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Memorandum to Clients

October, 2007 | *News and Analysis of Recent Events in the Field of Communications* | No. 07-10

Can you prove it?

Ad-Producing Broadcasters May Face Increased Liability for Deceptive Advertising

Terse FTC ruling may signal trouble

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

If you thought keeping up to date and in compliance with the myriad rules and regulations the FCC imposes on broadcasters was hard enough, get ready for another think: now the Federal Trade Commission (FTC) is getting into the game. Earlier this year the FTC found that Premiere Radio Networks, Inc. was acting as a "hybrid entity," *i.e.*, as both a broadcaster and an advertising agent for a company which was selling a product dubbed "HeightMax". And as a result, Premiere faced potential liability for the apparent sins of HeightMax.

It is unclear what level of involvement may trigger potential liability – but it is clear that such liability lurks in wait for the unwary and incautious.

HeightMax, for those of you who may have missed the ad campaign, was a substance (the term "magic potion" is probably not too far off the mark) which was said to increase the user's overall height by multiple inches in a matter of months while increasing lean body mass and reducing body fat. Apparently the FTC wasn't convinced of the quasi-miraculous powers ascribed to HeightMax, and whacked the manufacturer for $375,000 in a settlement which also imposed significant limits on the manufacturer's ability to market HeightMax.

Meanwhile, Premiere was just standing on the sidelines. But once the FTC had taken care of the manufacturer, it turned its sights on Premiere. According to the FTC, Premiere fell into the "hybrid entity" category because it produced both radio programming, like a broadcaster, and commercial advertising, like an advertising agency. The agency found that when Premier acted in the latter capacity it was liable to the same extent that an advertiser would be for any false and misleading advertising that Premier helped produce. Under FTC case law, an ad agency can be held liable if it "was an active participant in preparing the deceptive advertisement and it knew or should have known that the advertisement was false or lacked substantiation."

While a broadcaster should never run any ad that it knows is false or misleading, it is clear from the FTC's ruling that the FTC imposes a higher standard on a broadcaster when the broadcaster has helped produce the ad. This ruling should alert broadcasters that they should take extreme care if and when they assist in the production of advertising on behalf of their clients. According to the FTC's letter, when an entity "produces commercial advertising for nationwide distribution", it can be treated as an "advertising agency", and thus be liable if "it knew or should have known" that the ad was untrue and unsubstantiated.

The FTC's ruling is terse, to say the least. The significant holding consists of the following less-than-illuminating language:

> In addition to radio program production, [Premiere] produces commercial advertising for nationwide distribution. When it engages in the latter services, [FTC precedent

(Continued on page 14)

The Scoop Inside

FCC Issues Emerge In Presidential Contest 2
Focus on FCC Fines 3
FCC Starts To Swing Enforcement Blade At VNR's 5
LPTV Permit Yanked Because Of Antenna Discrepancy 6
Delinquent Debts Dealt To Dunners 6
Government Investigates Itself, Finds Itself OK!!! 9
Deadlines 10
FCC Demands Would-Be Sellers Put Their Money On The Table 11
Updates on the News 12
Allotments 13

12 months and counting . . .

FCC Issues Emerge In Presidential Contest

Fairness Doctrine, shortened license terms, increased public interest obligations may all be on the table

By: Ron Whitworth
703-812-0478
whitworth@fhhlaw.com

Less than five months before the 2008 Presidential nominees face off in primaries which will pick the major parties' nominees, and just 12 months before the national election itself, top candidates from both major parties are beginning to reveal their positions on key issues affecting the communications industries.

The picture will undoubtedly become clearer as February 5, 2008 – *i.e.*, this year's "Super Tuesday", when up to 20 states will hold their primaries – draws near. But several big names have already given indications of where they stand on some of the most important issues facing the FCC.

Senator Barack Obama (D-IL) has been perhaps the most vocal on FCC issues. He is adamant about preventing further media consolidation before considering its effects. He issued a statement at a Public Hearing on Media Ownership in Chicago in September, expressing his disappointment at the Commission's leniency in permitting consolidation. Obama's comments echoed the sentiments of Democratic Commissioners Michael Copps and Jonathan Adelstein, stating that the Commission should be "doing more to encourage diversity in ownership in broadcast media, promote the development of new media outlets and the expression of diverse viewpoints."

Obama issued a second statement in October, commenting on reports that Chairman Kevin Martin intended to schedule a Commission vote on media ownership issues on December 18, 2007. Obama said that date is far too early in view of the issues that need to be considered. "I believe both the proposed timeline and process are irresponsible," Obama wrote. "Minority owned and operated newspapers and radio stations play a critical role in the African American and Latino communities and bring minority issues to the forefront of our national discussion. However, the Commission has failed to further the goals of diversity in the media and promote localism, and as a result, it is in no position to justify allowing for increased consolidation of the market. Moreover, 30 days of public review of a specific proposed change is insufficient to assess the effect that change would have on the media marketplace or the rationale on which any such proposal is based."

In addition to suggesting that a special panel be commissioned to address minority ownership concerns, Obama favors shorter broadcast license renewal terms and more scrutiny from the Commission regarding whether broadcasters are addressing their public interest obligations. Reports from Capitol Hill indicate there is movement in some corners of Congress to impose stricter regulations on broadcasters in connection with renewals, so this is an issue that could take root and spread throughout the election.

Of course, for years Commissioners Copps and Adelstein have grumbled about what they perceive to be a relatively lax and licensee-leaning renewal system which generally rubber-stamps renewals without detailed review and analysis of the licensee's public interest performance. And, along the same lines, some folks in Congress have been suggesting in recent months that such oldies but goodies as the Fairness Doctrine should be re-instated as a means of enhancing public interest programming. Obama's stated positions are certainly consistent with these notions. So an Obama candidacy (and election) could create increased momentum for them.

Net neutrality is another potential hot button issue that has been referenced by candi-

(Continued on page 4)

Fletcher, Heald & Hildreth
A Professional Limited Liability Company

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

Supervisory Member
Vincent J. Curtis, Jr.

Co-Editors
Howard M. Weiss
Harry F. Cole

Contributing Writers
Anne Goodwin Crump,
Joseph M. Di Scipio, Kevin M. Goldberg,
Patrick Murck, R.J. Quianzon,
Michael Richards and Ron Whitworth

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Focus on FCC Fines

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

FCC fines stations for sponsorship ID lapses – In January, 2005, reports began to surface that Armstrong Williams, a syndicated talk show host, had been paid by a government agency to assist in promoting the programs and efforts of the agency. Complaints were received by the FCC. During the following month, the FCC sent letters to Williams and affiliated companies inquiring about his dealings with the Government. The FCC also contacted stations around the country about whether they broadcast the programs. After two plus years of investigations, the FCC has fined several stations and issued a citation to Williams.

Decades ago, Congress passed laws (and the FCC duly adopted rules) requiring any person who supplies programs to broadcasters to disclose to those broadcasters if there was any money, service or other value exchanged for the broadcast of the programming. The law and rules are quite broad as they apply to any person in the chain between production and broadcast.

As part of its investigation, the FCC reviewed the contracts between Williams and the government agency. The FCC searched further and also reviewed the programs which Williams and his related companies had produced and distributed for broadcast. The inquiry also turned up progress reports from the host back to the government. While Williams insisted that he did nothing wrong, the FCC decided that the totality of the arrangements surrounding the programs triggered the sponsorship identification rules – and, since no sponsorship ID had been broadcast in connection with Williams's broadcast appearances, the rules had been violated.

The core conclusion reached by the Commission was that Williams had received consideration from the government in return for the inclusion of particular material in his programs. Accordingly, he was required to disclose that consideration to the broadcasters who aired his programming. The failure to do so was a violation of the sponsorship ID rule.

However, because Williams was not himself a Commission licensee, the FCC was limited in how it could punish him for a first time offense. The most it could do was to issue him a "citation". A "citation" is, in effect, a warning letter which imposes no fine, penalty or other redress. Instead, it puts the recipient on notice that the recipient has apparently been violating the rules, and warns the recipient not to continue in such violations. Should the citation addressee then break the rules again, the FCC can impose a more dramatic punishment.

Unfortunately, some of the stations that broadcast the show did not fare as well. After conducting nearly two years of investigations of Williams, earlier this year the FCC began to ask questions of the stations who broadcast his programs.

The stations were not held responsible for the fact that the host and/or his production companies had been paid for including certain content in their shows – since the stations were not aware of that. But the investigation of the stations turned up other problems related to the show. One of the stations received a nominal $100 sum for each Williams show that it broadcast, but the station didn't disclose those payments in the required sponsorship ID's. The FCC did not accept the excuse that the amount paid was only nominal. The fine for that transgression was, by contrast, far from nominal, as the station was ordered to pay a $40,000 fine.

Another group of stations faces a $36,000 fine for related violations of the political broadcast rules which were uncovered during the investigation.

The moral here is that the Commission is still ready to enforce its sponsorship ID rules even though such enforcement has tended to be somewhat, er, dormant for decades. Complainants motivated by a wide variety of factors can attract the FCC's attention, and once the investigation begins there's often no telling where it might end. (*See* the article on Page 5 of this issue for another illustration of how complainants have recently been able to prod the Commission into investigating alleged sponsorship ID violations.)

Licensees should be appropriately diligent in questioning the provenance of programming they broadcast, and if there is any reason to believe that unusual consideration has changed hands in the production of that programming, care should be taken to determine whether sponsorship identification may be required. It is important to recognize that there is no prohibition against broadcasting programming for which consideration has been given (whether to the broadcaster or to someone else upstream in the production chain). Rather, the violation occurs simply when the fact of such consideration is not disclosed in an appropriate sponsorship ID announcement (which itself need not be elaborate or particularly intrusive – as the closing credits of most

(Continued on page 4)

(Continued from page 2)
dates and is likely to come up throughout the election campaign. The Democratic candidates that have spoken out thus far – most notably Obama and Hillary Clinton (D-NY) – support net neutrality. Former New York Mayor Rudy Giuliani (R-NY) released a statement saying that the federal government "must fight the urge to unnecessarily tax and overregulate the Internet" and that the government's intervention should be limited to the protection of consumers and businesses against cyber crimes. Senator John McCain (R-AZ) has expressed a similar view, holding that the FCC should interfere only in markets where there are demonstrable infractions and/or unfair competition.

Major communications issues could become prominent campaign issues between now and the election.

Another communications issue that could generate considerable talk throughout the election is the development of broadband in the U.S. and America's progress compared to other countries. A survey released by Wireless Communications Association International (WCA) in October revealed that six of 17 presidential candidates have already released broadband policies, indicating it is likely to be a discussion point over the next year.

While all of the candidates concur that it is critical to promote the dissemination of broadband, candidates have cited different supporting rationales. Former New York Mayor Rudy Giuliani (R-NY) has focused on the public safety aspects of broadband and its ability to help fight terrorism. McCain and Clinton have touted the benefits of improving compatibility across government agencies through broadband, which would trigger a chain effect of benefits for the entire nation.

The majority of candidates who have spoken out regarding broadband, however, have focused on its social benefits and its ability to empower those living in rural areas by providing improved access to health care, education and other vital services. Among those who have already spoken about the necessity to reach out to rural America through broadband are Clinton, McCain, John Edwards (D-NC), Jim Gilmore (R-VA), Duncan Hunter (R-CA) and Mike Huckabee (R-AR).

Even those who have not directly spoken about the use of broadband will likely illustrate its importance through their campaign methods. As the Internet continues to evolve at a staggering pace, politicians have begun to rely on it increasingly as a primary means of informing and attracting voters. Early indications are that the Internet will play a significantly bigger role in the outcome of the 2008 election than was the case in 2004.

The candidates clearly understand the importance of reaching out to the tech community. Many have already paid a visit to Google's headquarters in Silicon Valley (including Clinton, McCain, Edwards and Bill Richardson (D-NM) in an attempt to raise funds. According to the New York Times, the computer industry contributed $2.2 million to all candidates in the primary for the first half of 2007, up from $1.2 million in the first six months in each of the last two presidential primary races.

It remains to be seen whether FCC-related issues will become an integral part of the candidates' platforms in 2008. But all indications point to the fact that candidates are well aware of the major communications issues and these issues could become prominent campaign issues between now and the election.

(Continued from page 3)
game shows demonstrate).

FCC comes knocking but nobody's home – In two separate incidents, FCC agents arrived at main studios only to find the buildings locked up with no lights on and nobody home. In response, the FCC sent letters to the stations advising them that they would be fined. In both cases, the USPS returned the letters as undeliverable. Through a bit of sleuthing and research, the FCC finally found the licensees of the stations (one in Texas, the other in Tacoma, Washington) and hit them with fines. The Washington station admitted that it did not have full staff; the FCC spanked them with a $7,000 fine. The other station simply ignored the FCC and, because they had provided the Commission with no information at all – about their staff or about anything else, for that matter – the FCC fined them only $3,600 for failing to respond to an FCC inquiry.

Readers should be well aware of the FCC main studio rules and should comply with them completely. In addition, the FCC's latest fine is a reminder that the FCC hates to be ignored and will fine you if you don't respond to their questions. But then there's also the mixed message that, if you do ignore the Commission, the penalty may end up being less than if you respond fully and candidly. Of course, it's likely that, if the Commission eventually determines that a mum licensee did in fact violate the rules, the FCC would feel free to issue a fine for those violations over and above the fine for not responding in the first place. In general, it is a good policy to respond to all FCC queries fully and truthfully.

Comcast first to get whacked, for $20K

FCC Starts To Swing Enforcement Blade At VNR's

Actions ignore cable/broadcast distinction

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

$20,000 may be chump change to the nation's largest cable company. But fines levied in that amount to Comcast Corporation in two Notices of Apparent Liability for Forfeiture (NALs) released last month have gotten the company's attention. The NALs also raise serious questions about the actual extent of First Amendment protections still enjoyed by broadcasters in the face of FCC regulation.

The controversy began when the ironically-named organizations "Free Press" and the "Center for Media and Democracy" filed complaints against Comcast with the FCC last November. The Enforcement Bureau issued Letters of Inquiry to Comcast in April, asking the company to respond to allegations that it had violated Section 76.1615(a), which imposes a "sponsorship identification" obligation on cablecasters. The cable sponsorship ID rule is essentially identical to the corresponding rule for broadcasters. It requires that the cablecaster include an identifying announcement when, in the origination of any cablecast programming, any consideration (*i.e.*, money or anything else valuable) is either directly or indirectly paid or promised to or charged and accepted by, the cablecaster in return for the cablecast of the material.

> *The most disturbing aspect of these decisions is their intrusion into the newsroom and the sphere of editorial independence of which the FCC is required to steer clear.*

The complaints resulted from five segments broadcast on four episodes of a consumer interest-oriented program appearing on a regional Comcast channel. Specifically, Comcast was asked to respond regarding the following:

- A segment about non-prescription sleep aids that featured footage produced on behalf of "Nelson's Rescue Sleep", a commercial, natural sleep aid product. "Nelson's Rescue Sleep" was the only product mentioned during the segment, which contained the statement, "If you are one of the estimated 70 million Americans who have trouble sleeping – Rescue Sleep may be what you're looking for."

- A segment about health and fitness which utilized material produced by General Mills about "Wheaties" cereal and the "Wheaties Fit to Win Challenge." Again, this was the only commercial product shown or mentioned during the segment.

- Another segment discussed the importance of life insurance and the fact that September is "National Insurance Month." The segment utilized footage from two interviews with a representative of Allstate insurance; one portion contained the Allstate logo. Both were produced by Allstate.

- A segment that discussed laptop computer security. The segment employed video footage produced on behalf of "Trend Micro", the maker of a software product known as "Remote File Lock", to illustrate the dangers posed by lax security and the prevalence of identity theft from laptop users. The specific footage explained the utility of that product as a defense against identity theft; and

- A segment which featured extensive images and mentions of "Bisquick" pancake mix that were produced by General Mills. This was the only commercial product shown during the segment – which should not be surprising, since the story was about the history of the breakfast favorite on its 75th anniversary.

Comcast answered each letter of inquiry with two basic arguments. First, it claimed that Section 76.1615(a) of the rules is invalid because the provision of the Communications Act which authorizes the FCC to regulate sponsorship identifications applies only to broadcast, and ***not*** to cablecasting. (Pounding that nail in even harder, Comcast also observed that nothing in the legislative history of the Act suggests that Congress intended that the sponsorship ID provision should be extended to cablecasting.) Comcast further argued that, in the event the Commission or a court were nevertheless to hold that the rule is applicable to cable operations, Comcast did not violate the rule because it never received any financial compensation in exchange for use of the VNR. In fact, Comcast claimed that it *actually paid to use* the Nelson's Rescue Sleep footage as part of an agreement it had with CNN Newsource to access this type of video material.

The Enforcement Bureau tersely disposed of these arguments in the two NALs. The first found Comcast apparently liable for $4,000 – the base amount for a violation of this rule – for the "Nelson's Sleep Rescue" news re-

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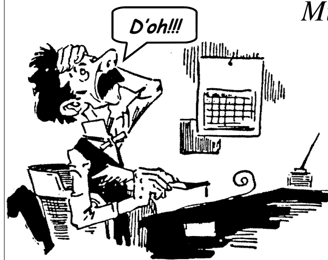


Minor change, major loss

LPTV Permit Yanked Because of Antenna Discrepancy

By: Anne Goodwin Crump
703-812-0426
crump@fhhlaw.com

The FCC's staff has recently reaffirmed its previous ruling that a construction permit had expired and therefore was lost due to failure to construct the authorized facilities in a timely manner, despite the fact that the station had been built and a license application filed a few days prior to the expiration of the permit. The problem was that, when the facility was built, an antenna other than that specified in the construction permit was installed. The rules applicable to LPTV and TV translators provide that prior authorization is required for any change in antenna. Therefore, while station facilities were built, they were not built in accordance with the outstanding construction permit prior to the permit's expiration.

An underlying but unstated theme of this decision appears to relate to the Commission's regret that the most recent permit for the facility had ever been issued. The permittee in this case had sought and was granted a construction permit for a new station at a particular location. Thereafter, the permittee sought to modify its permit to specify a location at a considerable distance from its original site. Since this move, essentially to an entirely new area, was not prohibited under previous rules for modifications of facilities, the modification application was granted. Knowledgeable sources have indicated to us, however, that the Commission's staff was unhappy about the grant when it realized exactly how far the move was – even though the move was still within permissible limits – but by the time the staff's second thoughts bubbled to the surface, it was too late to rescind the grant.

Thereafter, the permittee constructed facilities at the new, authorized location and filed a license application immediately prior to the expiration date of the construction permit. In the license application, the permittee revealed that the antenna used in the actual construction was not the same brand as that specified in the construction permit.

The permittee subsequently attempted to fix this situation by filing a belated application for modification of construction permit and a request for special temporary authority. A review of the engineering included in both the request and application showed that the directional pattern of the antenna actually installed was essentially identical to that of the antenna specified in the construction permit. In other words, there was no practical difference, from any valid regulatory perspective, between the facilities which had been authorized and those which had been installed.

But the rule applicable to LPTV and TV translator stations, unlike the rules regarding modification of radio and television stations, appears to allow no leeway for ***any*** change in the antenna. Glomming onto this approach, the staff justified its hard-line approach as in accordance with the FCC's rules. Since the as-built facility did not match the outstanding construction permit in every minute detail, the staff found that the station had not been timely built in accordance with the permit. And, in the absence of timely construction, the staff declared that the permit had expired way back when (notwithstanding the fact that the permittee had obviously built a facility essentially identical to the facility which had been authorized). Once the construction permit was found to have expired, the STA request and modification application were dismissed as moot, since there was no authorization left to modify.

The overall lesson should be familiar by now: don't wait until the last minute to complete construction of a new station.

The overall lesson from this tale is one that should be familiar by now: don't wait until the last minute to complete construction of a new station. If there had been time to file a modification application and have it granted prior to the permit's expiration, the outcome would likely have been substantially different.

A second lesson is that it is a good idea to take extreme care that the facilities which are built are in fact the facilities which were authorized. Take a good look at the specifications set out in the construction permit and doublecheck to make sure that the facilities conform to those specs.

As it stands now, the permittee has been left with nothing but a number of arguments to raise on appeal. While those arguments may be strong, it could take a long time and a lot of money to litigate the issues.

Responding to the leg-breakers

Delinquent Debts Dealt To Dunners

What to do when the Treasury notice arrives

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

Mistakes can happen. Just ask anyone who's recently received a debt collection notice from the Treasury Department for FCC bills that they've paid but that, somehow, ended up in the deadbeat pile anyway. Once the FCC sends an alleged debt to the Treasury Department for collection, bank accounts, tax refunds and any other assets are at risk. Even non-existent debts may end up in credit reports. It can happen (and appears to be happening more than usual lately) to both commercial stations and noncommercial educational licensees, even those exempt from most FCC fees. Adding to the pain, clearing up these mistakes can require frustrating encounters with two separate bureaucracies, each claiming the remedy lies with the other guy. But that is not a good reason to ignore the problem

As we reported a couple of years ago, the Commission has chosen to adopt a get-tough policy on those regulatees who, in the FCC's view, owe the Commission money. Normally, the source of the debt is a regulatory fee that the FCC thinks, rightly or wrongly, should have been paid but wasn't. When such a perceived debt occurs, the Commission can, and often does, notify the licensee in question. The threat at that point is to impose "red-light" sanctions on the licensee. Such sanctions include refusal to process any application which the red-light-impaired licensee might submit. (Any applications already pending when the red-light notice is issued are subject to dismissal if the licensee doesn't act promptly to clear things up.)

While the FCC's initial red-light notice often does the trick to encourage the licensee to focus on the problem and get it resolved one way or another, sometimes it takes more. That's when the Commission refers the "debt" – remember, it's not 100% guaranteed that any debt is in fact owed just because the FCC *thinks* a debt is owed – to the Department of the Treasury for collection. That can be bad news, because collection agents in general, and government bureaucrats moonlighting as collection agents in particular, tend not to be all that sympathetic to the alleged debtor's side of the story.

In recent weeks it appears that the Commission has referred a new batch of supposed deadbeats to Treasury, which in turn has spawned a number of dunning letters from Treasury to the supposed deadbeats. If you happen to be the recipient of such a letter, don't let the thought of having to deal with two sets of money-hungry bureaucrats deter you – it is important to get the matter resolved, sooner rather than later.

Of course, if you know that you do, in fact, owe the money, the best approach is to pay it, making sure that you keep copies of what you submit and that you obtain written confirmation of receipt of any materials you send to the FCC and/or Treasury.

But if you don't think you owe anything, the way out is to attack both bureaucratic fronts simultaneously. Send proof of payment or of exemption, including copies of all prior correspondence on the matter, first, to the FCC financial help desk: arinquiries@FCC.gov. Mention that the bill was referred to Treasury despite payment or despite clear evidence that the licensee is exempt from such fees. Next, send a copy of everything (including the email) sent to the FCC and mail it to the Treasury Department, at the address indicated on the collection notice, including a cover letter explaining the circumstances. If you're lucky, the FCC will be able to pull the bill back from Treasury quickly, or, the Treasury Department might be able to get the FCC to close the case.

But whatever you do, do not ignore a Treasury Department collection notice even if you are absolutely confident that the claim is 100% bogus. Unlike many natural pests, these unnatural pests won't go away if you ignore them.

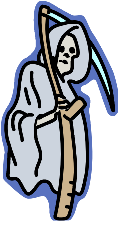
FHH - On the Job, On the Go

Scott Johnson participated as a member of the Board of Visitors of the School of Communications of the University of Alabama at a meeting on October 25.

Paul Feldman is attending the Community Broadcasters Association meeting in Las Vegas on October 29-30.

Frank Jazzo and **Joe Di Scipio** will conduct a political broadcasting session for the Alaska Broadcasters Association at its annual convention in Anchorage on November 1.

On November 2, **Frank Montero** will attend a board meeting in New York of the National Association of Minority Media Executives, of which he is a member.



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lease. The second was issued less than a week later and noticed $4,000 per release (for a total of $16,000) for the four other complained-of segments.

The Enforcement Bureau presented, almost to the word, identical rationales for each forfeiture. It insisted that Section 76.1615(a) is applicable to origination cablecasting, though it never addressed Comcast's argument that Section 317 does not provide underlying authority for that rule. It did go into more detail regarding its authority to fine any broadcaster or cablecaster who does not identify the sponsor of material even if it is not compensated for running that material. In each instance, the Bureau found that Comcast received valuable consideration when it was provided with free footage.

The Enforcement Bureau also found that, in each instance, Comcast went beyond the limits of the exemption found at the end of the rule, an exemption which allows for use of material which is provided for free or at a nominal charge. However, the only guidance it provided for potential transgressors was that this exemption protects only "fleeting or transient references to products or brand names." The Bureau declined to elaborate on this term, nor did it provide any examples of what might be a fleeting or transient reference, nor did it explain exactly why each Comcast segment exceeded the limit contemplated by the rule. The Bureau also noted in each instance that "there may be other bases for requiring sponsorship identification" but did not elaborate as to what those bases might be.

These rulings should naturally alarm any cable channel which originates programming, as they appear to be the first time that these sponsorship identification rules have been applied to cablecasters. They should also serve as a clear warning to broadcasters that the FCC is taking its VNR inquiry to the next level and actually intends to levy fines despite the obvious constitutional questions surrounding such fines. We do not see mere coincidence in the fact that these NALs were issued exactly one year to the day after the performance of the complained-about segment. Cable stations do not have license terms similar to those of broadcasters; the NALs were likely timed to avoid any statute of limitations problems which might have opened the door for Comcast to avoid liability on procedural grounds. However, the FCC could find apparent liability at any time during a broadcaster's license term, so radio and television stations will likely be looking over their shoulders for years to come as a result of these Free Press and Center for Media and Democracy complaints.

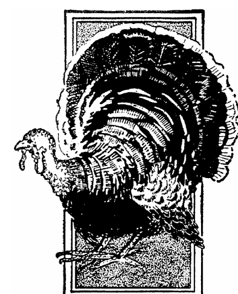
In addition to the uncertainty of when a complaint may metastasize into an NAL, broadcasters have been provided absolutely no guidance as to what actions they have taken or will take which may result in liability. This is due to the NALs' vague assertion that other bases for requiring sponsorship identification may exist.

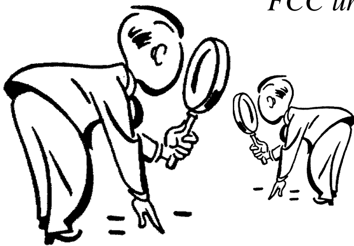
But obviously the most disturbing aspect of these decisions is their intrusion into the newsroom and the sphere of editorial independence of which the FCC is required to – and traditionally does – steer clear. The Bureau recognized in each NAL that "VNR material in each segment was edited, but that the editing did not alter the product and brand-name focus of the material." Yet, the Bureau apparently had no problem substituting its own editorial judgment for that of the producers and deciding, without providing any guidance for the future, that too much outside footage was used. This cuts directly into the heart of news coverage and tells a broadcaster that it must use only certain sources of audio and/or video in news footage or that it must engaged in compelled speech.

For these reasons, the Radio/Television News Directors Association strongly opposed the letter of inquiry and is likely to file comments in support of Comcast's response to these NALs. Other broadcasters are encouraged to do so as well. Broadcasters need to stand up to the FCC and demonstrate that the freedom of the press that is the cornerstone of our democracy does not fall victim to bullying – and particularly bullying by organizations whose names perpetrate a greater fraud on the public than a few seconds of video footage ever will.

Holiday Schedule Reminder

Fletcher, Heald & Hildreth, P.L.C.
will be officially closed on
November 22-23 (Thanksgiving weekend),
December 24-25 and January 1.
We will be open on Friday, November 10
(the federal holiday in honor of Veterans' Day).

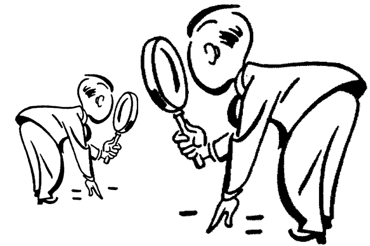




FCC under the microscope

Government Investigates Itself, Finds Itself OK!!!

But GAO does criticize FCC leaks



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

Two different investigations of the FCC were made public in October. Surprise, surprise – both determined that overall the FCC was behaving appropriately. However, one of the investigations did determine that the FCC has been leaking advanced information to in-the-know stakeholders who were given an unfair advantage.

In September, 2006, three U.S. Senators asked the FCC's Inspector General (IG) to investigate whether the Commission or its staff was suppressing or destroying reports. In particular, the Senators were concerned about allegations, raised by a former FCC employee, that the agency had ordered staffmembers to destroy (a) a report on "localism" in television programming and (b) a separate radio industry report. Both reports, it was suggested, were deep-sixed because Somebody In Power felt that the reports' conclusions might be seen as inconsistent with the direction that that Somebody In Power wanted to take with the Commission's highly controversial broadcast ownership proceeding. Concerned about these allegations, Chairman Martin (who was not the Chairman when the alleged deep-sixing supposedly occurred) also asked the IG to investigate the situation.

Those who have access are not likely to give it up just because the GAO has exclaimed for all to hear: "We're shocked – SHOCKED – to find inappropriate leaking going on here."

The IG conducted a year-long investigation into the matter. The evidence turned up during the investigation indicated that the allegations regarding orders to deliberately destroy a TV localism report were unfounded. Although the former employee happily, and repeatedly, alleged in numerous media interviews that the FCC had misbehaved, he refused to be interviewed for the resulting investigation. The IG interviewed 35 employees and reviewed more than 100,000 documents and a terabyte of electronic data and determined that there was no support for the former employee's allegation.

The IG also determined that the FCC did not deliberately conceal the results of a report on the radio industry. After extensive interviews and review of the record, the IG reported that the failure to issue a final version of the report was not improper. In addition, there were no reported incidents of the FCC or its staff intentionally suppressing or otherwise delaying unfavorable reports.

In an unrelated matter relating to possible internal FCC misconduct, Congress asked the Government Accountability Office (GAO) to investigate how well the FCC conducted its rule making proceedings. The GAO found that overall the FCC was obeying the law but that the agency was giving advantages to "inside the Beltway" organizations.

The GAO reviewed four different FCC proceedings and determined that the agency "generally followed the rule making process." However, in conducting its investigation, the GAO interviewed a dozen organizations and groups – no law firms were interviewed – and identified a problem with FCC leaks of information. When the GAO spoke with FCC officials, the officials claimed that they do not give special advance notice about items up for a vote to anyone outside of the FCC. In contrast, when the GAO spoke to twelve organizations outside of the FCC, nine of the twelve admitted that FCC staff and officials do leak information about which items will be voted upon. One organization admitted that the FCC actually called them and listed what items would be voted upon.

In its report the GAO asserted that the problem with this leaked information is that the lucky recipients of the leaked information gain an advantage over those kept in the dark. In general, the FCC is required to notify the public one week before it meets in open session to vote on proposed rules. During that week, nobody is permitted to discuss with the FCC any matters on the meeting's agenda. The GAO found that the FCC followed this law. ***But*** – and this is a fairly significant "but" – the GAO determined that the FCC sidesteps this limitation by alerting interested parties to the possible vote more than one week prior to the vote. As a result, those "in the know" can lobby the FCC right up to the hour at which the one-week prohibition begins. In other words, they are likely to be the last voice heard before the one-week "cone of silence" descends on the Commission's deliberations. While getting the last word does not necessarily guarantee any particular result, the GAO noted that this FCC tactic can obviously give an unfair advantage to the organizations that have the last-minute opportunity to get the last word in.

Although the overall tenor of the GAO's report was that the FCC was following the law, Members of Congress im-

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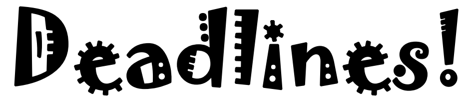


December 1, 2007

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.

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.

January 10, 2008

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.

A word to the wise from Joe Di Scipio

Holding All The Cards, The FCC Demands Would-Be Sellers Put Their Money On The Table

Escrow requirement latest twist in tolling saga

Unfortunately, there is more to report on the continuing saga of station license renewals, tolling agreements and station 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 (involving, in most cases, charges 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. We have confirmed that the FCC does not plan to take any action on pending indecency complaints until the on-going litigation involving Janet Jackson's breast (a CBS problem, currently on appeal to the Third Circuit federal appeals court in Philadelphia) and the fleeting expletive exemption (a Fox problem, also subject to a pending appeal in which the FCC has already lost the first round) are complete. This means the holds will likely continue for at least another two years (or until we get a new Chairman of the FCC – although a change in the Chairman may not make much of a difference).

Now the FCC Enforcement Bureau is placing holds on ***all*** station sales in which there is an indecency or VNR complaint pending against the station, even if the station's license renewal is not already pending and subject to a hold. The Commission has indicated informally that it might be willing to release the hold on the sale of one or more stations if the seller will still remain the licensee of one or more other stations – so that the Commission would still be able to get its hooks into the licensee if and when the FCC were to conclude that a fine was in order. (As we reported here briefly last month, thanks to the efforts of some of here at FHH as well as others in the communications bar, the FCC has apparently abandoned its wild-eyed notion of holding ***Buyers*** responsible for the sins of the sellers).

But you may be asking yourself: "Self, what is the FCC doing in the instance where there is a single FCC licensee selling a station, or where a group owner is selling all of its stations, and no FCC licensee will remain post-sale?"

We are glad you asked yourself that question. The FCC has decided that in such cases, in order to get a grant of the sale, the seller must place in escrow an FCC-determined amount representing the likely amount of the future fine – with the FCC to be named as the third-party beneficiary of the escrow. Take a moment and read that sentence again. Now count to ten. Okay, you can count to 20 if you need the extra time. (We have not settled down either.)

The amount of the escrow will supposedly bear some relation to the number of alleged violations multiplied by the maximum potential forfeiture amount at the time the alleged violation(s) occurred. What the FCC is obviously concerned about is that, by allowing licensees to sell off their stations, the FCC could end up with no effective means of squeezing forfeiture payments out of the ex-licensees should the Commission decide that violations did occur and fines were in order.

The problem with the FCC's "Escrows 'R' Us" approach is that the FCC has no obvious legal right to demand the escrowing of the funds.

The problem with the FCC's new "Escrows 'R' Us" approach is that the FCC has no obvious legal right to demand the escrowing of the funds. After all, putting aside the conventional (and constitutionally-mandated) presumption of innocence that we normally associate with governmental enforcement efforts, the Communications Act makes incredibly clear that licensees cannot be required to pay any FCC-imposed fine unless and until a court has reviewed the whole matter *de novo* (that's Latin for "from scratch") to confirm that the proposed fine is, indeed, warranted. Moreover, the Act specifically provides that a failure to pay prior to such a court determination cannot be held against the licensee in any way.

Nonetheless, the unfortunate licensees that find themselves trying to sell a singleton station or selling the entire company may find they are forced to escrow funds if they want approval from the FCC to sell the station.

Our Common Sense Squad has started an educational campaign to show the FCC the error of its ways, but we don't like our odds. The Commission is obviously bound and determined to sit on applications until it is satisfied that the cash will be there to cover possible fines. And once the Commission starts sitting, it's hard to dislodge it – but there's probably no harm in trying to persuade the FCC anyway.

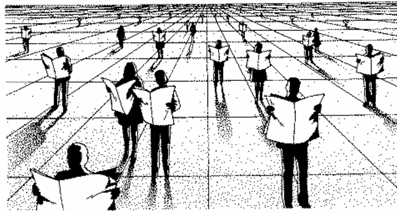
Still, it may be that that the time has come for a licensee to

(Continued on page 14)

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

Updates on the News

Spring forward, fall back – wait, not so fast – That whole pesky daylight savings time problem is coming back again for AM stations with presunrise (PSRA) and postsunset (PSSA) authorizations. As you may recall, this first cropped up last Spring, when daylight savings time kicked in, like it has for decades. But this year was a bit different, because Congress had, in an effort to mitigate some perceived problems with the way it had been working all along, decided to expand the DST period by starting it earlier and ending it later than had historically been the case. That could cause some problems for AM folks whose licenses include different specs for daylight savings and standard time periods. A certain amount of confusion reigned last Spring (we reported on it in the March, 2007 *Memo to Clients*), but we figured that, with six months and a specific, Congressionally-designated deadline (*i.e.*, November 4, when DST ends), the Commission would get things under control by the Fall. We were kind of right. This time there was no elaborate FCC decision or the imposition of any filing requirement or anything – just a simple, two-paragraph public notice advising that, for the period November 1-3, 2007, licensees with PSRA's and PSSA's should use the October DST "advanced" powers and time periods shown on their current authorizations. So while the FCC has not yet adjusted all the outstanding authorizations to get with the new daylight savings time program, the Commission has at least recognized the most obvious and common sense way of dealing with the problem.



Localism – It's Baaaaaaack! – Three years ago, the Commission initiated a proceeding to inquire into the broad notion of "localism". The inquiry arose in connection with the multiple ownership proceeding, which was a hot topic back then. While the Commission has historically genuflected like mad at the altar of localism pretty much every time it wanted to justify some action or another, the fact of the matter is that the FCC really has never bothered to define the concept of "localism" with any precision. Nor has the FCC ever bothered to adopt rules that codify any specific duties which notions of "localism" might impose on broadcasters. The Commission sometimes seems to think that it hypnotized all of us at some point and, while we were under, it instructed us to do whatever it wanted us to do every time it says the word "localism". The initiation of the localism inquiry in 2004 was a curiosity, then, because in the Notice of Inquiry the Commission seemed to acknowledge that it had no clue what "localism" has historically meant or what it might mean now.

Some observers figured that the localism inquiry was just a ruse by which the Commission would create the impression that it was serious about filling the empty word "localism" with some real meaning – when in fact all the Commission wanted to do was to distract the contrarians who were opposing changes in the ownership rules. And, since very little has been done in the localism inquiry in three years, that speculation seemed to have some merit.

But now, just in time for Halloween, it's risen from the grave. On October 24 the Commission announced that it would be holding a localism hearing on October 31. Short notice, to be sure, but it's all in the name of localism. The meeting is set for the FCC's meeting room in Washington. Be there or be square.

By the way, two FHH attorneys – Harry Cole and Patrick Murck – have published a law review article analyzing the FCC's historical approach to "localism". It concludes, essentially, that the FCC may have talked the localism talk, but it has never walked the localism walk. You can find a link to the article at our blog site, www.commlawblog.com. You can also post comments of your own there.

This never happened when we just used pencils – Luddites everywhere rejoiced at the news that, staggering under the weight of several thousand (by some estimates) applications for new noncommercial FM CP's, the FCC's electronic system (fondly known to the *cognoscenti* as "CDBS") crashed during the "window" period for filing those applications, and then again for a couple of days after the window was closed. Commission folks were tight-lipped about precisely what happened, but they at least agreed to keep the filing window open an extra little bit to make up for the down time during the crash.

FM ALLOTMENTS ADOPTED –9/21/07-10/23/07

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
OR	Prineville	147 miles SE of Salem,	299C3	07-39	TBA
KY	Perryville	89 miles SE of Louisville, KY	298A	05-248	TBA

FM ALLOTMENTS PROPOSED –9/21/07-10/23/07

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
OK	Hugo	119 miles NW of Texarkana, TX	286A	07-194	Cmnts: 11/26/07 Reply: 12/11/07	Drop-In
TX	Harper	84 miles N of San Antonio, TX	256C3	07-211	Cmnts: 11/26/07 Reply: 12/11/07	Drop-In
OK	Antlers	139 miles NW of Texarkana, TX	284A	07-182	Cmnts: 11/26/07 Reply: 12/11/07	Drop-In
TX	Dilley	73 miles SW of San Antonio, TX	291A	07-183	Cmts: 11/26/07 Reply: 12/11/07	Drop-In
OR	Butte Falls	50 miles E of Grants Pass, OR	290A	07-210	Cmnts: 11/26/07 Reply: 12/11/07	Drop-In
OR	Netarts	79 miles W of Portland, OR	232C3	07-210	Cmnts: 11/26/07 Reply: 12/11/07	Drop-In
CA	Tecopa	83 miles W of Las Vegas, NV	288A	07-226	Cmnts: 12/10/07 Reply: 12/26/07	Drop-In
CA	Susanville	115 miles N of Carson City, NV	264A	07-221	Cmnts: 12/10/07 Reply: 12/26/07	Accommodation Substitution

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.

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

First Class

(Continued from page 11)

seek a writ of mandamus from the Court of Appeals on this issue. "Mandamus" is another fancy Latin term which refers to a process by which a private party asks a court to order the FCC to act as the agency's existing statutory authority (in this case, the Communications Act) requires it to do. As we think out loud about this, it occurs to us that the mandamus petitioner would be a licensee trying to sell its only station(s), only to be told by the FCC that a hold is in place and will not be released unless the licensee establishes an escrow. The licensee would then traipse down to the court and tell the court that the FCC is under an obligation to act on its application as is, without the whole escrow thing, and that the FCC is unlawfully refusing to do so. We expect that the court might be very interested in hearing what the FCC might have to say, and that that might help move the application forward.

(Cautionary note: in acting on a mandamus request, the court would ***not*** order the Commission to grant the application. Rather, at best the court would order the FCC to act on the application, one way or the other, within a reasonable time frame – probably a couple of months. That would at least theoretically succeed in getting the application moving.)

As always, we here at the *Memo to Clients* will keep you on top of the next unforeseen twist(s) in this saga.

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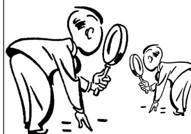
relevant to advertising agencies] is applicable.

So we don't really know exactly what level of involvement may be enough to trigger increased potential liability – but it is clear that such liability lurks in wait for the unwary and incautious.

A broadcaster that plays any role in producing an advertiser's materials should protect itself from later FTC action by asking its clients for evidence that substantiates the claims made in the advertisement. Unless such evidence is provided – and that evidence is reasonably convincing – the broadcaster may do well to just say "no, thanks" and walk away.



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mediately issued statements denouncing the insider atmosphere at the FCC. The FCC had no official response to the report.

The only really surprising things about the GAO report are that (a) anybody might have been truly surprised by it, and (b) anybody might think anything can be done about it. Access to inside information is a long-recognized, highly-prized source of power and influence in Washington, and those who have such access are not likely to give it up just because the GAO has raised its bureaucratic eyebrow in Captain Louis Renault fashion, exclaiming for all to hear: "We're shocked – SHOCKED – to find inappropriate leaking going on here."