significantly more controversial, set of rules. The new rules state:

- No action from an NFL game may be streamed via on an Internet website.
- Websites are limited to 45 seconds per day of audio and/or video of NFL employees (which includes players *and* coaches) from NFL facilities. This includes footage of team practice.
- This content can be available for only 24 hours before it must be taken down and replaced with new audio and/or video.
- There is no limitation on the amount of "talking head" audio or video – meaning station employees can talk to their hearts' content.
- There is also no limitation on the amount of audio or video of an NFL employee that is shot off of NFL premises, so stations can set up interviews outside of stadium or practice facilities and use as much audio or video as they like.
- The media webpage containing this content must contain links back to the NFL.com website and the site of any NFL team whose employees are featured permitted.

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"Those who cannot remember the past are condemned to repeat it." - George Santayana

Fairness Doctrine Resurgence?

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The good news is that the Fairness Doctrine probably won't be reimposed by the FCC for at least a year. The bad news is that the Fairness Doctrine has appeared on Congress's radar screen at all.

Earlier this summer, legislation was introduced in both Houses of Congress aimed at preventing the FCC from reinstating the Fairness Doctrine. Anything that might keep the coffin sealed on that Doctrine, interred by the Commission two decades ago, should be viewed as a plus. . . ***except*** that the Commission was not, as far as we are aware, giving any serious thought to reinstating it just now. So Congress's curious interest in the Fairness Doctrine raises the question of what they might be thinking down there on Capitol Hill.

There's an old adage that, in politics, where you stand depends mainly on where you sit. And with the Democrats in control of Congress and President Bush's popularity ratings in the tank, many big D lawmakers may be contemplating what they might do to maintain their current edge. One likely focus of such contemplation is how the left might counteract the talk radio machine that has so benefited the right since the FCC, under both judicial and political pressure, got rid of the Fairness Doctrine back in 1987.

For you young 'uns who arrived on the broadcasting scene too late to experience the Fairness Doctrine first hand, here's a quick recap. The Doctrine required each broadcaster to devote a reasonable amount of time to discussions of controversial issues of public importance and if, in so doing, the broadcaster presented one side of an issue, the broadcaster had to provide a reasonable opportunity for the presentation of contrasting views on the issue. The broadcaster had considerable latitude in the process: the contrasting views did not have to be presented in any particular context – just somewhere in the station's overall programming.

The Doctrine was designed to promote public discourse about important issues, and on paper it seemed like a relatively low-impact way to achieve that salutary goal. But in practice, many found the opposite to be true. If a broadcaster had the temerity to broach a controversial subject on the air, he or she ran the risk of litigation brought by some representative of some viewpoint claiming that that viewpoint had not been adequately represented. And that, in turn, gave rise to the possibility that the broadcasters' programming judgment would be second-guessed by some bureaucrat in Washington.

As a result, in the eyes of many, the Fairness Doctrine discouraged stations from covering *any* controversial issues because of a not irrational fear of potential complaints about the "fairness" of the coverage and the regulatory consequences of such complaints.

It should not be surprising that, in a Democratically-controlled Congress, the reinstatement of the Fairness Doctrine in some form may have attracted attention.

By 1987, after several years of deregulatory fervor, the Commission concluded that the Fairness Doctrine should be scrapped.

Not coincidentally, the nation then experienced an upsurge of talk radio, as stations felt comfortable in unleashing one-sided pundits who could opine freely without having to worry about presenting "contrasting views". One notable example: in 1988 Rush Limbaugh moved to New York City and became a nationally-recognized "talk radio" phenomenon. Since 1987, the sphere of political talk radio – a potent means of tapping into and molding public sentiment – has been seen as an arena dominated by the political right. While folks on the political left have tried to emulate the right's approach, with only a couple of notable exceptions talk radio has not worked for the left.

So it should not be surprising that, in a Democratically-controlled Congress, the reinstatement of the Fairness Doctrine in some form may have attracted attention. Reports indicate that Democrats Dick Durbin (IL), Byron Dorgan (ND) and John Kerry (MA) have all openly discussed the idea of restoring the Doctrine, possibly even including it in the Communications Act (historically, the Doctrine was not explicitly a part of the Act, but was implemented by the FCC based on its interpretation of the Act).

Of course, many have viewed (and presumably continue to view) the goal of the Doctrine to be loftier than simply

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affording a tactic in the game of politics. They see the Fairness Doctrine as a tool that promotes democratic values in the purest sense. After all, the marketplace of ideas concept which underlies the First Amendment is based on the notion that truth is the ultimate commodity in the megamall of expression. The more information that is available to consumers – and voters – the better able will they be to make informed decisions and the more society will benefit.

From that perspective, the Fairness Doctrine is nothing but good. Even the Supreme Court (in the 1969 *Red Lion* case) had no problem upholding the Fairness Doctrine when broadcasters argued that it was a gross governmentally-imposed infringement of their First Amendment rights.

(In the Court's view, the First Amendment values supposedly embodied by the Doctrine outweighed any First Amendment infringement. The Court was particularly impressed by the fact that the airwaves on which broadcasters claimed to have top-to-bottom First Amendment rights are scarce resources, the use of which, the Court concluded, could be subject to limitations notwithstanding the First Amendment. While the continued validity of the *Red Lion* scarcity rationale has been criticized repeatedly – especially in light of the multitude of media sources now available to the public – the Court has thus far declined to re-visit *Red Lion* in the nearly 50 years since that decision. As a result, proponents of a 21st Century Fairness Doctrine may feel that they are still skating on firm constitutional ice.)

So it should not be surprising that we are starting to hear some vague sounds in the distance that suggest that, with the change in prevailing political winds, the Fairness Doctrine is blowing back in our direction. The earliest official indication of that was the proposed legislation, noted above, which would prevent the FCC from re-imposing the Doctrine for the next year or so. But that proposal would ***not*** stop Congress from itself attempting to codify the Fairness Doctrine in some form in the Act at any time. Of course, even if Congress were to pass legislation breathing the breath of life back into the Doctrine, it would still need the President's signature – and until there is a regime change in the White House, it is doubtful that that signature will be available.

Whether a matter of FCC invention or Congressional imposition, the practical and unavoidable problem with the Fairness Doctrine was and remains two-fold. First, it subjected broadcasters' independent programming judgment to second-guessing by the government. And second, that potential for second-guessing could, and did, discourage broadcasters from any coverage of "controversial issues". In other words, constitutional values were jeopardized and the range of issues presented was decreased, not increased, as a result of the Doctrine.

The Fairness Doctrine subjected broadcasters' independent programming judgment to second-guessing by the government. And that potential for second-guessing could, and did, discourage broadcasters from any coverage of "controversial issues".

To be sure, the Doctrine may have also discouraged "talk radio" in its current sense, so in the eyes of some politicians – and particularly those who tend not to fare so well on the talk radio circuit – it may be a good idea to bring the Doctrine back. To many, though, that notion is ill-conceived, especially in the Internet era. From its own seeming success in mastering the blogosphere and other high tech communications channels (*see, e.g.*, the 2004 Howard Dean campaign), the political left should recognize that discussions stifled in one medium can and will simply move to other, less regulated, media. Ultimately, voices will be heard and those that resonate will gain adherents – however the message happens to be communicated.

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sure if time limits are violated. More than a dozen licensees were fined between $4,000 and $15,000 this month after they fessed up about commercial violations during children's programs. Three licenses were merely admonished when the FCC found that "inadvertence" led to one or two violations.

The homeless run my CB – We close this month with the story of a Texas man who apparently used his CB radio to rebroadcast a local AM station. The man was quickly discovered when, of all the channels he could have used, he chose CB channel 19 to rebroadcast the radio. FCC agents showed up at the man's home and demanded they be permitted to inspect the CB radio. The man refused to let the G-men into his house, although (discretion being the better part of valor) he did go inside and turn off the CB.

A few months after the incident, the FCC sent the man a letter and proposed a $7,000 fine. Curiously, the man denied that the CB had been on when the agent arrived. And then, in a textbook illustration of "pleading in the alternative" (a technique occasionally taught in law school – think "I didn't break your window, and if I did, I didn't mean to, but in any event, there was a good reason for me to break it"), the man claimed that if the CB had in fact been left on, it likely was turned on by homeless people who the man supposedly allows to roam about his house. The FCC did not buy the explanations and upheld the $7,000 fine.

Editor's Note: *As we have trumpeted – on page one, no less – in the last two editions of the Memorandum to Clients, FHH has launched a blog (www.commlawblog.com). If you checked it out this past month, you may have seen the following pieces which appeared there – so you'd be ahead of the game and could skip reading them here. If you haven't yet seen our blog, read on, and then be sure to take a peek at the blog from time to time in coming weeks.*

Taking precedent Siriusly? – The FCC has asked for comment on whether a statement that it made ten years ago should be deemed a "binding rule" and if so, whether that rule should be changed or waived to permit the proposed merger of the only two U.S. satellite-delivered radio services, XM and Sirius.

If you've been living in a sensory deprivation tank for the last couple of months, you may not have heard that XM and Sirius are proposing to merge. Back in the misty ages of time, when the Satellite Digital Audio Radio Service (SDARS) was barely a glimmer in the eyes of some visionaries – that is, back in 1997 – the FCC had occasion to contemplate the possibility of future consolidation in the SDARS business. At that time, the FCC held in unequivocal terms that "one [SDARS] licensee will ***not*** be permitted to acquire control of the other remaining satellite DARS license" (emphasis added).

Fast forward ten years to 2007. There are only two SDARS licensees, and they are proposing to merge into a single entity – precisely what the FCC declared would ***not*** be permitted. What about that pesky old prohibition? Not to worry. Echoing the famous words of the pirate Barbossa (in *Pirates of the Caribbean: The Curse of the Black Pearl*), XM/Sirius argue that the FCC's words weren't really rules, but more what you might call guidelines. And even if they were really rules, they should be waived, or modified, or whatever, in order to let the merger proceed.

The FCC wants to know what the Great Unwashed – that is, anybody who isn't XM or Sirius – thinks about all this. The deadline for filing comments is currently August 13; reply comments are due August 27. Let us know if you have any interest in sharing your thoughts on these topics with the Commission. – *Harry F. Cole*

Chief Justice Roberts: Student speech is bad; Corporate speech is good – At the end of June, the Supreme Court surgically removed a portion of the Bipartisan Campaign Reform Act (BCRA, a/k/a McCain-Feingold), the campaign reform act enacted with great fanfare five years ago. BCRA was originally pitched as a means of limiting the money spent on election campaigns. Among the restrictions affecting broadcasters was Section 203, which criminalized the use of general treasury funds by any corporation or union to pay for an "electioneering communication", a term defined (for BCRA purposes) as any broadcast referring to a candidate for federal office that is aired within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction where the election is being held. A corporation or union could still fund such ads through a separate Political Action Committee.

This provision was previously upheld by the Supreme Court against a facial First Amendment challenge. But the issue arose again after the Wisconsin Right to Life (WRL), a corporation, began broadcasting advertisements which mentioned by name certain senators (including, ironically enough, Senator Feingold, one of BCRA's namesakes), and urged voters to contact those senators to oppose a filibuster on the nomination votes of federal judges. The ads ran through June and July, 2004, but, come August, 2004, would have been prohibited as "electioneering communications" because of the then-approaching election. WRL sued the Federal Election Commission (FEC) for the right to continue airing the advertisements.

WRL's suit was rejected by a trial judge, who figured that the still-recent Supreme Court decision upholding BCRA left no room for WRL's "as applied" challenge (which dealt with WRL's three specific ads). The Supreme Court initially vacated the trial court's judgment in early 2006, holding that the earlier holding was never intended to prevent future challenges to BCRA. On remand, the trial court ruled in favor of WRL, and back the case went to the Supremes.

Chief Justice Roberts wrote the majority opinion of this 5-4 decision, with other members of the Court adding their own views in multiple separate opinions. Roberts first tackled the question of Section 203 of BCRA – which WRL conceded would be applicable to these advertisements. Roberts immediately identified that the "strict scrutiny" test would be applied to this content-based regulation. Thus, the burden would be on the government to prove that Section 203 furthers a compelling government interest and is narrowly tailored to achieve that interest (basic Con Law II here, folks). However, when the Supreme Court had looked at BCRA earlier, the FEC had demonstrated the existence of a compelling interest for

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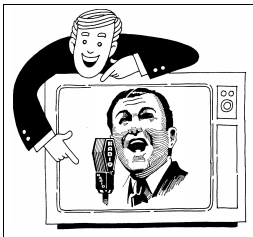

Audio revives the video star?

Radio On The TV

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Have you ever noticed that your FM radio can be tuned to receive broadcasts on frequencies as low as 87.7 MHz? This may seem strange, since according to the FCC's rules "the FM broadcast band consists of that portion of the radio frequency spectrum between 88 MHz and 108 MHz." The FCC divides that swath of spectrum into one hundred channels of 200 kHz each and numbers the channels from 201 (88.1 MHz) to 300 (107.9 MHz). The FCC reserves the first twenty channels for noncommercial educational (NCE) stations. So what's up with this 87.7 business?

The future of such Channel 6/FM Radio operations is cloudy, particularly with the final DTV conversion deadline fast approaching.

It turns out that, in some areas, you can receive the audio signal of a television station broadcasting on TV Channel 6. That's because the FM radio spectrum way down at the noncom end butts up against the top of the FCC's allotted spectrum for TV Channel 6 (which, to be precise, occupies the 82 MHz-88 MHz chunk of the spectrum). That proximity is why there are extensive regulations designed to protect Channel 6 operation from nearby NCE FM stations, but those regulations are not the focus of this article (much to the relief of most of you and me, too).

What *is* the focus of this article is the fact that enterprising Channel 6 TV licensees have managed to put their proximity to the FM band to use to reach radio audiences. For example, KCEN-TV in Temple, Texas, tells radio stations listeners to tune to 87.7 to listen to "NBC 6 Radio" where they can hear the audio portion of all of the station's programming such as Dr. Phil, Jeopardy, local news and weather. The station's website, with perhaps a little too much enthusiasm, says "when you can't watch, listen!" Listening to the audio portion of a television show probably doesn't excite most radio station audiences, but it could be useful as an additional source of information in the case of an emergency.

Another approach has been taken by at least a few other Channel 6 LPTV stations which have essentially converted themselves into "radio" stations specifically targeting radio audiences with programming suitable for listening only. One example is "Coast FM 87.7" in Hawaii, which is really LPTV Station K06NC , Hanamaulu, Hawaii. According to the station's website, the company's owner is a "former California TV weatherman" who broadcasts local music and "lite hits" targeted to the community's radio listeners during at least part of the day. Without cable carriage, it is apparently more profitable to operate his low-power television station as a pseudo radio station. K06NC was inspired to do this by Station KZND-LP "the End" in Anchorage, Alaska, which bills itself as "Alaska's New Rock Alternative." And lest you think that this is merely a West Coast/ Pacific phenomenon, a New York City LPTV station re-

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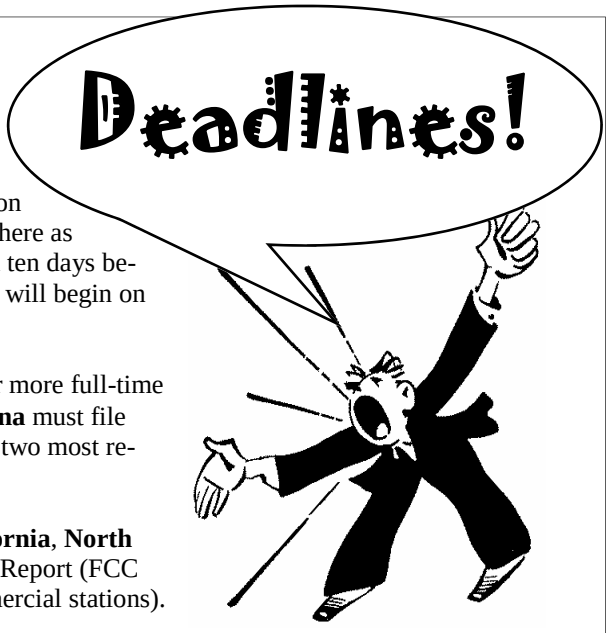
Several major media organizations have protested these new restrictions. With the knowledge that there is little if any legal right to access to the NFL's privately-owned facilities or its employees, officials from the American Society of Newspaper Editors (a Fletcher, Heald & Hildreth client), the Associated Press Sports Editors, the Radio-Television News Directors Association, the Newspaper Association of America and other media associations have mounted a public interest campaign designed to highlight the importance of the league's widespread media partnerships. These organizations have either written letters to or met with NFL staff in an attempt to negotiate a more reasonable set of rules that benefits the league, the media and, most importantly, the fans, who will lose out on the hard-hitting, in depth interviews that the NFL's own websites won't provide. Let's face it: 45 seconds is barely enough time to interview a couple of players and show a play or two from practice.

Nowhere is this better illustrated than in a video produced by Houston Chronicle blogger John McClain. He interviews Houston Texans players and management while an assistant with a stopwatch stands by to tell him when he is exceeding his limit. Check it out at http://blogs.chron.com/nfl/2007/06/video_mcclain_annamegan_try_to.html

Unfortunately, while McClain's video and his brethren's efforts may have highlighted this issue, they have not changed the NFL's policy. Discussions between the League and the media continue but to date, the League has conceded only that the 45-second limit applies to the NFL employee's responses, but ***not*** to the interviewer's questions. So it does not look like much progress will be made before NFL training camps open later this month.



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.

August 8, 2007

DTV Third Periodic Review - Comments are due in response to the Notice of Proposed Rule Making in its Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television.

Mid-September 2007

Regulatory Fees - While this date has not been set in stone or publicly announced as yet, we have heard that the likely filing window for regulatory fees will be September 5 - 20, 2007.

October 1, 2007

EEO Public File Reports - All *radio* and *television* stations with five (5) or more full-time employees located in **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Iowa**, **Mariana Islands**, **Missouri**, **Oregon**, **Puerto Rico**, the **Virgin Islands**, and **Washington** 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 **Florida**, **Puerto Rico**, or the **Virgin Islands** 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 **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, **Puerto Rico**, the **Virgin Islands**, or **Washington** 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 **Iowa** and **Missouri** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323 or 323-E.

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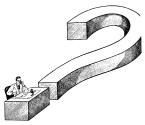
Section 203 (the interest being the prevention of corruption, or the appearance of corruption, in political campaigns and the aggregation of wealth in corporations that do not mirror the desires of the voting public), so the Court moved directly to the second issue: whether the law is narrowly tailored to that interest so as to prohibit these particular advertisements.

The Court let the ads speak for themselves. Chief Justice Roberts said that, because the advertisements could be construed as something other than an express urging to vote for or against a candidate, they were not express advocacy advertising – in other words, the vagueness of the speech here would be resolved in favor of the corporate speaker. (This was in sharp contrast with the "Bong Hits 4 Jesus" case that the Court had decided just days before, with considerably less concern for the First Amendment rights of the speaker involved.) With that in mind, the Court concluded that these advertisements were *not* express advocacy ads because they were open to reasonable interpretation: they took a focus on legislative issues and requested only that the public contact a candidate with regard to that issue, not that the public vote for or against the candidate. Issue advertisements such as these do not carry the same concerns regarding corruption in the political process that exist with regard to express advocacy advertisements. Nor does the fact that corporations may have significant wealth justify preventing their speaking out on issues rather than endorsing candidates – issues are the lifeblood of an advocacy organization such as the WRL and they must be able to state their public position on public issues.

Justice Souter dissented, joined by Justices Stevens, Ginsburg and Breyer. Souter went to the trouble of reading his dissent from the bench, so angry was he with the apparent reversal of the Court's earlier decision which had appeared, for all practical purposes, to uphold BCRA. The dissenters believe that the majority has reopened the door to corporate spending to defeat candidates under the guise of promoting an issue.

What does all this mean for broadcasters? Only good things, we're sure. Broadcasters were never subject to criminal punishment under Section 203, so there was limited downside to an adverse Court ruling. But the Court's ruling opens the door to direct spending by corporations and unions during the periods before an election without fear of running afoul of Section 203. If, as many believe, the Court showed its sympathy for Corporate America in the decision, then the biggest subset of corporations that won were the broadcast media. – *Kevin M. Goldberg*



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The Internet auction services, however, argue that sales through their systems should not be included in LUC calculations because their systems create "unwired networks" of stations. The FCC has long excluded from the LUC calculations of stations any sales by networks that do not act as sales representatives of those stations but that, instead, simply purchase time on a defined group of stations.

Regardless of how the FCC decides the matter, the state broadcaster associations are urging the FCC to decide quickly. The first presidential primary is in mid-January 2008, putting the start of the first *federal* LUC window in late 2007. (Note that any intervening *state* and *local* races would also be subject to these considerations, so the problem may arrive at your doorstep even sooner than December.) If the FCC does not issue a decision before the next near-election political time buys start to roll in, stations which have participated in Internet auctioning of time to non-political buyers will need to make their own determinations on whether or not to include the auction rates in the LUC calculations and take the risk of issuing refunds, credits or make goods if they are wrong.

Comments on this matter are due to the FCC on August 6th and reply comments are due August 21st. If you have any questions or wish to file comments, please call your friendly neighborhood communications counsel.

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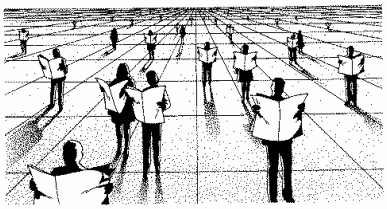
portedly broadcasts Russian language radio programming. These stations also typically broadcast some type of nominal video image, but that image reportedly does not necessarily correspond to the audio programming which appears to be the stations' primary focus.

The future of such Channel 6/FM Radio operations is cloudy, particularly with the final DTV conversion deadline fast approaching. Some LPTV stations are already being displaced from their current Channel 6 locations by full-service television stations getting set for the transition. Also, LPTV channel 6 stations that aren't displaced are likely at some point to be forced to abandon analog transmission and go strictly digital (although the FCC has not yet set any date for that). That, too, could pose some problems, although there may be some way that a digital Channel 6 TV station could continue to broadcast analog FM radio programming as an ancillary service. (If that suggestion sounds a bit tentative, consider this paraphrase of a classic line by Dr. McCoy in the original *Star Trek*: "Damn it, Jim, I'm a contracts lawyer, not an engineer.") In view of the ingenuity, technical expertise and entrepreneurial spirit of many station owners, it would be surprising if they were unable to figure out a way to continue to reach radio listeners at the bottom of their radio tuning range.

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

Updates on the News

Comment deadlines – Get out your calendars. If you want to file comments on the FCC's Third DTV Period Review notice of proposed rulemaking, you've got until August 8, with reply comments due by August 23. With the final DTV transition now less than 18 months away, there aren't likely to be too many more opportunities to chip your two cents' worth in on transition-related issues. And elsewhere on the television front, if you've been champing at the bit to toss in your thoughts on the status of children's programming, the deadlines for doing so have moved again. The FCC's public notice which initially invited comments was released in April, with comments and replies due in June. Forget those dates. Now kidvid comments are due by September 4, and replies by October 1.



Changes on the AM front? – A couple of rays of hope for AM licensees. First, as we reported in last May's *Memo to Clients*, the Commission has taken to granting STA's authorizing AM stations to re-broadcast on FM translators. Now we have informal confirmation (from the Media Bureau) that a notice of proposed rulemaking has been drafted and is circulating on the 8th Floor relative to that prohibition. Rumors of such an NPRM had been making the rounds for some time. While we haven't seen the draft, we suspect that it proposes the elimination of the prohibition. But even if the NPRM were to be adopted right away and put on a fast track, don't look for any change on this front until early to mid-2008, at the absolute soonest. What with the need to give folks the opportunity to file comments and reply comments – which in turn means that somebody at the FCC has got to read and consider them – and then the need to squeeze preparation of a final report and order into the staff's to-do list, it's entirely possible that we may not see a final decision on this until 2009. But trying to push things along are a group of 15 members of Congress who wrote to the Chairman last month in support of letting AMers onto FM translators. Until the rulemaking actually happens, AM licensees looking to get onto FM translators will have to stick to the individual case-by-case STA route. Such STA's are apparently being granted wit some regularity, we hear.

Meanwhile, the FCC *has* invited comment on Ted Schober's proposal to overhaul a number of AM night-time rules. We wrote about his proposal in the March, 2007 *Memo to Clients.* Comments are due by August 18, and replies by September 17. Again, don't look for anything to pop out on this in the short term, but at least it indicates that some relief for AM folks may be available at some point in the next few years.

Public interest, diversity back in limelight while Commissioners toddle – We're starting to hear more noise about possible steps to increase "diversity" in the ranks of TV programmers and also to impose some kind of reporting requirement relative to "public interest" programming by all broadcasters.

On the TV side, the Commission is considering a proposal that would impose must-carry requirements on digital "side" channels leased by the broadcaster to small businesses or companies owned by women or minorities. Comments are due by September 4, replies by September 21. (Note that such an approach could open the must-carry obligation up not only to the standard First Amendment challenge which cable operators routinely lob against must-carry of any sort, but also to a Fifth Amendment equal protection argument by non-minority-male-owned companies who might claim to be the target of reverse discrimination. This could be make the whole interesting of digital must-carry obligations even more interesting.)

On the "public interest" side, during recent Congressional testimony it was suggested that the FCC could and should be gathering more information from broadcasters about their "public interest record". Chairman Martin reportedly advised that he "has a pending FCC item which would give broadcasters a collection of categories to report on in order to provide a public interest record to evaluate." It's not clear exactly what all this means or where it all may lead, but it certainly is a development to monitor. (We are constrained to note that this development should not be a surprise to anyone familiar with the FCC's historical efforts to evaluate broadcaster performance. For a recap of those efforts, check out *The Myth of the Localism Mandate*, an article written by FHHers Harry Cole and Patrick Murck. It can be found at http://commlaw.cua.edu/articles/v15/15_2/Cole%20Murck.pdf. Their research reveals that, while the FCC has talked a good game about "public interest" and "local" programming requirements for more than 60 years, in fact the on-again-off-again regulatory steps the agency has taken have amounted to little more than pointless and unnecessary window-dressing and paper-shuffling.)

And while all of this is going on, the Commissioners will be toddlin' off to, appropriately enough, the Windy City for another hearing on media ownership on September 20.

(Continued on page 13)

FM ALLOTMENTS ADOPTED –6/22/07-7/23/07

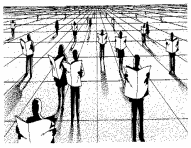
State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
TN	Englewood	66 miles NE of Chatanooga, TN	250A	05-273	TBA

FM ALLOTMENTS PROPOSED –6/22/07-7/23/07

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
OR	Dallas	15 miles W of Salem, OR	*236C3	07-124	Cmnts: 8/20/07 Reply: 9/4/07	Accommodation Substitution
OR	Monmouth	15 miles SW of Salem, OR	252C3	07-124	Cmnts: 8/20/07 Reply: 9/4/07	Accommodation Substitution
OR	Waldport	106 miles SW of Salem, OR	253A	07-124	Cmnts: 8/20/07 Reply: 9/4/07	Drop-in
FL	Live Oak	24 miles W of Jacksonville, FL	*261A	07-131	Cmnts: 9/3/07 Reply: 9/18/07	Substitution (subject to noncommercial reservation)
CO	Silverton	48 miles N of Durango, CO	281A	07-130	Cmnts: 9/3/07 Reply: 9/18/07	Drop-in
IN	Oolitic	22 miles S of Bloomington, IN	231A	07-125	Cmnts: 8/20/07 Reply: 9/18/07	Drop-in

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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NCE app cap? – Looking forward to the upcoming window opportunity for filing new NCE FM applications, and looking backward at what happened the last time a long-closed window was flung open, several groups have filed a petition asking that the Commission impose a 15-application-per-applicant limit on new NCE FM applications for the October window. The petitioners note that, in 2003, the Commission opened a similar window for FM translators and, lo and behold, more than 13,000 applications walked in the door – by most accounts, far more (by a factor of four or five) than the Commission had anticipated. The impact of that tsunami is still being felt, as a significant number of those applications still remain pending. At this point it is unclear what, if anything, the Commission plans to do to avoid a recurrence with the next window. While the petition proposes a 15-application limit, we have heard at least one rumor that some on the 8th Floor may prefer a 100-application limit, which frankly would not be much of a limit at all. Down closer to the processing line, we hear that the sentiment runs more in favor of capping applications at 10, or even five. Keep an eye out for a public notice describing the procedures to govern the October window filings – if there's going to be a cap, it will most likely be announced there.

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

First Class

FHH - On the Job, On the Go

Ron Whitworth has been named Co-Chair of the FCBA Charity Auction Raffle Subcommittee and has been elected Treasurer of the Communications Law Institute Alumni Association of The Catholic University of America, Columbus School of Law.

Frank Montero has been elected to the Board of Directors of the National Association of Minority Media Executives and attended the NAMME Conference and Board meeting in Washington, D.C., the week of July 9. **Frank** also attended the Minority Media and Telecommunications Council's *Access to Capital and Telecom Policy Conference* in Washington on July 16-17, and participated in a panel discussion entitled "Know What You're Buying: Due Diligence In Media And Telecom Transactions." **Frank** is on the Board of the MMTC.

Meanwhile, the other Frank, **Frank Jazzo**, will conduct the "Legal/FCC Issues" seminar, along with **Roy Stewart**, Senior Deputy Chief of the Media Bureau, at the annual convention of the Arkansas Broadcasters Association in Little Rock on Thursday, August 2.

Kevin Goldberg will speak at the Association of Capitol Reporters and Editors Conference in Philadelphia on August 4.

And the *Media Darlings of the Month* are **Harry Cole** and **Patrick Murck**, whose article on *The Myth of the Localism Mandate* appears in the Spring, 2007, edition of *CommLaw Conspectus*, a journal of communications law and policy published by the Columbus School of Law at the Catholic University of America. You can read their article at http://commlaw.cua.edu/articles/v15/15_2/Cole%20Murck.pdf.