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Memorandum to Clients

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Trying to round up the herd at the end of the trail

Third Periodic Review: Final Countdown To Transition

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DTV Update

On New Year's Eve, while the revelers were gathering in Times Square, the Commission's staff was busily completing – and releasing – the Report and Order in its Third Periodic Review of the rules and policies governing the DTV transition. With the February 17, 2009 deadline for the completion of the transition screaming toward us like a doomsday asteroid, the Commission (finally) managed to address many of the nitty-gritty details which will need to be attended to in the transition.

Each full-service TV station must provide a detailed account of its efforts to complete the construction of its digital facilities

The DTV transition process is kind of like a cattle drive in the old west. The Commission started off at Point A with 1,500 (or so) TV stations, and had to get all those stations to Point B by a specific deadline (*i.e.*, D-Day, February 17, 2009). Along the way the bulk of the herd stayed together, but some strayed in one alternate direction or the other, some lagged behind, and some got lost. But the target deadline is fixed and unmoveable (or so at least it currently seems), so as that deadline approaches, the Trail Boss (the FCC) has got to figure out where all its charges are and take steps to get them all to the same destination at the same time. The Third Periodic Review provides the master plan for achieving that result.

The following is a summary of the Third Periodic Review. This summary is long – which is to be expected, since the report itself is well over 100 pages long – and detailed. But it is essential that all full-power television station licensees and permittees have a clear understanding of the steps that they must take in the ramp-up to transition, now less than 13 months away. Those steps include completing the construction of facilities, notifying the Commission on a routine basis of the status of construction efforts, and updating PSIP equipment to ensure compliance with the new standards.

The Commission included the warning that all full-power television licensees must cease operation of their analog facilities and their pre-transition DTV facilities as of 11:59pm, February 17, 2009, and must be prepared to commence operation with their fully authorized post-transition DTV facilities specified in the updated DTV Table of Allotments (the "Appendix B facilities") by 12:00:01 AM, February 18, 2009.

Submission of Status Report – FCC Form 387

An essential first element to the final stage of the transition is getting a firm and accurate fix on exactly what progress each station has made toward the transition. Accordingly, the Commission is requiring that each full-service TV station prepare and submit a new report – FCC Form 387 – that will provide a detailed account of the reporting station's efforts to complete the construction of its digital facilities. The deadline for the new report is ***February 19, 2008***. ***All*** full-service stations have to file this – that includes licensees, permittees,

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The Scoop Inside

Satellite provider wants public to get Sirius

Proposals Could Give SDARS Providers An Earthly Foothold

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There's a move afoot at the FCC that might bring satellite radio operators down to earth – literally – by allowing them less restricted access to earth-bound terrestrial transmitters combined with the ability to feed those repeaters from non-SDARS satellites. Broadcasters may wish to take note.

Satellite digital audio radio service (SDARS) operators – of whom there are a total of two, XM and Sirius – are different from regular old garden-variety broadcasters in many ways, but the most important difference in many respects relates to localism. The satellite guys serve a nationwide footprint and are not supposed to provide localized service. For broadcasters, of course, diligent attention to their respective local service areas is viewed by most if not all as an essential element of their operation.

Since the inception of the SDARS more than a decade ago, though, the satellite folks have sought at least some local (*i.e.*, terrestrial) transmission capacity. Their claim has been that their satellite-delivered signal isn't able to penetrate certain ground-level features, such as "urban canyons" in large cities, tunnels and natural topographical barriers like mountains. Many broadcasters have been suspicious of the motives underlying that claim, since earth-bound transmitters would afford SDARS licensees with the capacity to serve local audiences with locality-specific programming. That, of course, could constitute a significant competitive threat to local broadcasters, particularly since SDARS licensees are not subject to many of the routine FCC-imposed regulatory obligations which burden broadcasters.

Historically, the Commission has allowed XM and Sirius to use terrestrial repeaters to fill service gaps, that is, areas where their satellite signal is predicted to go but doesn't in fact reach. That use has been on an STA (special temporary authorization) basis, with no formal rules or regulations to govern it. In late 2007, however, the Commission issued a notice of proposed rulemaking (NPRM) seeking guidance as to whether – and if so, how – to formalize use of repeaters by SDARS operators.

The NPRM includes discussion of a proposal lobbed in by Sirius in 2006 seeking greater and more flexible use of terrestrial signal delivery mechanisms. Sirius proposed to set up terrestrial repeaters in the more populous parts of Alaska and Hawaii – locations that would normally be expected to receive absolutely no, or only spotty, satellite reception. To many observers, by this proposal Sirius was attempting to achieve what it had been prohibited from doing: offering a land-based service where its satellite transmissions leave neither a theoretical nor actual satellite footprint. Alaska's and Hawaii's broadcasters association have fought the proposal. (Disclosure Alert – we here at FHH have assisted them in their fight).

In the NPRM, the Commission is seeking comment on a range of SDARS technical matters, but broadcasters should be especially sensitive to questions relating to the licensing and operation of terrestrial repeaters by SDARS licensees. While the NPRM does not propose any specific rules and does not, in particular, embrace the Sirius proposal, by the same token it does not flatly reject that proposal, either. So the possibilities are wide open.

Historically, the NAB has vigorously opposed possible SDARS intrusion into the terrestrial realm, and it is expected to take a strong stand against any rule change that would allow XM and Sirius to provide subscription broadcast services when their satel-

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Focus on FCC Fines

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Closet in Texas hair salon is not a main studio – A Texas AM station has been ordered to pay an $8,800 fine for failing to maintain a main studio and for failing to power down at sunset. An agent from the FCC's Houston office trekked to a town north of San Antonio four days in a row to investigate problems with the station. On Monday and Tuesday, the agent searched for the station's main studio and took signal measurements throughout the day and night to determine that the station was not powering down at nighttime. On Wednesday, the agent returned, took more measurements and spoke on the phone with the station owner and contract engineer.

On Day Four, the agent returned yet again and began his "inspection" of the main studio. The FCC agent met the station manager at a local hair salon, only to find that the manager claimed that the salon was also his main studio. In an interesting take on the term "full time employee", the manager explained that the beauticians knew to call him if anybody turned up asking questions about the station. The manager showed the agent broadcast equipment which was located in a closet in the back room. However, upon closer inspection the agent found that the equipment was not even plugged into any power source.

Meeting with the contract engineer later in the day, the agent determined that the station was broadcasting from an unattended computer at the transmitter. Moreover, the engineer confirmed that the station had not been powering down at all. The FCC fined the station $5,600 for using a beauty salon as its main studio with no full-time station employees on staff. The FCC also hit the station with a $3,200 fine for not powering down. Total fine for the station $8,800 – without any mention of whether the agent had a shave and a haircut while searching for the public file.

DJ calls hotline, earns station $4K fine – A Utah FM station faces a $4,000 fine even though the station argued that its radio personality acted in contravention of company policy and without management's knowledge. The FCC reiterated that the station is responsible for its employee's behavior.

A radio personality announced to his audience that he would make a prank call to a state Poison Control Center to ask about symptoms from swallowing pepper spray. As promised, he called the center, recorded the call and played it back for listeners to have a laugh. Although some listeners may have been entertained, at least one person was not amused and e-mailed a complaint to the FCC. FCC rules require stations to inform a person being called that the conversation will be broadcast or recorded for broadcast prior to doing so. That precaution was not taken here.

Instead, the radio personality called the hotline, recorded the call, and played back his prank on air. The FCC sent an inquiry to the station, which had little in the way of explanation. The station admitted that the incident occurred but claimed that the D.J. was behaving in violation of company policy, that management was unaware of the prank and that it only happened once. The station also noted that at least the D.J. called a non-emergency number. The FCC was not convinced and it reiterated its zero tolerance policy for recorded or broadcast telephone conversations. The station was fined $4,000.

This incident presents us with yet another opportunity to remind our readers that the FCC's rules absolutely prohibit the broadcast – or recording for future broadcast – of a telephone conversation unless both parties to the call are aware of the broadcast/recording and have expressly consented to the broadcast/recording ***before*** the broadcast/recording starts. It is ***not*** sufficient to play the prank, tape it, and then ask the caller to be a good sport and allow it to be broadcast. The caller must be advised of the broadcast/recording ***before it starts***. (The only exception to this prior notice requirement involves calls into the station under circumstances in which the caller is presumed to be aware that the call might be aired or taped – for example, in an on-air call-in talk show, or a "call-in and win" contest, particularly if the announcer says "if you're the X caller, we'll put you on the air . . .") Yes, we know that that whole pesky notice thing tends to let the air out of a lot of excellent on-air bits, but the law is the law.

Entravision gets $15K reduction in fine – Readers may recall that in 2006 the FCC visited the roof of a Tampa building and fined many stations broadcasting from towers on top of the building (*see* our column in the February 2007 *MTC*). The fines were issued because the stations did not protect rooftop visitors from radiofrequency emissions. In doling out its fines, the FCC was not consistent. While some stations got whacked with $25,000 fines, others were hit with smaller fines. Entravision was one of the stations strung up at the $25K level. They wrote back to the FCC

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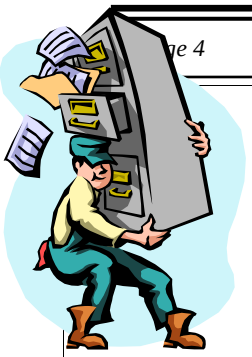

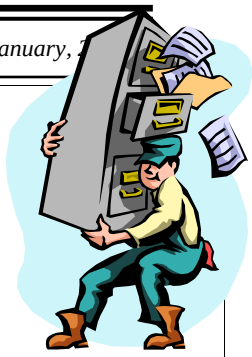

Turning back the hands of time

TV ReReg Is Back

New Public File, Program Reporting Requirements Released

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In late January the FCC released the full text of the television reregulation order it adopted last November. That order heralds a dramatic change in the reporting requirements for television licensees, imposing standardized and enhanced disclosure requirements slated to go into effect 60 days after notice of the approval of the new form by the Office of Management and Budget is published in the Federal Register. The new public file rules take effect 60 days after the FCC's order is published in the Federal Register.

The new rules require full-service and Class A TV licensees with websites to post the vast majority of their public inspection files on their websites. Those full-service/Class A TV licensees which do not have their own websites and those which do have their own sites but prefer not to include their public files on their own sites must post their public files on the websites of their respective state broadcaster associations (SBA), if the SBA permits them to do so. The rules also replace the current issues/programs lists required of full-service and Class A TV licensees with standardized programming report forms (the new FCC Form 355) requesting a laundry list of information concerning various forms of programming. Unlike the current issues/programs lists, Form 355 will have to be filed with the Commission.

The FCC concluded that the existing public file rule does not provide the public with enough insight into how stations are serving their communities.

The requirements were developed because the FCC concluded that its existing public file requirements do not provide the public with enough insight into how stations are serving their communities. According to the Commission, the new rules are not intended to alter in any way broadcasters' public interest obligations.

The following is a summary of the amended requirements, which apply to all full-service and Class A TV licensees:

Public Inspection File Requirements

- Stations with websites must post their public inspection files on their websites ***or*** on the website of their SBA, if the SBA permits them to do so. Stations which do not have websites must post their files on their SBA website, if permitted to do so. Stations which do not already have websites but which later do will be required to include their public files on their site (or post them on their SBA site, if permitted).

- Stations must give notice twice daily (including at least once between 6 p.m. and midnight) that the station's public inspection file is available for inspection at the station's main studio and on its website. (NOTE: This particular obligation is now included in Section 73.1201 – the Station Identification Rule – which is applicable not only to full-service and Class A TV licensees but also to radio and LPTV stations. Since the website public file rule as set out in the FCC's order applies ***only*** to full-service and Class A TV licensees, it would appear that the public notice requirement concerning the availability of the public file would apply only to that limited class of licensees, and *not* to radio or LPTV. However, the FCC should clarify this, as the new rule language which it has adopted technically extends the requirement to LPTV and radio.)

- While political files are *not* required to be posted on the website, emails (but not public correspondence received in "hard copy") from the public must be included in the electronic public file. Stations must retain hard copies of all letters and emails from the public in their "hard copy" public inspection files.

- Some documents (*e.g.*, children's television reports) which are required to be included in the public file are also available on the FCC's website. If a licensee wishes simply to link to such documents on the FCC site (or on any site where the documents may be located, as long as access to that target site does not require any payment or registration), it may do so.

- Stations must make the public inspection file portion of their websites accessible to the disabled, requiring compliance with specific Web Content Accessibility guidelines

Reporting Requirements

- The current issues/programs lists required by full-service and Class A TV licensees will be replaced by the all-new ***FCC Form 355***, which will have to be filed

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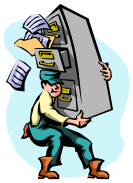

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with the Commission (electronically) each quarter on the 30th day of the succeeding calendar quarter – that is, the reports will have to be filed by April 30, July 30, October 30, and January 30 of each year. As of this writing the new form has not yet been approved by OMB, but you can see a copy of it at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-205A1.pdf – it's Appendix B to that order.

- In the quarterly reports, which cover not only the main broadcast channel but also any additional programming stream(s), each full-service and Class A TV licensee is required to describe its programming in a laundry list of categories including national news, local news, local civic affairs, local electoral affairs, local programming, public service announcements, paid public service announcements, underserved communities programming, religious programming and independent produced programming.

- The report form also requires information on closed captioning (including which programs were not closed captioned due to exemptions, in which case the basis for each exemption must be described), voluntary video description efforts, efforts to make emergency information available and access of the information to the disabled.

- The report form also requires a certification that the reporting licensee has undertaken ascertainment efforts to assess the needs of its community, together with a description of any programming it has designed to address those needs. The new rules do not mandate specific ascertainment efforts, although the new Form 355 does require the reporting licensee to describe (a) any ascertainment efforts it did take and (b) any programming designed to address any needs identified through such efforts.

Don't be surprised if one or more organizations challenge the new rules. As this issue went to press, NAB had indicated that it is looking into a possible challenge. While it is premature to speculate about all issues that might be raised on appeal, they are likely to include the anticipated costs associated with shifting a local public inspection file to the Internet. The cost of uploading a substantial public file could be significant, not to mention the cost of constant maintenance, particularly for small market stations. The Commission estimated that if a public inspection file contained 10,000 pages – an estimate the FCC deemed excessive – there would be a one-time cost of less than $15,000 and a cost of less than $20 per month to maintain that volume on a server. The accuracy of those figures might easily be questioned.

The Commission estimated a cost of less than $20 per month to maintain a 10,000-page public file on a server.

Broadcasters might also challenge the burden imposed on them in the new FCC Form 355. Completing the form will require a substantial amount of record-keeping and tracking various forms of programming. The mandatory, quarterly forms will create quite a burden for stations to comply, particularly those that are short staffed and/or operating on tight budgets.

The Commission's rationale for the mandatory Internet posting component could also be questioned. According to the FCC, it is valid – and consistent with Congress's intent – that the public file should be available to the world at large because that "enhances the ability of both those within *and* those beyond a station's service area to participate in the licensing process." One might legitimately wonder how that notion squares with the FCC's recent insistence on the overriding importance of "localism" to the regulatory system. If a broadcaster's obligation is to its "local" audience, then what purpose is served by making its public file available to those "beyond a station's service area"? And what interest do such people have in "participat[ing] in the licensing process" with respect to stations that they can't view?

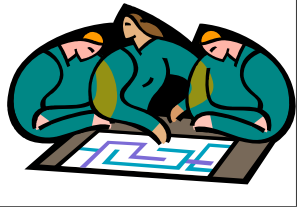
And for the truly bold, now may be the time to mount a full frontal assault on the whole public file requirement. As the Commission acknowledges in its decision, the record before it contained multiple statements from multiple broadcasters, all uniformly advising the Commission that virtually nobody ever looks at the public file. This is, of course, an observation that many have made over the years. And yet, rather than abandon the public file rule as one which has been demonstrated to have generated virtually no discernible benefits, the Commission is instead ratcheting up that rule.

FHH will be closely tracking the developments on its blog and in future editions of the *Memo to Clients*. Please contact your FHH attorney with any questions/concerns about the new rules.

Coming Next Month!!!

Coverage of the Radio ReReg Proposals

Simultaneously with the TV ReReg order described above, the FCC also released its Notice of Proposed Rulemaking in the Radio ReReg proceeding. We'll be reporting on that 100-page item in next month's issue.



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commercial and NCE alike, and even stations which have already completed the construction of their Appendix B DTV facilities. The form is available at the FCC's website (http://www.fcc.gov/Forms/Form387/387_view.pdf). Here's a quick survey of the form.

Form 387 asks for the current status of the construction of the station's Appendix B facilities. If that status is something other than "operating its fully authorized final DTV facility", the Commission seeks further information as to the current operational status (*e.g.*, program test authority, STA) and what authorizations the station holds with respect to its Appendix B facilities (construction permit, license).

Under the "Next Steps" section, the Commission asks what additional steps stand in the way of completion of construction of the Appendix B facilities. For example, does the station have to submit (and get granted) a modification application, or receive international coordination clearance, FAA approval, and/or the thumbs up from a local zoning authority? If the station must modify or install equipment, the Form requires specific information on the equipment and/or modifications necessary.

The Form next focuses on the Station's analog operations, asking whether the licensee will continue to provide analog service until the very end of the transition or, instead, seek authority to cease analog operations (under the terms discussed in more detail below) at some earlier time.

Finally, for those stations whose digital facilties are not fully constructed and operational, the Commission requires the submission of detailed plans for terminating analog operations and for completing construction of the Appendix B facilities, including timelines and supporting information.

The Commission will require routine updates relating to the information contained in the initial filing, with special attention paid to updating the timeline provided by the station. Moreover, each full-power station will be required to file an updated form on October 20, 2008, if the station has yet to complete construction of its authorized Appendix B facilities by then.

Construction Deadlines

While the final DTV Transition will occur in February, 2009, the Third Periodic Review imposes earlier deadlines for completion of construction of some licensees' Appendix B facilities. Some relief from these deadlines may be available but, as discussed in more detail below, the standards for obtaining such relief are fairly stringent, and it would be prudent ***not*** to assume that relief will automatically be available.

The Third Periodic Review imposes earlier deadlines for construction of some licensees' Appendix B facilities.

May 18, 2008 – This deadline – a mere four months and change from now – applies to construction of Appendix B facilities of stations which (a) are already operating on their final DTV channels and (b) have at least a construction permit for their Appendix B facilities. While this deadline is very near, the Commission figured that these licensees should be in the best position to wrap up construction quickly. After all, they are already operating on their final DTV channels and they already hold the CP to get them to the finish line, so there would not appear to be any FCC-imposed impediment to reaching the finish line in a matter of months.

August 18, 2008 – This deadline applies to stations that (a) are already operating on their final DTV channel, but (b) do not have a construction permit or license application pending that matches their Appendix B facilities. These stations must take steps either (a) to obtain a construction permit allowing them to match their Appendix B facilities, or (b) to indicate to the FCC that the information in Appendix B should be modified to correspond to the station's current construction permit. The FCC's rationale for granting additional time beyond May 18, 2008, is that these stations must prepare and submit applications, which must be then processed by the Commission.

For those stations that cannot currently commence operations on their final DTV channel with their Appendix B facilities – most likely because such operation would cause impermissible interference to other stations – the Commission will require the station to construct and commence operation of their existing authorized facilities (***not*** the Appendix B facilities), and the station will then be expected to submit a request for an extension of time (as detailed below) for the completion of construction of its Appendix B facilities.

So if you're a full-service TV station already operating your DTV facilities on your final DTV channel, you have until August 18, at the latest, to complete construction of your Appendix B facilities. That still leaves a number of strays who, for one reason or another, are not currently operating on their final DTV channel. For those, the ultimate D-Day deadline of February 17, 2009, will apply, as follows.

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February 17, 2009 – The final construction deadline involves three discrete groups of stations:

- *Stations that will operate post-transition on a different DTV channel than the one assigned to them in 1997*. This universe includes, *e.g.*, stations which will use their analog channel for DTV operation, or which received a new channel through the election process. These stations will be permitted immediately to cease further construction of their pre-transition DTV channel and to proceed with the construction of their Appendix B facilities. If the pre-transition facility is operating, and the station elects to cease further construction of the facility, the Commission is requiring stations to submit an application to modify the pre-transition construction permit to match the constructed facilities (such as a facility operating with reduced power).

- *Stations that face "unique technical challenges" in completing construction of their Appendix B facilities*. In most cases, these challenges include particular practical problems, like the need to swap out a top-mounted analog antenna with a side-mounted digital antenna, or towers that can not support an additional antenna, or limitations at the tower site (*e.g.*, space in transmitter building, availability of power) that impede the installation of the Appendix B facility.

- *Stations that sought extensions of the earlier two deadlines, and which do not qualify under the stricter standards for further extensions or phased transitions discussed in more detail below*.

Extensions and Waivers of the DTV Construction Deadlines

For those stations which think that they can't meet the construction deadline applicable to them, the Commission has indicated that extensions ***might*** be available if exceptional extenuating circumstances can be shown.

Just what circumstances may do the trick? Lack of equipment is one, ***but*** the Commission will ***not*** routinely grant requests based on that claim. It will look favorably on such requests if the station can demonstrate that the equipment was ordered and/or the station requested tower crews well in advance of the construction deadline but timely construction was prevented by weather conditions or delivery delays. Note that the Commission will require specific documentation of the facts surrounding the need for the extension. The Commission will also require the station to include this information on the FCC Form 387, and to keep the form updated as equipment is delivered and installed.

Historically, financial hardship has been deemed a possible justification for extension. That's still available, ***but*** the Commission has changed the necessary showing and will now grant extensions ***only*** if the station (a) is in receivership or bankruptcy or (b) has had negative cash flow for the past three years. Again, the station must submit supporting documentation – either copies of the relevant bankruptcy filing or audited financial statements for the past three years – to show that it satisfies the relevant criterion.

Finally, the Commission will extend construction deadlines for events beyond the control of the station, such as acts of god, terrorism, and/or international coordination issues.

*Financial hardship extensions will be available **only** if the station (a) is in receivership or bankruptcy or (b) has had negative cash flow for the past three years.*

Extension requests will have to be filed electronically, using a revised FCC Form 337 (another form which has not yet been cleared for use as of this writing) and must be filed no earlier than 90 days and no later than 60 days prior to the construction deadline. Requests that are filed less than 60 days before the deadline must provide persuasive justification for the late-filing, such as an unforeseen event occurring within that 60-day period.

So much for extensions of deadlines prior to the ultimate February 17, 2009 transition. But what about those who might want an extension of that February 17, 2009 deadline? For such requests, the Commission will apply its existing tolling standard. Those most likely subject to this standard will be folks with recently-granted digital singleton facilities or pending applications for new television stations.

Stations that receive extensions (or approval of a phased transition) beyond February 17, 2009, will be required to provide viewer notifications on their analog facility every day at least four times a day in the 30-day window before the station terminates operation of its analog facility. The notification is intended to (a) inform the public of the nature of the delay in operating the station's Appendix B facilities, and (b) provide an estimate of the duration of the post-February 17, 2009 service deficiencies.

Anyone who thinks that the Commission is not serious about compliance with its construction deadlines should think again. According to the FCC, unexplained and unjustified failure to meet the construction deadlines will

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result in a range of sanctions, running the gamut from reporting requirements through monetary forfeiture through loss of interference protection and all the way to the ultimate penalty, license revocation. And if any extension is granted, the Commission will be looking for completion of construction within three months (not the more lenient six months that has been the informal policy previously).

Phased Transitions

The Commission also created an additional avenue for stations that can not complete construction of their Appendix B facilities by the end of the transition, but do not qualify under the extension standards discussed above.

A station that is moving to a different DTV channel post-transition will be permitted to remain on its in-core pre-transition channel so long as (a) it serves the same population that currently receives its current analog and DTV service, and (b) the operation will not cause impermissible interference to other stations or prevent other stations from completing their transition. The FCC will require such requests to be submitted no later than August 17, 2008, and the stations must complete construction of their Appendix B facilities no later than February 18, 2010.

Unexplained and unjustified failure to meet construction deadlines will result in a range of sanctions, all the way to license revocation

For stations that can operate on their post-transition DTV channel, the Commission will permit temporary operations at less than their Appendix B facilities, but will require the station to make one of two showings. First, the station must demonstrate that: (a) "unique technical challenges" (*e.g.*, side-mounting, site accommodation issues) are preventing the station from completing construction of its full Appendix B facility, but (b) the proposed temporary facility will serve at least 85% of the same population receiving the station's current analog TV and DTV service.

Alternatively, the station must demonstrate that (a) there is a technical impediment blocking the completion of construction (an impediment which does not otherwise qualify for extension under the standards discussed above), and (b) the proposed facility would serve at least 100 percent of the same population currently receiving the station's analog TV and DTV signal. For example, let's assume that a station can't complete construction due to dangerous weather conditions at the tower site lasting until May, 2008. Even if the Commission might not deem this satisfactory under the construction extension deadlines discussed above, the licensee might nevertheless still delay completing construction until after February 18, 2009.

Temporary operation under either of these two scenarios must ***not*** cause impermissible interference (0.5% new interference to other Appendix B facilities), and it must ***not*** prevent the transition of other stations. Further, the station must complete construction of its Appendix B facilities no later than August 18, 2009. Finally, the Commission will require stations that take advantage of these options to notify the public (in a manner similar to the notices described above) about the delay in the construction of their Appendix B facilities.

Termination of Analog and Pre-Transition DTV Services

The Commission also established procedures governing the termination of analog and pre-transition DTV services. In doing so, the Commission acknowledged that there will be disruptions to analog and pre-transition services, and created different rules based on the projected duration of the disruption.

Temporary - Lasting Less than 30 Days: Where the projected disruption of analog/pre-transition service will last less than 30 days, the Commission will permit the station to file a notification with the Commission as currently required under the Commission's rules, but not require prior authorization. If an unexpected emergency should occur and the station is not capable of returning to service within the 30-day period, the Commission will require an additional notice to be filed, which will provide the station an additional 30-day period. Each station must demonstrate why this extension should not be subject to the more stringent requirements associated with extended or permanent disruptions discussed below. The Commission will permit stations to use this provision within 30 days of the Transition Deadline, but will require the station to comply with the notification requirements referenced above.

Extended or Permanent - Analog Service: If a station believes that it must terminate its analog service prior to the transition deadline to permit the construction of its Appendix B facilities, the Commission will require the station to receive prior approval. The station must provide evidence that the reduction/termination of analog service is directly tied to the construction of its Appendix B facility, or that such reduction/termination will assist another station to complete its transition. The Commission will require that the station file for such approval at least 90 days prior to the planned reduction or

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termination, and must commence announcements on the analog channel for a 60-day period prior to the planned reduction or termination.

Extended or Permanent – Pre-Transition DTV Service: If a station is changing DTV channels to its Appendix B DTV channel from an alternat pre-transition channel, it may be necessary to reduce or terminate operation of the pre-transition service and commence early operation of its Appendix B channel. In those cases, the Commission will require the station to notify the Commission of its intent to do so in the construction permit application for its Appendix B facilities, and the station must demonstrate that it will not cause impermissible interference to other stations. The Commission will permit these stations to operate at reduced power until the Construction Deadlines discussed above, but after that point, the station must commence full-power operations.

Stations that will operate post-transition on their analog channel face additional problems since they will need to terminate analog operation and then move their digital operation to the new channel. In these cases, the Commission will permit a station to permanently cease operations of both its pre-transition DTV service ***and*** its analog service in conjunction with the completion of construction of its Appendix B facilities ***so long as*** the station demonstrates that termination of these operations is necessary to complete its transition (or that of another station) ***and*** the station completes the notification requirements set forth above. Such requests must be submitted at least 60 days in advance of the planned termination.

With limited exceptions, the FCC will not permit applications that violate the 2004 Freeze Order until August 17, 2008.

Permanent – Within 90 Days of Transition Date: Starting on November 19, 2008, the Commission will permit stations to reduce or terminate operations of either their analog or pre-transition facilities after submitting a notification at least 30 days in advance. The station must demonstrate that the reduction or termination is necessary to aid the transition, and will require notifications to the public.

Submissions of Applications for Construction Permits

In light of the short deadlines associated with the construction of Appendix B facilities, the Commission also articulated the requirements for obtaining construction permit authorizations.

Stations with Appendix B facilities which specify a different channel than used during the transition must submit construction permit applications immediately upon the effective date of the Report and Order, *i.e.*, as of January 30, 2008. Stations that have the same pre- and post-transition DTV channels but do not have a construction permit that matches the Appendix B facilities must file construction permit applications immediately (*i.e.*, irrespective of the effective date of the Report and Order), as they do not have to wait for the Report and Order to be effective.

The Commission will expedite processing of such applications if (a) the station does not propose to expand its facilities beyond those specified in Appendix B; and (b) the proposed facilities match or are no more than 5 miles smaller than the Appendix B facilities; and (c) the application is submitted within 45 days after the effective date of the Report and Order, *i.e.*, by March 17. The Commission pledged to process these applications within 10 days should the application comply with these standards.

Further, the Commission will not permit applications that violate the 2004 Freeze Order until August 17, 2008. The Commission noted that the applications for Appendix B facilities should have priority over applications to expand Appendix B facilities. However, the Commission will entertain waiver requests from stations with different pre- and post-transition DTV channels. These waiver requests must show that: (a) the use of the station's analog antenna or new antenna is necessary to avoid a significant reduction of its coverage area; (b) the expansion of the coverage area is no larger than five miles in any direction; and (c) the proposed expansion would not cause more than 0.5 new interference to other stations.

Other Matters

In addition to the foregoing deadline-related issues, the Third Period Review also addressed a number of miscellaneous items relating to life in the Post-Transition world:

Post-Transition Interference Standard – The Commission adopted a 0.5 % new interference standard. This 0.5% interference will be stacked upon the baseline Appendix B facilities, and the Commission discontinued the use of the 10% interference cap. The Commission also eliminated the 1 dB power reduction for UHF stations that use more than 1 degree antenna beam tilt.

Program System and Information Protocol (PSIP) – The Commission updated its rules with respect to the new version of the PSIP standard. This new standard requires broadcasters to include more accurate event information,

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On the streaming front

New Year, New Challenges

Royalty calculations, recordkeeping on the front burner

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Radio stations streaming music over the Internet were probably one group that was more than happy to say a big, fat goodbye to 2007. After all, the year may best be remembered for the death of hundreds of webcasters after the March 2 decision of the Copyright Royalty Board (CRB) to increase rates for digital transmission of sound recordings through 2010, an increase which applied retroactively to January 1, 2006.

The bad start to the year was compounded by successive legal losses that ensured the CRB decision would remain in place. After a petition for rehearing of the decision (filed with the CRB) and then a motion to stay the decision (file with the U.S. Court of Appeals) were both shot down in flames, spirits brightened momentarily as the Internet Radio Equality Act (HR 2060 and S 1353) began to gain some momentum in Congress (it eventually garnered 143 co-sponsors). But that, too, faded as legislators moved on to other issues upon their return from their August break.

If streaming software cannot provide per performance-related data, the webcaster should consider finding a new provider that does offer such service.

Meanwhile, the new royalty rates became effective on July 15 and their impact was immediately felt. Several webcasters, especially smaller, Internet-only operators, ceased transmission because the lump sum they would be required to pay to make up the difference between the old and new rates from January 1, 2006 through July 14, 2007 far exceeded their cash on hand. Others took a hard look at the road going forward and decided to turn around, figuring the uncertain destination was not worth the upfront (and on-going) costs of the trip.

2008 threatens to derail more webcasters. However, this time the problem won't be dollars, but paperwork: at least two factors will make the administrative aspect of complying with the statutory licensing scheme significmore burdensome.

First, royalty payments ***must*** be calculated on a ***per performance*** basis. This is difficult for many webcasters, as it requires the ability to determine both the number of songs that were played in the month ***and*** the number of listeners who heard each song (the latter being a far more difficult calculation). These numbers are multiplied and the product is then multiplied again by the 2008 royalty rate of $ 0.0014.

Second, it is likely that SoundExchange will pay more attention to the reports of streaming activity that webcasters are supposed to, but often do not, file on a quarterly basis.

Change in Method of Calculating Royalty Payments

In denying rehearing of its original March 2 decision to increase the royalty rates for years 2006-2010, the CRB did acknowledge that it had erred in one way: by instituting a mandatory per performance calculation method for that period. Among the arguments raised on rehearing was the claim that requiring webcasters to pay back royalties on a per performance basis for all streaming since January 1, 2006 would create an undue burden for those stations which, without warning of this potential change, had been calculating rates on an aggregate tuning hour basis during the transition period.

The CRB agreed – and rightfully so, because the distinction between aggregate tuning hour calculation and per performance calculation is significant. Most webcasters (certainly most broadcasters who simulcast an over-the-air signal on the Internet) believe aggregate tuning hour calculation to be much simpler as it requires the webcaster merely to know the number of hours during the month in which copyrighted programming was transmitted and the number of listeners who heard each hour of copyrighted programming. Most broadcasters we have talked to receive Internet listenership numbers on a daily or perhaps hourly basis. According to those same broadcasters, it is much more difficult to calculate rates on a per performance basis because their (admittedly basic) streaming software does not allow them to make the required determination of how many listeners heard each copyrighted song.

The prevailing wisdom was that market forces would result in streaming software that automatically provides the necessary data to calculate royalties on a per performance basis. Every webcaster should now be asking its software provider whether the provider's software has the capability to facilitate per performance calculations. If the software cannot provide per performance-related data, the webcaster should consider finding a new provider that does offer such service.

Finding such software may be easier said than done, though,

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as it still appears that options are few and far between. Several broadcasters have requested our guidance in the absence of appropriate software. All we can suggest is that each webcaster should make its best effort to accurately count the number of listeners per song. If a webcaster can determine only the number of listeners per day, it can simply make the conservative calculation that each listener listened to each song during the day. This will provide an admittedly higher royalty payment than required; however, it is unlikely that an excessive payment will be rejected by SoundExchange, Inc.

A webcaster who can calculate the number of listeners on an hourly basis or who can determine the average number of hours each listener heard the stream can get a more accurate per performance listenership. Again, this will likely result in higher payments than an exact count of listeners per song but, for the average webcaster which garners only a few dozen online listeners per day, the practical effect may be minimal.

So, how do the changes affect various webcasters in 2008 and beyond?

- Nobody is eligible to pay a percentage of gross revenue, the rate previously applicable to "small webcasters" (which no longer exists as a classification). All webcasters will pay on the per performance basis (though, as discussed below, there is still one instance in which the aggregate tuning hour applies to noncommercial webcasters).

- All webcasters, commercial and noncommercial, will pay an annual minimum of $500 per channel.

- A commercial webcaster will not make any further payments until it aggregates more than $500.00 in royalty payments for the year, based on the per performance method. By following the steps on the 2008 Statement of Account form for commercial webcasters, available in Excel or PDF Format here:

  http://www.soundexchange.com/assets/download_forms/SOA_Per_Perf_Option_2008_COM-v02FINAL.xls (Excel)

  http://www.soundexchange.com/assets/download_forms/SOA_Performance_2008_COM.pdf (.PDF)

- the webcaster can determine whether it owes any money or whether it is still under the $500.00 annual minimum. Once a commercial webcaster does exceed the $500.00 annual minimum, it will still determine the overall royalty liability for the year and subtract those amounts already paid in order to obtain the amount due for that month.

- A noncommercial webcaster must also pay an annual minimum of $500.00 per year. It will not pay more unless it exceeds a maximum allowable listenership for a given month – which is calculated according to the aggregate tuning hour standard. Thus, a noncommercial webcaster must be well-versed in both calculation methods. If the noncommercial webcaster does not exceed listenership of 159,140 aggregate tuning hours in a given month, it does not pay anything for that month. If it does exceed that amount, it must calculate its royalty obligation for the excess listenership at the same per performance rate applicable to commercial webcasters ($ 0.0014 per song per listener). The Statement of Account form for noncommercial webcasters is available here:

  http://www.soundexchange.com/assets/download_forms/SOA_for_Noncomm_2008.pdf

Failure to comply with the recordkeeping rules can result in disqualification from the statutory license for webcasting for now and forever.

Recordkeeping Requirements Likely to Take Center Stage

Many webcasters are also casting a wary eye at the stringent recordkeeping requirements that were created to assist SoundExchange in taking all this royalty money and distributing it to recording artists based on the frequency with which each recording artist's works were performed.

The recordkeeping rules require the filing of detailed reports containing six pieces of information regarding each song played during two weeks of each calendar quarter. These can be any two seven-day periods – they do not have to begin on a Sunday and end on a Saturday, nor do they have to be consecutive weeks. However, the information must be filed in specific electronic formats (on a spreadsheet using ASCII computer formatting and either Microsoft Excel or Corel Quattro Pro). The full requirements are summarized in more detail in a memorandum available to firm clients who are webcasting or interested in commencing webcasting. Please do not hesitate to contact us if you have not received your copy.

Broadcasters, in particular, are troubled by the recordkeeping requirement and express fears that they will have to hire additional staff just to comply. Many have simply ignored the recordkeeping requirement. Others, knowing that failure to comply with the recordkeeping rules can

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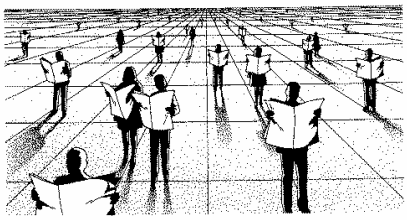
Stuff you may have read about before is back again . . .

Updates on the News

FCC to ABC: "Butt out? That'll cost you!" – As we were getting this issue ready for press, the Commission whacked more than 50 ABC TV affiliates with fines totaling more than $1.3 million for an episode of *NYPD Blue* that aired in February, 2003 – just about five years ago. We have posted a brief discussion of the case on our blog (www.CommLawBlog.com), and we expect to cover it in greater detail in next month's *Memo to Clients*. The decision presents a whole host of interesting questions. For example, why did the Commission choose to issue this now, after it had let a year or so go by with no action on the indecency front at all? Why did the Commission opt to characterize the display of a woman's "buttocks" as indecent while seemingly ignoring exposure of one of her breasts akin to Ms. Jackson's display at Super Bowl 2004? Why did the FCC impose such a short response time on the target licensees – responses were due within about two weeks, rather than the more customary 30 days? The *NYPD Blue* matter was not the only indecency item on ABC's plate this month, though. During a broadcast of ABC's *Good Morning America*, actress Diane Keaton woke up the neighborhood by dropping the F-bomb in the middle of her conversation with Diane Sawyer. Oops. And out it went to all those unsuspecting affiliates . . . The FCC has not yet reported whether any complaints have been received, but we'd be willing to bet that they'll be rolling in sooner or later. However, since it took the Comission five years to get around to doing anything about *NYPD Blue*, we don't expect to be hearing much official on this for some time to come. But you do have to wonder why the ABC network apparently sends out a live talk show like *Good Morning America* without any kind of delay. Presumably they figured that that nice, sweet, 60-something Ms. Keaton wouldn't be getting quite so funky. Live and learn.



FCC gets new mouthpiece – Let's give a big *Memo to Clients* "Howdy" to Matthew Berry, who has just been appointed the General Counsel of the FCC. And while we're at it, howdy as well to Ajit Pai, who will serve as Deputy GC. Both are moving up in the ranks – Berry was previously Deputy GC, and Pai was Associate GC.

LPFM effective date established – The new LPFM rules adopted by the Commission a couple of months ago have finally made it into the Federal Register, which means that the clock for filing petitions for reconsideration (or appeals) has started ticking. And perhaps more importantly, Federal Registration publication sets the effective date for the new rules. Mark your calendars: absent a stay, they're scheduled to kick as of March 17, 2008. Happy St. Patty's Day!

Better late than never – And while we're discussing effective dates, let's not overlook the fact that, in a late January issue of the Federal Register, we stumbled across a notice that the Commission's rules on the provision of ancillary and supplementary services on DTV capacity of NCE stations had been approved by OMB. That struck us as a bit odd because (a) we were looking at a January, 2008, Federal Register and (b) the rules in question had first been adopted in November, 2001, and had been approved by OMB in July, 2003. The brief notice did not highlight the, er, slight delay in getting the notice into the Federal Register. We suspect that whoever was responsible for doing so back in 2003 might have been watching *NYPD Blue* and was so rattled at the sight of broadcast buttocks that they lost track of what they were supposed to be doing.

DTS problems? – A couple of years ago we reported on DTS – or distributed transmission systems – a technology in which a DTV station uses multiple, synchronized, lower-power, on-channel transmitters to achieve its predicted contour without the need for a high-power transmitter operating through a lofty antenna. (*See* the January, 2005, and December, 2006, issues of *MTC*.) At least one STA for a DTS system has been granted, and the initial news is not good for DTS proponents. A Class A station has complained that the DTS STA operation is causing interference. According to press reports, the DTS operator is in the midst of a bankruptcy proceeding, which is hindering a resolution of the matter. It's hard to say at this point whether this is a harbinger of fundamental technical problems with DTS or, instead, an isolated instance that may ultimately be favorably resolved once the bankruptcy wraps up. But this does send at least a tentative, ominous signal to DTS boosters. Meanwhile, the FCC's rulemaking looking into formalizing DTS standards remains pending.

Delinquency has its consequences

From The Fee Failure Frying Pan To The Former Defaulter Fire

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We often stress to clients the importance of making timely regulatory payments to the FCC, and when the occasional delinquency pops up, we counsel that it is important to resolve such issues immediately. The lingering effects of missed payments and failure to resolve late payment/delinquency issues can lead to serious, unpleasant consequences.

A recent Commission illustrated this chain effect, as Frontier Wireless LLC – a prospective bidder in an FCC auction – was forced to pay, in addition to the ordinary upfront payment required of bidders, an additional 50% premium because of a handful of delinquent payments which were attributable to its parent company, EchoStar Communications Company, in connection with bills from the Universal Service Administrative Company (USAC).

A December 26, 2007 decision by the Wireless Telecommunications Bureau denied Frontier's request for a waiver of Section 1.2105(a) of the Commission's rules states that "[a]ny auction applicant that has previously been in default on any Commission license or has previously been delinquent on any non-tax debt owed to any Federal agency must submit an upfront payment equal to 50 percent more than that set for each particular license." This rule allows an applicant that has cured its previous defaults to bid as a "former defaulter", as long as its upfront payment is 50% more than other, non-defaulting bidders.

The Commission initially tagged Frontier with "former defaulter" status based on three delinquent USAC payments totaling $75,738.80, which were eventually paid along with $1,161.24 in late fees. The fact that EchoStar, not Frontier, was responsible for the payments had no effect on Frontier's status. Any applicant is considered a former defaulter if "any one of its affiliates, controlling interests or their affiliates . . . has been in default or delinquent on such a debt, but has made the requisite payment."

Frontier explained that the 2004 delinquency issues were due to "integration problems" and "the misdirection of bills . . . to an outdated company mailing address", all of which had supposedly occurred in connection with EchoStar's earlier acquisition of the entity which had been guilty of the three defaults on which the FCC was focusing. Frontier argued that EchoStar itself does not have a history of financial or credit problems, and the late payments were all within a confined time period. It asserted that because upfront payments required of former defaulters are held without interest until the conclusion of any contingent subsequent actions in the auction, imposing this status in this circumstance would deter potential auction participants and therefore would not serve the public interest.

The Commission's decision serves as another reminder that licensees should ensure that fees are timely paid and delinquency issues settled immediately.

What Frontier apparently was not aware of when it submitted its waiver request was a subsequent delinquent payment from EchoStar to USAC in 2007, in the amount of $27,295.15. The fee was eventually paid, along with a late payment fee. The fact that, in that instance, EchoStar itself had defaulted (and not just some company that EchoStar happened to have acquired after the company had already defaulted) led the Commission to conclude that EchoStar itself – and, therefore, Frontier – totally deserved to suffer the consequences of being a "former defaulter". The Commission dismissed Frontier's waiver request because EchoStar's delinquent payment is something of which Frontier "should have been aware" but which Frontier had not bothered to mention in request.

The Commission's decision serves as another reminder that licensees should ensure that fees are timely paid and delinquency issues settled immediately. Commission licensees (and other regulatees) should always be cognizant of any issues involving parent companies or subsidiaries, as problems with affiliated interests can be imputed to the licensee.

As always, feel free to contact your FHH attorney if you have any questions regarding your status, or the status of your affiliates with regard to payments due to the Commission or otherwise.

A Memo to Clients DTV Sidebar!

What's in a name?

Station ID's For The DTV Age

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A question came across the *MTC* desk the other day about the proper form of station identification for DTV stations. Here's the scoop.

Like regular old analog stations, DTV stations must identify themselves on the air, either aurally or visually, as close to the top of the hour as possible (and also at sign-on and sign-off). The basic ID is the same for both analog and DTV: Call sign followed by community of license. Note that a DTV station's formal call sign includes the "-DT" suffix. If you happen to simulcast the same programming on both your analog and DTV channels, you may take care of the required ID's for both in a single mention with a combined call sign – for example, "WXYZ-TV/DT, Whereverville".

If you want to gussy up the ID a bit, you may insert the station's channel number, digital stream number (*e.g.*, "Channel 24.1"), licensee and/or network affiliation between the call sign and the community. But note that if the DTV station is simulcasting the analog's programming, the ***only*** channel number permitted in the ID is the ***analog*** channel.

Now if, on either your main digital channel or one of your separate digital streams, you happen to rebroadcast the programming of some other station entirely, you may (but are not obligated to) provide credit to the other station in the ID. ***But*** if you do choose to provide such credit, you ***must*** use the following formulation: "WXYZ-DT, Whereverville [that would be your call sign and community of license], bringing you WAAA-TV, Someotherplace [that would be the call sign and community of the station you're rebroadcasting]". Note that, for the FCC-mandated, top-of-the-hour ID, you can***not*** include the channel of the station being rebroadcast. Even if the rebroadcast is occurring on one of your digital streams, identifying the channel of the rebroadcast signal is a no-no as far as the FCC-required ID's go.

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and the Commission will require compliance with this new standard by May 29, 2008, *i.e.*, no later than 120 days after the January 30, 2008 publication of the Report and Order in the Federal Register.

Ancillary Fees – The Commission will require those stations operating pursuant to STAs and construction permits to file the FCC Form 317 on December 1, 2008, and to pay fees on any ancillary services that the stations are providing. Previously, only licensees were subject to these requirements.

At this point, it should be clear to all that there will be significant activity over the next 13 months as we reach the transition date. Since the FCC Form 387 is due in less than one month, we recommend that all full-service TV operators (licensees *and* permittees) conduct a soup-to-nuts review of their transition plans, and speak with their attorney and engineer to ensure that there are no missed deadlines.

Each station will likely have different steps to take to meet the transition deadline, and close consultation with your legal and engineering advisors will be critical to a successful completion of this long process.

FHH - On the Job, On the Go

Frank Montero will be a presenter at the NAB Radio Group Fly-In in Washington, D.C. on February 20. His session is entitled "Charting Radio's Course Through Congress and the FCC".

Meanwhile, the Other Frank, **Frank Jazzo**, has been reappointed to the Information Technology Advisory Commission of Arlington County, Virginia.

On March 11, **Harry Martin** and **Jim Riley** will join the FCC's **Roy Stewart** on a regulatory panel at the annual convention of the National Religious Broadcasters.

An article by **Patrick Murck** on the FCC's recent "localism" activities appeared in *TVNEWSDAY*. He assures us that the title of his article ("A Stupid and Futile Gesture") was added by the publication and was not at his suggestion.

Moving to the land of the Cards, the Rams, the Blues and the Arch

FCC to Fee Filers:
Meet Me In St. Louis

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The FCC has announced that it is changing its "lockbox" bank location for all fees required to be submitted to the Commission (other than fees submitted online by credit card payment). Effective immediately upon publication of the Order in the Federal Register, all of the application fees, filing fees, regulatory fees, and tariffs (and any accompanying paper applications, forms or filings) which used to go to the Commission's lockbox bank in Pittsburgh will have to be delivered instead to the new lockbox bank in St. Louis, Missouri.

The bank that will serve as the FCC's collection agent is the US Bank at 1005 Convention Plaza in St. Louis. But anyone trying to file a fee should first review the FCC's addressing protocol carefully – just slapping "US Bank, 1005 Convention Plaza, St. Louis" will ***NOT*** do the trick, and can result in the rejection of the submission. Each filing must reflect the FCC as the addressee, with a particular P.O. Box specified – and the box number will vary depending on the nature of the filing being submitted. The various box numbers may be found in the FCC's order, which in turn may be found at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-122A1.pdf.

Recognizing that immediate compliance with the change in delivery location would require daily monitoring of the Federal Register over (approximately) the next two months, the FCC has provided a 45-day "transition period" which will begin the day of publication. During this period, any fee-based filings and fee or tariff payments submitted to the Pittsburgh location automatically will be forwarded to the St. Louis lockbox bank, and the date-stamp reflecting the date of receipt by the Pittsburgh lockbox bank will be deemed the official filing date.

We here at Fletcher, Heald & Hildreth will update the FCC filing address once Federal Register publication occurs, so that any fees and fee-based applications or filings that need to go to the Commission's Fee Filing office will be properly directed to St. Louis.

The switch to St. Louis does, however, present a serious practical problem which did not previously exist. Since Pittsburgh (the site of the soon-to-be-abandoned Fee Filing office) is not all that far from Washington, it has generally been possible for us to provide last-minute "same day service" by shipping late-arriving filings up to Pittsburgh by courier. That won't be true for St. Louis: we won't be able to put a filing into the hands of a courier and be confident that that filing will reach the St. Louis office that same day. Accordingly, ***once the St. Louis address becomes the effective FCC Fee Filing address, we will insist that any fee payments to be submitted to the FCC by FHH on behalf of any client be received by us a minimum of two business days before the due date in order to ensure timely delivery to St. Louis.***

When the St. Louis designation has been published in the Federal Register, we will post a notice on our blog (www.CommLawBlog.com) and in the *Memo to Clients*.

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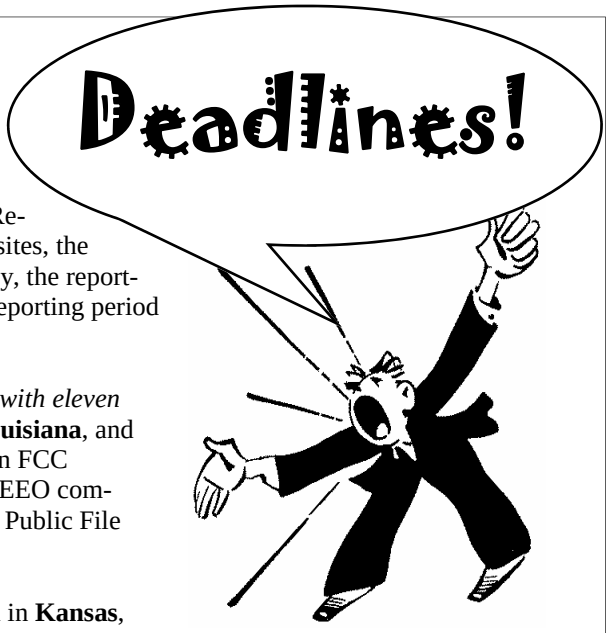
result in the extreme sanction of disqualification from the statutory license for webcasting for now and forever, have taken the extreme step of not webcasting at all.

As with royalty calculation methods, the prevailing view in favor of a stringently detailed recordkeeping system was that the marketplace would adjust to create software to allow automatic compilation of these reports. The good news is that the market does appear to be reacting here. Several products are available to assist in the recordkeeping and filing process. However these records are maintained, though, clients should be filing these quarterly reports with SoundExchange within 45 days of the end of each calendar quarter. The importance of these reports is heightened by our assumption that SoundExchange will pay more attention to enforcing this rule now that much of the controversy over the new royalty rates has died down.

Conclusion

This article is not meant to scare broadcasters away from webcasting. We love webcasting. We listen to our favorite stations via the Internet all day at work. In fact, that's the reason that we continue to stress compliance with these rules – to ensure that those stations, and everyone else who uses the Internet to reinstate programming diversity in this era of media consolidation, can make the workplace just a little bit happier. If you are a webcaster who would like to discuss the reporting rules and royalty calculations, let us know.



February 1, 2008

EEO Public File Reports - All *radio* and *television stations with five (5) or more full-time employees* located in **Arkansas**, **Kansas**, **Louisiana**, **Mississippi**, **Nebraska**, **New Jersey**, **New York**, and **Oklahoma** 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 Reports - All *radio station employment units with eleven (11) or more full-time employees* and located in **Arkansas**, **Louisiana**, and **Mississippi** must file EEO Mid-Term Reports electronically on FCC Form 397. This report includes a certification as whether any EEO complaints have been filed and copies of the two most recent EEO Public File Reports for the employment unit.

Television Ownership Reports - All *television* stations located in **Kansas**, **Nebraska**, and **Oklahoma** 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 **Arkansas**, **Louisiana**, **Mississippi**, **New Jersey**, and **New York** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323 or 323-E.

February 18, 2008

DTV Transition Status Reports - All *permittees* and *licensees* of *full-power television stations* must file a DTV Transition Status Report (FCC Form 387) to detail their current digital DTV transition status, including any additional steps which may be necessary in order to meet the February 17, 2009 DTV transition deadline and a timeline for taking those steps.

April 1, 2008

EEO Public File Reports - All *radio* and *television stations with five (5) or more full-time employees* located in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, **Tennessee**, and **Texas** 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 Reports - All *radio station employment units with eleven (11) or more full-time employees* and located in **Indiana**, **Kentucky**, and **Tennessee** must file EEO Mid-Term Reports electronically on FCC Form 397. This report includes a certification as whether any EEO complaints have been filed and copies of the two most recent EEO Public File Reports for the employment unit.

Television Ownership Reports - All *television* stations located in **Texas** 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 **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, and **Tennessee** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323 or 323-E.

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Jeff Gee Named Member

FHH is pleased to announce that, as of January 1, Jeff Gee has become a member of the firm.

Jeff has been with FHH since April, 2005. His work has covered a wide range of broadcast-related activities, including transactions, applications and enforcement actions. He has prepared a primer covering day-to-day regulatory considerations for broadcast stations, which he has presented as an introduction and refresher course for licensees and station staffs. Faithful readers of the *Memo to Clients* will recall his by-line on articles dealing with a wide variety of programming-related issues, such as indecency, violence and kidvid.

Jeff is a 1995 graduate of Syracuse University, where he majored in Policy Studies, Political Science and Writing for Television, Radio & Film. He received his law degree from Georgetown University in 1998, and has been practicing communications law since. While a student he interned for an Illinois State Senator, Dean Witter, the U.S. Department of Justice, the British Broadcasting Corporation and the Renaissance Entertainment Corporation, where he worked as an actor, musician and stunt performer.

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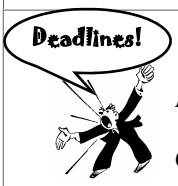
lites could, in no possible way, reach a particular geography. NAB's concern has been that the XM and Sirius would have an unfair economic advantage, because they have no obligation to meet local public interest needs.

The Commission says it is open to proposals making it harder for XM or Sirius to decouple terrestrial service from satellite service requirements. However, the Commission has also stated that anyone proposing rules tending to inhibit expansion of XM or Sirius terrestrial repeaters should also present analysis of a proposal's effects on people who live where the XM and Sirius's satellite beams don't fall. This suggests the Commission may be focusing on "consumer choice" – an approach which may skew toward XM and Sirius's claim that broadcasters' opposition is calibrated to protect their existing radio monopoly.

Nonetheless, the record is open for all comments. Whatever rule the FCC may adopt, it is important for broadcasters to get their views on that record. Good arguments and strong data, on the record, make appeals more viable if the Commission ultimately decides to loosen the repeater rules in ways which inappropriately expand the SDARS service.

At present, comments in response to the NPRM are due to be filed by Valentines Day (February 14, 2008), with reply comments due on St. Patrick's Day (March 17, 2008).



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April 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.

Editor's Note

Reproduced on this page are screen-grabs containing portions of two articles which were posted this month on the FHH blog at:

www.CommLawBlog.com

and which you could already have seen – and commented on – if you had visited the site. Because of space limitations, we can't reproduce the full text of these (much less all the other materials available at the blog) in this month's *Memo to Clients*, but if you want to see them in their entirety, you can find them on the blog. Bookmark the site to make it easier for you to check in on it between issues of the *Memo to Clients* – or make life really easy and subscribe to the blog for automatic updates delivered to your email inbox as they are posted!

FM ALLOTMENTS ADOPTED –11/20/07-1/21/08

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
FL	Live Oak	24 miles W of Jacksonville, FL	*261A	07-131	TBA
MT	Charlo	185 miles E of Spokane, WA	251C3	07-143	TBA
TX	Christine	63 miles S of San Antonio, TX	245C3	07-78	TBA

FM ALLOTMENTS PROPOSED –10/24/07-1/21/08

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
KY	Irvington	51 miles SW of Louisville, KY	261A	07-296	Cmnts: 3/03/08 Reply: 3/18/08	Drop-in

Notice Concerning Listings of FM Allotments

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

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and sniffed, in effect, that the FCC was being unfair because it had fined other guys only $10,000. The FCC agreed and cut the Entravision fine to $10,000.

Pirate supplies for sale – In 2005, this column reported that the FCC had pointed its spyglass at www.hobbytron.com and "X" marked the spot for a supplier of illegal FM broadcast equipment for use by radio pirates. Since that column was written, the website was sold at public auction and a new owner took control. The FCC recently visited the website again and found that the new owner was marketing illegal FM transmitters. In fact, at press time the website continues to offer the equipment for sale – and at a clearance sale price, to boot. The FCC has warned the new owner of the website that selling transmitters without an FCC certificate is a punishable federal offense. Perhaps the website will be up for auction again soon.

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electronically!!

If you would prefer to receive the *Memo* on-line - saving yourself the burden of extra paper to deal with - please contact us at cole@fhhlaw.com.

Same content—less paper.

. . . or this?

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