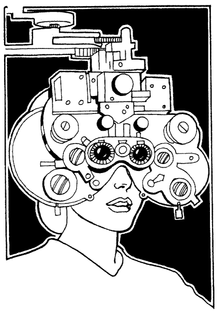
FLETCHER, HEALD & HILDRETH, P.L.C.

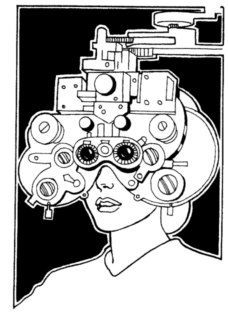
Memorandum to Clients

September, 2007 *News and Analysis of Recent Events in the Field of Communications* No. 07-09



Dual-ing carriage requirements

Post-Transition Must-Carry Picture Coming Into Focus



By: Jeffrey J. Gee
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The FCC has adopted long-awaited rules that will help ensure that cable subscribers will still be able to watch their local television stations after February 17, 2009. The new rules will require cable operators to provide the digital signal of local television stations to their analog subscribers in analog format. In the alternative, the signals may be provided in digital format only – ***if*** all subscribers have the necessary equipment to view digital signals. The FCC also affirmed that cable operators must carry high definition broadcast signals in HD format without material degradation.

> *The Communications Act, and the new rules, require that cable operators deliver local broadcast signals in a manner that is viewable by all subscribers.*

As our regular readers should know, February 17, 2009, marks the end of the digital television transition. On that date, all U.S. television stations are expected to cease broadcasting in analog and commence digital-only operations. For those viewers lucky enough to have shiny new television sets with digital tuners, this change over should not be a problem. Likewise, cable customers subscribing to digital cable service should not anticipate any problems.

Life may be considerably more uncertain, however, for the 40 million households that subscribe to analog-only cable service. Lacking the necessary equipment to decode the new-fangled DTV signals, these viewers will be reliant on the good graces of their cable company to somehow provide them with a viewable signal. While the cable industry argued that it could be trusted to take good care of its customers, there were no clear cut rules mandating how digital format broadcast signals would be provided to analog-only subscribers. The new rules seem to address this gap.

The complete text of the new rules has not been made available as of the time of this writing. The news release issued by the FCC, however, indicates that the new rules do not actually mandate "dual carriage" as many broadcasters have urged for many years now. Rather, the new rules are based on the Communications Act's requirement that cable operators deliver local broadcast signals in a manner that is viewable by all subscribers.

To meet this "viewability" requirement, cable operators have a choice: Either they must ensure that all of their subscribers have the necessary equipment to view digital signals (presumably by requiring subscribers to buy or lease digital set-top boxes), or they must downconvert broadcasters' digital signals and provide those signals in analog format for their analog subscribers. Digital subscribers, of course, would receive the digital signal.

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The Scoop Inside

40 days in purgatory

Forgotten But Not Gone

Licensee lets license lapse, license lives on

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The Commission has recently instructed that an expired license has not really expired just because the expiration date has passed without a renewal application. Who knew?

At the FCC, it appears that a license is no longer a license only when its expiration is "final" – and that (as perceived by the FCC, at least) occurs 40 days *after* expiration.

This conundrum was addressed in a case involving a Michigan NCE licensee (we'll call it "Superior") which noticed that the nearby Bloomfield Hills School District had not filed a license renewal for its station when it was due back in 2004. Failure to seek renewal meant the school district's license would expire exactly four months from the missed filing deadline. Superior waited patiently to see if the school district might file late, but no late-filed application was forthcoming. The school board filed nothing before the expiration date. Zilch. Nada.

Let's take a moment to contemplate the school board's situation here. It had a license which, on its face, said that that license expired as of a date certain. That date certain came and went. The school board did not ask for renewal of the license prior to the date certain. Common sense – not to mention the ordinary meaning of language – would indicate that, as of that expiration date, the license had, well, expired. And if it expired, it wasn't there anymore, it didn't exist, it simply wasn't.

That, at least, is what Superior thought.

So once the expiration date on the school board's broadcast license has passed, Superior filed to modify its own facilities to cover spectrum turf that the school board had (in Superior's view) vacated. Because of interference considerations, that modification application could not have been filed while the school board's station was authorized. But, reasoned the interloper, if the school board's station was no longer there, there was no longer anything to interfere with.

The FCC was not convinced. Superior apparently wasn't showing the requisite respect to the dearly departed. According to the Commission, broadcast licenses do ***not*** expire on the date indicated on their face, even when the licensee fails to ask for renewal. *Au contraire*. In the FCC's view, an expiration date on a license is not really an expiration date. Apparently, the Commission believes that once that date arrives and the licensee has not sought renewal, the license ascends (or maybe descends) into some kind of "non-final" expiration limbo. So, for a period of 40 days, the license apparently rattles around in an undead, wraith-like state – and during that time, according to the Commission, the license is still entitled to protection.

Presumably roused from its morbid torpor by Superior's effort to settle into the seemingly vacated spectrum, the school board filed an application to renew its then-expired broadcast license within the 40-day period. The FCC granted the renewal, and sent Superior packing because it had filed too soon.

The notion that a license has a sort of 40-day afterlife is odd. The Commission de-

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Focus on FCC Fines

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FCC loses paperwork and blames station – Although the tale of a radio station owner bringing home his transmitter and strapping it to the roof of his house normally would be enough for a story in this column, the FCC's mistakes in this case make the story even more interesting. The FCC readily admits that it cashed a check for an application but that it cannot find the application. Nonetheless, the FCC is fining the station for not "following-up" to check on the application.

An Oregon AM station outside of Portland experienced problems with its transmitter and sought authority from the FCC to move its antenna. The FCC issued temporary authority for the station to operate its antenna from the roof of the owner's residence. After moving the antenna, the station owner ran out of time on the temporary authority and filed an application to extend the time for broadcasting from home. There was a mix-up with the payment of the fee for the extension application; the FCC cashed the check for the application but somehow misplaced the application, so it never got granted.

A few years later, an FCC agent inspected the owner's home and proposed fining the station $4,000 for operating from an unauthorized location. The station owner produced a copy of the application seeking an extension of authority to broadcast from the new location and the cancelled check for the associated filing fee. The FCC admitted that it had taken the station's money for the application but it had no explanation for what it had done with the application itself.

Pay no mind to the cancelled check and the copy of the application, said the FCC to the broadcaster; look instead at your own failure to ask us where your application was. The FCC boldly blamed the station for making "no effort to follow-up or notify the FCC that it did not receive the requested extension."

The station probably made the reasonable assumption that when the government cashes your check, it will do something with the application to which the check was stapled. The FCC faults the station for that assumption and implies that applicants have an obligation to badger the FCC when the FCC does not process paperwork quickly enough. The FCC also bases its fine on the fact that, even if it had processed the application and granted an extension request, FCC rules would have limited the amount of time for the extended temporary authority.

As any seasoned practitioner before the FCC can attest, on occasion the government processes paperwork slowly. This recent decision seems to suggest that when paperwork is processed slowly, a licensee should become concerned and make inquiries of the FCC. Here, the government wasted no time in cashing the check – but it fined the licensee for thinking that he were actually paying for something.

Chain link fences should have chain links – A California AM station faces a fine for having posts in the ground for its chain link fence, but not an actual fence. The station was inspected by local fire authorities and was ordered to remove weeds at the base of its towers to prevent a fire hazard. Dutifully, the station obeyed the local authorities and removed the chain link panels of the fence and began applying herbicide to kill the weeds. Shortly after the chain link was removed – wouldn't you know it? – an FCC inspector showed up at the towers. Noticing that there were posts but no fencing, the inspector proposed a $7,000 failure to fence fine.

The station replied that a $7,000 fine for removing the fence was unwarranted, particularly because the fence had been removed to kill weeds pursuant to an order by local governmental officials. Unfazed, the FCC asserted that even when the fence was down for repairs, the station still had an obligation to maintain some type of enclosure around the towers. In recognition of the fact that the fence was removed in order to comply with a local government directive, the FCC cut the $7,000 failure to fence fine by 20%. The fine was also reduced due to the station's poor financial condition.

Gates should have locks – A Mississippi AM was not as lucky in its efforts to reduce its own $7,000 failure to fence fine. Although the fine involved an unlocked gate rather than problems with the fence itself, the FCC still fined the station the full $7,000. Agents from the FCC's New Orleans office swept down on the AM tower array and discovered a gate with a broken hasp which prevented the gate from being locked. The station insisted that the gate had been inspected only a few days earlier and that there had been no problem. The station also pointed out that within two hours of the inspection, the hasp had been repaired and the gate was fine again. However, the FCC only cared about the moment at which the agents were there and upheld the full $7,000 fine.

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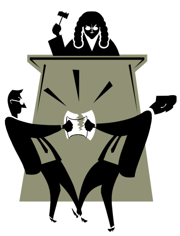
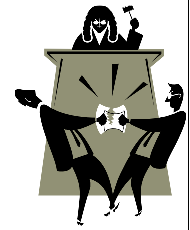


Three and one-half years after the half-second exposure

Third Circuit Hears CBS's Janet Jackson Appeal



By: *Patrick Murck*
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CBS finally got its day in court to protest the $550,000 dollar fine levied against it in the wake of Nipplegate, the infamous Janet Jackson /Justin Timberlake 2004 Super Bowl performance. Oral argument took place on September 11, 2007, but a decision likely won't be made until early next year. From the tenor of the judges' questions, however, a decision in the FCC's favor seems to be far from a sure thing.

For those who need a refresher, CBS claimed that it was just as surprised as those complaining members of the audience by what occurred that fateful night. The network said that it followed industry standards to prevent the broadcast of indecent material, including a five-second audio delay. The fleeting exposure (which everybody agrees clocked in at about one-half of one second) of Ms. Jackson's breast was not punishable, according to CBS, because the FCC had longstanding precedent for exempting fleeting indecent content – and the Commission failed to explain why that longstanding policy didn't apply to *L'Affaire Jackson.* By contrast, the FCC contended that CBS controlled every aspect of the show and that the network knew or should have known that something outrageous and indecent would be broadcast. According to the FCC, CBS should be vicariously liable for the actions of Timberlake and Jackson.

The Third Circuit argument at least hints that the Commission's indecency policy may suffer yet another judicial setback.

Unlike the Fox/Second Circuit case, in which the court's questions tended to focus on the nitty-gritty of the indecency policy, the Third Circuit seemed more interested in exploring whether CBS could or should be held liable for the halftime show if that show were held (for the sake of argument) to have been indecent. The court did address some of the standard indecency-related questions, such as the history of the "fleeting expletive" doctrine and the manner in which the FCC supposedly determines whether any particular word(s) or image(s) may be contrary to the national standard for broadcasting. But the judges returned repeatedly to the question of liability, and they seemed reluctant to impose vicarious liability on CBS in view of CBS's assertion of less-than-complete control over the two artists.

You can hear the full 75-minute Third Circuit oral arguments on the Internet. (Fire up Real Player, select "open file", and paste the following URL in for the file name: rtsp://video.c-span.org/60days/ac091507.rm.) While it is never prudent to draw any conclusions about the likely outcome of an appeal based on the questions asked at oral argument, the Third Circuit argument does at least hint that the Commission's indecency policy may suffer yet another judicial setback.

How the Third Circuit ultimately rules could have a significant effect on whether the U.S. Supreme Court will weigh in on the indecency issue. The Supremes are under no obligation to take any appeals in this area. However, when there is a "conflict in the circuits" – that is, when two federal courts of appeals reach seemingly inconsistent results in similar cases – the Supremes are usually more inclined to agree to hear the appeal in order to announce a consistent standard of federal law in the area. Since the Second Circuit has already made clear that it does not believe the FCC's indecency policy is good law, a contrary decision from the Third Circuit could mean that the Supremes will consider that question in the next term. Of course, if the Third Circuit agrees with the Second, that could be it for the policy. Stay tuned.

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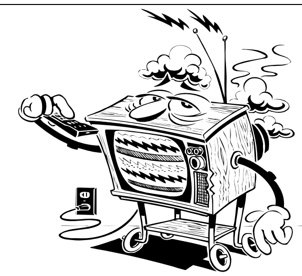
Stations should have working EAS systems – The FCC continued to issue fines at the rate of $6,400 per station for failure to have operating EAS equipment. A Las Vegas Class A television station was fined for not maintaining proper EAS logs despite various excuses (examples: volunteers didn't change printer ribbons, or how about they couldn't get printer paper due to delivery problems, or the classic leaky roof). The former owner of an Arizona AM station similarly faces a fine, despite the fact that the station had been sold nine months prior to the fine being issued. In that case, the FCC inspection occurred prior to the sale, but the paperwork (a/k/a the notice of apparent liability) didn't get prepared and released until some time ***after*** the sale had been approved and consummated. (Note that, given that chronology, it's not entirely clear that the FCC could legally issue an NAL against the licensee, but that's an issue we can address at some other time.) All stations should take precautions to ensure that they have functioning EAS equipment, that they conduct regular testing and that they maintain EAS logs.

More oldies-but-goodies to be accessible to hearing-impaired



Captioning Constraint Climbs

Starting 1/1/08, 75% of "old" programs must be captioned

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The culmination of a transition period spanning more than a decade will occur on January 1, 2008, when all video programming distributors (including broadcasters, cable operators and satellite television services) must comply with the Commission's benchmark for "pre-rule" English language non-exempt video programming.

The "rule" in question is the Commission's execution of Congress's mandate in Section 713 of the Telecommunications Act of 1996 stating that all English language programming must be captioned. The Commission established a series of steps to ensure that all video programming become accessible to deaf persons and those hard of hearing. Since January 1, 2006, ***all*** non-exempt "new" English language programming has been required to be captioned. "New" programming includes all programming first published or exhibited on or after January 1, 1998, and digital programming first aired on or after July 1, 2002, with some exceptions.

The second and final benchmark period begins on January 1, 2008, when the captioning requirement for "old" programming more than doubles, to 75 percent.

The captioning of "new" programming was a forward-looking requirement. But the FCC also insisted that ***old*** programs (*i.e.,* analog programs pre-dating January, 1998, and digital programs pre-dating July, 2002) also be captioned. Because the retro-fitting of captioning on old programming was a more cumbersome process, the FCC established two benchmarks for compliance.

The initial benchmark period began on January 1, 2003 and will expire on the last day of 2007. During this period, program distributors have been required to assure at least 30 percent of their "old" programming per channel is captioned. The second and final benchmark period begins on January 1, 2008. As of that date, the captioning requirement for "old" programming more than doubles, to 75 percent.

There are some exemptions to the rule which provide programmers some relief from the mandate. For example, public service announcements that are shorter than ten minutes and are not paid for with federal dollars are exempt, as are programs aired early in the morning (2 a.m. to 6 a.m. local time) and programming that is primarily textual in nature. A full list of exemptions can be found at http://www.fcc.gov/cgb/dro/exemptions_from_cc_rules.html. Also, where compliance would pose an undue burden (*i.e.,* significant difficulty or expense) on a programmer, the FCC will consider petitions for exemption from the closed captioning rules.

Please do not hesitate to contact your FHH attorney for further explanation on the rules and their exemptions.

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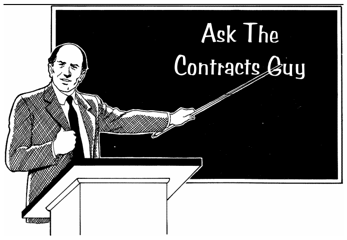
scribed the expiration as "not final", but that term is normally used in connection with actions taken by the Commission, actions which are subject to reconsideration or review. Here, the Commission had taken no action. Rather, the expiration date had come and gone. There was nothing left to review, so it's difficult to say exactly why the expiration wasn't "final".

That is especially true in view of the fact that the FCC routinely fines licensees for "unauthorized operation" if they happen to operate after their license has expired, the theory being that, with the expiration of their license, they are not authorized to operate. But if that's the case, what are we to make of this 40-day post-expiration non-expiration?

Any licensee like Superior which is hoping to expand its coverage once some other licensee fails to seek renewal should pay heed here. It appears that such a maneuver may indeed be possible – but only if you wait at least 40 days from the "expiration" date on the license, and even then there is no guarantee that that approach will work. This is an odd situation, but so it has always gone in the Land of Oz. Just as the good townsfolk of Munchkinland proclaimed, "We thank you very sweetly for doing it so neatly; you've killed her so completely," so too must a station improver-in-waiting stand by until the ruby slippers have completely slid off.



LMA's, TV-style

Staff Decision Sheds Light On Shared-Services Arrangements

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While FCC Commissioners traipse around the country to a seemingly endless series of media consolidation fora and slog their way through reams of scholarly research studies, the FCC Media Bureau's staff has to deal with nitty-gritty interpretations of the presently existing rules in the real world. In doing so, the Bureau has recently released a couple of decisions clarifying a way in which one television station in a small market can effectively operate another station in the same market. The staff has provided a roadmap for lawyers to follow when preparing a complex matrix of contracts leading to FCC approval of television station duopolies in these markets.

The Bureau staff really does examine the arrangements to confirm that the Sidecar has the necessary degree of independence from the competitor, both financially and in management decisions.

To review, the FCC's current multiple ownership rules for television stations permit an existing station owner to acquire another TV station license in the same DMA ***only*** if: (a) there will still be eight independently-owned TV stations (commercial and non-commercial) remaining in the DMA after the acquisition is completed and (b) at least one of the co-owned stations is not among the top four-ranked in the market.

So what happens when a television station comes up for sale in a DMA that doesn't have enough stations to permit another owner in the market to acquire it? The party to whom the station is worth the most and who is, therefore, willing to pay the highest price is usually one of the other TV station owners in that DMA. This creates a tremendous economic incentive for both this potential buyer and the station's seller to come up with a way to strike a deal which is both consistent with the FCC's rules and consistent with the parties' private economic interests.

Something as simple as having a close family member buy the station is an obvious but not necessarily effective approach, because family members' ownership interests can be attributable under the FCC's rules. But creative contract lawyers (no, that's not an oxymoron) have come up with a way to structure sale transactions so that those deals satisfy the letter of the FCC's rules and yet provide substantially all of same the economic benefits to sellers and in-market buyers as conventional sale transactions.

This approach involves finding an independent third-party (let's call that party the "New Licensee") to buy the station's license and some (but not all) of the station's physical assets. The New Licensee then enters into a set of contracts with the existing in-market station owner, who buys the rest of the station's assets. The in-market station owner (let's call it the "Competitor") is the one who really wanted to buy the for-sale station but couldn't under current FCC rules. The New Licensee is known euphemistically in the trade as a "Sidecar."

The Sidecar and the Competitor enter into a series of agreements. These might include such exotica as:

- a shared services agreement (in which certain routine operating functions are, as you might have guessed, shared – such as accounting, human resources, newsgathering, etc.);
- an advertising representation agreement (self-explanatory);
- an option agreement (under which the Competitor might have a chance to buy the sidecar's interests if the FCC's rules are ever relaxed);
- and leases back and forth for certain assets owned by the other.

(In some cases the Competitor effectively finances the sidecar by guaranteeing loans for the sidecar to get the money necessary to purchase the station licenses and assets.)

These types of arrangements have actually been around for a number of years and the Media Bureau has been giving them a stamp of approval despite much wailing and gnashing of teeth by other station owners in the market who claim the arrangements are shams. From 2004 to this past July (in a decision in which FHH's very own Joe Di Scipio played a central role – way to go, Joe), the FCC has been steadily approving these transactions and refining the rules of the game.

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A word to the wise from Joe Di Scipio

FCC: Buyers Must Sign On To Sellers' Tolling Agreements

Our friends at the FCC have thrown a new twist into the continuing saga of station license renewals, tolling agreements and stations sales.

As we here at *Memo to Clients* Central have previously reported, the FCC has placed holds on a number of license renewals, mainly on the television side – the reason being that complaints (in most cases, complaints involving the broadcast of alleged indecency or VNR's and the like) are pending and the FCC just can't seem to get itself in gear to consider and resolve those complaints. As a result, the subject renewals are languishing in one stack or another at the FCC for years.

Now it is longstanding FCC policy that the Commission will not grant a station sale if a license renewal is pending. So if a licensee stuck in this FCC purgatory happens to want to sell its station, the luckless licensee must first get its renewal granted. Since that would ordinarily require that the Commission address sticky issues like indecency – which the FCC is not currently inclined to do – the licensee finds itself at an impasse.

But wait! The FCC (out of the goodness of its heart) has in recent years been willing to enter into tolling agreements with licensees to "toll" the statute of limitations. The primary benefit the FCC gets out of such agreement is more time to act on pending complaints (usually an additional two-three years). Until recently, once such a tolling agreement was signed by licensee, the renewal application was granted and so was the sale application. Seller and buyer went merrily on their way and all was well in FCC land. While the seller was still under the possible hammer of an FCC fine for the duration of the tolling agreement, at least the station deal could be done and, seriously, what's the likelihood that the Commission is *ever* going to resolve the indecency morass, much less within the two-three years of a tolling deal?

Then, abruptly, without warning, a dark cloud formed over FCC land. The FCC dramatically changed its policy. The FCC now requires that if the seller will no longer be an FCC licensee after the sale, the ***buyer*** must sign onto the tolling agreement and agree to accept any liability if the seller is no longer in existence if and when the FCC ever issues a fine (assuming the tolling

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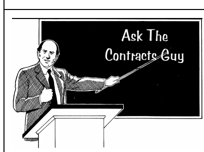

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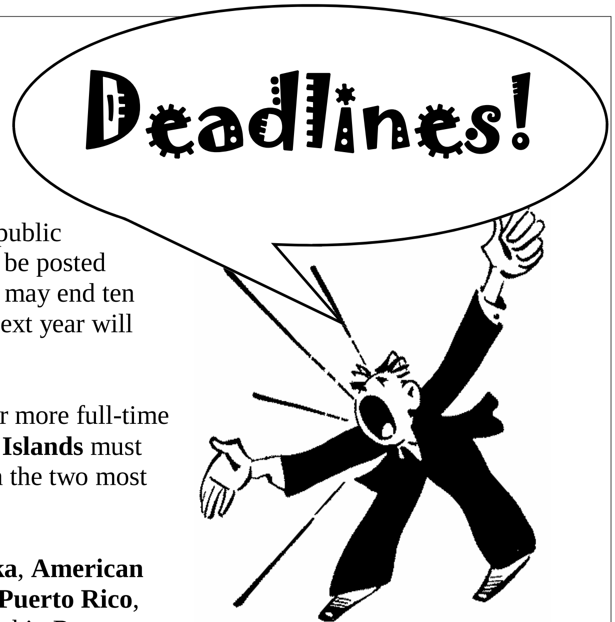
While it may seem on the surface that the FCC, by approving a fair number of these deals, is loosening the strings, the truth is that the Media Bureau staff really does examine the arrangements in detail to make sure that the Sidecar has the necessary degree of independence from the competitor, both financially and in management decisions. Behind the scenes, many deals have been amended and restructured to meet the Media Bureau's interpretation of the ownership rules before such deals are approved.

In its latest decisions involving these types of transactions, the Bureau emphasized that the payment terms in various contracts between the Sidecar and the Competitor are a fundamental part of the staff's analysis of a proposed transaction. The staff will look for factors such as which party bears the monetary risk of having to make repairs to the station's equipment. The Sidecar entity, as the licensee of the station, must also specifically retain ultimate responsibility for the station's operation, including control over even the Competitor's employees when they are working on behalf of the Sidecar. Finding a Sidecar who has credible experience in owning and operating televisions stations is also a factor that the Bureau staff weighs when evaluating these deals.

For any television station owner in small(ish) DMA's who may be eying a cross-town station that may be for sale – be advised that this is an expensive game in which to play. The legal fees can be very substantial, because both you and your Sidecar entity will need separate teams of lawyers. The number of contracts to paper the deal (almost all of which must be submitted to the FCC for review) is considerably more than the already veritable forest of trees that must be sacrificed for a run-of-the-mill television station acquisition.

And all of the scrutiny at the FCC together with the nearly inevitable objections (and appeals) filed by aggrieved competitors in the market can easily extend the final closing of a transaction of this type by a year or two. It might still be worth it to you, but you should go into this type of transaction with your eyes (and wallet) wide open.



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.

October 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.

December 1, 2007

DTV Ancillary Services Statements - All *DTV licensees* (***not*** permittees) must file a report on FCC Form 317 stating whether they have offered any ancillary or supplementary services together with its broadcast service during the previous fiscal year. If a station has offered such services, and has charged a fee for them, then it must separately submit a payment equal to five percent of the gross revenues received and an FCC Remittance Advice (Form 159) to the Commission. The report on Form 317 specifically asks for a list of any ancillary services, whether a fee was charged, and the gross amount of revenue derived from those services.

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FM ALLOTMENTS PROPOSED –8/22/07-9/20/07

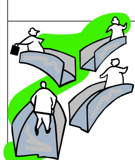
State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
IL	Cuba	78 miles N of Springfield, IL	252A	07-175	Cmnt: 10/15/07 Reply: 10/30/07	Accommodation Substitution

FM ALLOTMENTS ADOPTED –8/22/07-9/20/07

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
TN	Lynchburg	73 miles SE of Nashville, TN	230A	05-282	TBA

Notice Concerning Listings of FM Allotments

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



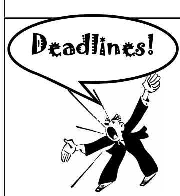
FHH - On the Job, On the Go

Ron Whitworth appeared as a guest panelist for a course on "Becoming a Communications Lawyer" at the Columbus Law School of the Catholic University of America on September 24.

Kevin Goldberg spoke on a panel at the annual training symposium of the American Society of Access Professionals on September 26.

Frank Jazzo will conduct an EEO compliance seminar (in the morning) and a political advertising regulation seminar (in the afternoon) for the Arkansas Broadcasters Association at the Crowne Plaza Hotel in Little Rock on October 10.

And this month's *Media Darling of the Month* is (drum roll, please) **Kevin Goldberg**, who appeared as a "First Amendment attorney" during an MSNBC discussion of whether Seattle newspapers should have published the photographs of two individuals who had reportedly been acting suspiciously.



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EEO Public File Reports - All *radio* and *television* stations with five (5) or more full-time employees located in **Alabama**, **Colorado**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **Rhode Island**, **Minnesota**, **Montana**, **New Hampshire**, **North Dakota**, **South Dakota**, and **Vermont** 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.

Television Ownership Reports - All *television* stations located in **Colorado**, **Minnesota**, **Montana**, **North Dakota**, and **South Dakota** 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.

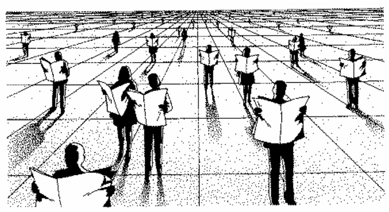
Radio Ownership Reports - All *radio* stations located in **Alabama**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island**, and **Vermont** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323 or 323-E.

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

Updates on the News

Site assurance – sine qua non or vestigial non-essential? – As we approach the October NCE FM filing window, there are doubtless boatloads of folks busily preparing their applications for new or major change NCE FM facilities. And here's a question that all prospective applicants should be asking themselves: do I need to get "reasonable assurance" of the availability of my proposed tower site, or can I just specify any old site and hope for the best?

The FCC's answer to that question is that all applicants need to obtain "reasonable assurance" of the availability of their proposed site(s). This answer came through loud and clear in a recent Audio Division decision. There the Division held that "the Commission's basic 'reasonable assurance' standard remains unaltered", notwithstanding the fact that the FCC had, in 1998, "repealed the requirement that broadcast applicants certify the availability" of their proposed transmitter sites. In other words, the Division was saying that while applicants are no longer required to certify that their sites are available, the mere specification of a site in an application is "an implied representation that the applicant has obtained reasonable assurance."



But hold on. In the 1998 Commission decision referred to by the Division, the FCC didn't mention anything about "implied representations". To the contrary. In the FCC's words, "[w]e surmised that elimination of the requirement of reasonable assurance of site availability was appropriate." Huh. Maybe the Division *circa* 2007 is misremembering things.

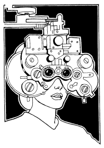
Not so fast. A couple of months after that 1998 decision, the FCC issued yet another decision in which (among other things) it revised its application forms. And sure enough, the revised Form 301 contained an instruction that, while the site certification had been eliminated, "the substantive site availability requirements are unchanged." That meant that all applicants had to have reasonable assurance of site availability before they file. So maybe the Division is right after all.

Wait, there's more. That instruction appears only in Form 301, which is used for commercial CP applications. No corresponding instruction appears in Form 340, which will be used for the NCE FM window.

So it's safe to say that there may be some justifiable confusion in the minds of many on this particular point. While some reasonably compelling arguments could be made on the side of not needing to get any assurance of site availability, by far the safest course would be to take all appropriate steps to get such assurance before filing. The Division's recent decision may be right, or it may be wrong, but one thing's for sure: it will be the Division that will be processing the applications that flow in next month, and the Division currently thinks that reasonable assurance of site availability is *de rigueur*. Unless you're looking for litigation, it would be a good idea to dust off the old casebooks, bone up on reasonable assurance, and go get yourself some before you file.

Elevated status for LPFMs? – Back when the lowly low power FM service was created, it was clearly designated as a secondary service. Ordinarily, that means that, if a full-service proposal would run afoul of an existing or proposed LPFM station, the full-service would trump the LPFM and it would be so long, LPFM. But lately, we have picked up on reports that suggest that the staff has been instructed to place holds on any full-service FM application that would otherwise wipe out an LPFM . . . BUT, if the full-service applicant can come up with a displacement channel to which to move the LPFM, then the full-service application can get processed. It will be interesting to see how that policy (if it is indeed a policy) will be applied relative to applications filed in the upcoming NCE window.

VNR NAL – If you were paying attention late last year and earlier this year, you will probably remember that the FCC issued more than 100 letters of inquiry addressed to TV stations which had allegedly broadcast video news releases (VNRs) without a sponsorship identification. Responses to those inquiries have been filed and are now sitting in some pile or other somewhere in the Commission, showing no signs of moving anywhere fast (presumably because, as long as the FCC sits on the affected stations' respective renewal applications, the Commission is under no time constraints). But hark, as we go to press we note that the Commission has issued a notice of apparent liability (NAL) for a VNR telecast. But the target is a cable company, not a broadcast station. Our hunch is that the Commission bothered to issue the NAL now because, unlike on the broadcast side, there may have been some statute of limitation running against the Commission on the cable side. Be that as it may, we note with interest that the cable guy got whacked $4,000 for the alleged VNR violation. Of course, it is at least possible (if not close to certain) that the cable operator will now respond to the NAL, and its file will get added to the stack of broadcaster files already gathering dust at the Commission.



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The FCC did not adopt an exception for small cable operators, as some in the cable industry wanted. Rather, systems with channel capacities of 552 MHz or less may request waivers of the new rules (presumably based on an economic hardship standard). The new rules affect only those stations being carried pursuant to the FCC's must carry rules. Stations that elected to negotiate for retransmission consent will continue to operate under the terms of their retransmission consent agreements. In addition, the new rules have an expiration date of three years after the transition date, with the expectation that the FCC will revisit the continued need for the rules by 2011.

At the same time, FCC reaffirmed that cable systems must carry HDTV signals in HDTV format, consistent with the current standards prohibiting "material degradation" of broadcast signals. The FCC did not, however, adopt a "carry all the bits" requirement sought by some broadcasters. Rather, cable operators may use compression technology to preserve bandwidth so long as it does not materially degrade the broadcast signal and the picture quality of such signals remains at least as good as the quality of any other programming carried on the system.

The FCC's decisions drew more or less predictable responses from the industry players. The NAB applauded the decision, noting that the ruling was a particular boon to viewers of Spanish language and religious stations, many of which rely on must carry to reach viewers. The American Cable Association, which represents small cable operators, gave an equal and opposite reaction, gloomily predicting that some small operators would have no choice but to shut down in the face of such a burdensome requirement. The National Cable & Telecommunications Association, which represents many of the largest cable operators, had previously announced a voluntary plan for dual carriage and therefore was somewhat more sanguine about the decision. Still, NCTA urged the FCC to "act quickly" to provide relief to "very small systems."

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agreement has not expired). The grant of the sale will also be subject to the condition that the buyer accept liability.

This is a reversal of years of FCC precedent – not to mention common sense and traditional notions of justice – which held that the buyer is not liable for the sins of the seller. There are a number of legal problems with this change in FCC land, problems which fascinate legal scholars. But that does not solve the immediate problem of getting stations sales granted. If the seller's parent will remain and have other subsidiaries that are FCC licensees, the seller's parent can sign onto the tolling agreement and the FCC will grant the sale application without requiring the buyer to accept liability. However, if there is no parent entity and the seller will not continue on as an FCC licensee, the FCC will ***not*** grant the sale application without the buyer also accepting liability.

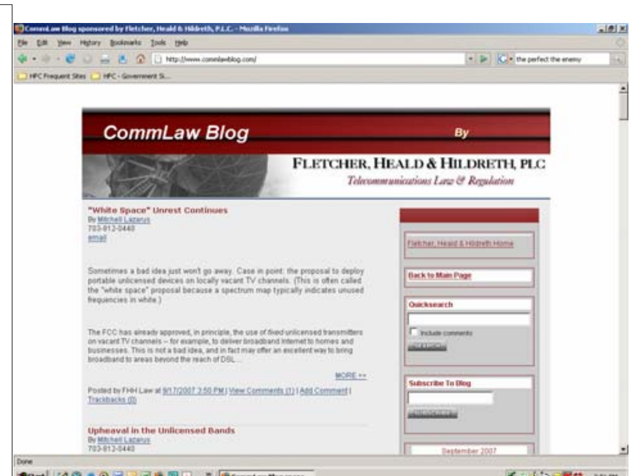
What this means going forward is that sellers and buyers will need to bargain for this new potential liability in the sale agreement. For sellers and buyers who have already negotiated and signed sales agreements, this means they may have to go back to the bargaining table to account for this potential new liability. We here at *Memo to Clients* Central will of course inform you of any changes in this new draconian policy.

Late Breaking News???

If you're looking for information and insight about late-breaking developments, check out our commentary on the Fletcher Heald blog. You can find it at:

www.CommLawBlog.com

(See the screen grab at right for a sample view.) We cover the gamut of communications issues – plus, if you feel so moved, you can submit your own views for posting. Join the more than 6,600 folks who have already visited our site to date.



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