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

Memorandum to Clients

February, 2008 | *News and Analysis of Recent Events in the Field of Communications* | No. 08-02

Soon to be a quarterly chore

Meet Form 355

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

As previously reported in the November, 2007, and January, 2008, *Memos to Clients*, the Commission has adopted a new and extensive program reporting requirement for TV licensees. The full text of that decision was released late in January, and the new rules will be implemented 60 days after notice of approval by the Office of Management and Budget (OMB) is published in the *Federal Register*.

While we can't be sure of when *Federal Regiser* publication will occur (much less OMB approval), the bottom line for television stations is clear: the program reporting requirement is on its way and, barring some last minute miracle, will likely be in place in time to require the submission of reports this Summer relating back to programming aired this Spring. In other words, ***preparation for compliance should begin immediately***.

> *The bottom line for television stations is clear: the program reporting requirement is on its way.* ***Preparation for compliance should begin immediately****.*

The Scoop Inside

For those of you who have not yet taken a close look at the new Form 355 on which program reports will be submitted, the following is a walk-through introduction to that regulatory onus (you can find the current draft of the form at Appendix B to the FCC's Report and Order at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-205A1.pdf):

Question 1 – Identification – This section merely seeks standard identifying information (name and address of licensee, call sign and FCC ID Number of station, etc.). No real problem here.

Question 2 – Programming Information – Here's where things get complicated fast.

Total hours of weekly programming – First, each reporting station will have to provide a break-out of the weekly average number of hours of certain types of programming which were broadcast on all primary and non-primary channels. Sounds simple, right? But what if (as the case happens to be) there are ***ten*** different types of programming that have to be calculated? The ten categories to be reported are:

High definition – This is relatively straightforward.

National news programming – Again, assuming that the station is an affiliate of a national network that provides news programming, this should be relatively straightforward as well, although the Commission has declined to define "news", so there may be some uncertainty as to precisely which network programs may properly be deemed to be "news".

Local news programming produced by the station – Again, the failure to provide a definition of "news" may complicate the recordkeeping here.

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Copps: You say "good buy", I say "Jell-O"

Newspaper/Broadcast Cross-Ownership

A little something for everybody

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

Almost two months after it was adopted by a 3-2 vote, the Report and Order (R&O) laying out the FCC's new newspaper/broadcast cross-ownership policy was released early in February. As reported in the December *Memo to Clients* when the R&O was first announced, in what is almost certainly the last big FCC media deregulation during the Bush years, newspaper publishers in the nation's top 20 markets will no longer be barred from buying broadcast stations in the same market.

The newspaper/broadcast cross-ownership prohibition was but one element of the highly contentious media ownership proceeding initially resolved in 2003 (after much controversy), only to be remanded in part by a federal appeals court in 2004 for further explanation by the FCC. Now, four years later, the Commission has adopted a much-reduced version of the original.

In its latest iteration, the revision of the multiple ownership rules addresses only the newspaper/broadcast cross-ownership aspect. And it does so in a set of rules worthy of Rube Goldberg.

First and foremost, the prohibition against newspaper/broadcast cross-ownership remains the rule. That hasn't really changed. But we now have a new subsection which provides that the prohibition doesn't apply if the FCC determines that the public interest would be served by some such cross-ownership.

And following that, we have *another* new subsection that says that there will be a presumption that newspaper/broadcast cross-ownership "is not inconsistent with the public interest" in the top-20 Nielsen DMA's, subject to certain limitations. Under those limitations, a daily newspaper in a top-20 market may be commonly owned with one (but only one) radio station whose 2 mV/m contour (for AM's) or 1 mV/m contour (for FM's) encompasses the city where the paper is published. With respect to TV stations, a newspaper can be commonly owned with a TV in the top-20 markets as long as: (a) the station is not one of the market's top four rated stations, and (b) there will still be at least eight separately-owned "major media voices" in the DMA (a "major media voice" being defined as a full-power television station or a "major newspaper").

And following that, there's still *another* new subsection that says that newspaper/broadcast cross-ownership will be presumed to be inconsistent with the public interest outside the top-20 DMA's or in any top-20 DMA situation not satisfying the criteria described in the preceding new subsection. But then (this probably won't surprise you) there's *another* new subsection that explains that that presumption of inconsistency with the public interest can be overcome by "clear and convincing evidence" that the proposed cross-ownership will increase the diversity of independent news outlets and competition among independent news sources in the market. Factors which may be considered in reaching this decision include: whether the proposed common ownership would "significantly increase the amount of local news in the market"; whether the newspaper and TV station would have separate staffs and exercise independent news judgment; the level of concentration in the DMA; and the financial condition of the newspaper and TV station in question and, if either is in financial distress, whether the proposed owner is committed to "invest significantly" in newsroom operations.

But wait, there's one more new subsection, which says that "negative presumption shall be reversed" if either the newspaper or station is "failed or failing" *or* the station was not providing local newscasts but would, after approval of the combined ownership,

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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
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Anne Goodwin Crump,
Donald J. Evans, Paul Feldman,
Lee G. Petro, R.J. Quianzon,
Michael Richards, Peter Tannenwald
and Ron Whitworth

Focus on FCC Fines

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

Render unto the FCC . . . – A Texas AM station faced a $5,600 fine for failing to comply with the main studio staffing requirement, under which a licensee must have at least two full-time employees (at least one of whom is management-level) assigned to the station's main studio during regular business hours. (Note that "regular business hours" limitation is not strictly applied to the management-level employee, who, according to the FCC, need not be "chained to his desk" – meaning that that employee may be absent from the main studio periodically, as long as he/she views the studio as his/her home base to which he/she reports regularly.) The station claimed that an unpaid volunteer from its congregation acted as the station's full-time staff. The FCC rejected that claim. The licensee then went for the "Hail Mary" argument, asserting that it was unconstitutional for the government to take money from the licensee, which happened to be a religious ministry. The claim, which had something to do with the First Amendment, was based on the notion that the ministry's operations were primarily religious in nature. The FCC was quick to smite that claim with the observation that any organization, religious or otherwise, which chooses to obtain a license to use broadcast channels must also abide by the reasonable, content-neutral regulations to which all broadcast licensees are subject.

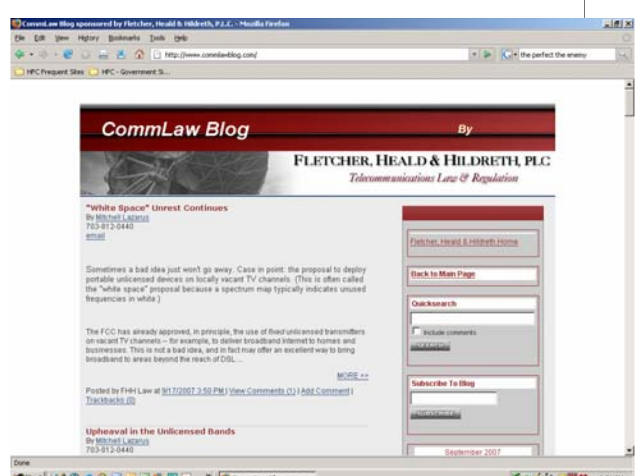
A reminder about broadcasting voice-mail – A Wisconsin station faces a $4,000 fine for broadcasting a voice-mail greeting. It seems that an announcer placed a call to an individual who apparently didn't answer the phone – meaning that his voice-mail kicked in. The announcer proceeded to broadcast the prerecorded voice-mail greeting. As regular readers of this column should realize by now, this was a violation of the rules: broadcasters may ***NOT*** broadcast telephone calls – even if the material being broadcast is a previously recorded voice-mail message, without the prior consent of the non-station person on the call. (Yes, there are some limited exceptions to this – but those involve situations where the other person has implicitly consented to the broadcast, such as when the person is calling in to a call-in talk-show line.) The gist of the rule is that a station is ***not*** supposed to place a call live on the air and effectively "ambush" the person on the other end of the line by putting him/her on the air without notice and consent. While this column often features stories of stations being fined when on-air personalities break the rule by putting the callee on the air, it is important to remember – as this most recent case demonstrates – that the rules applies as well to recorded messages (like voice-mail greetings). The FCC has long held that it will fine stations that broadcast (or record for later broadcast) answering machine or voice-mail messages without obtaining the prior consent of the party on the other side. This rule often takes the fun out of drive-time pranks, but it is intended to protect the person on the other end of the phone and should be heeded by all broadcasters.

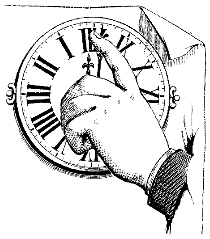
Late Breaking News???

If you're looking for information and insight about late-breaking developments (f'rinstance, the recent spate of "localism" activity, or the change in the FCC's Fee Office address), check out the Fletcher Heald blog. You can find it at:

www.CommLawBlog.com

We cover the gamut of communications issues — plus, if you feel so moved, you can submit your own views for posting. We've had more than 40,000 visits to our site to date! Click on over and see why.





Boy, the way Glenn Miller played, Songs that made the Hit Parade,
Guys like us, we had it made, those were the days . . .

Rereg Proposals Would Turn Back The Hands Of Time

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

The march toward reregulation has advanced considerably.

As reported in our November, 2007, and January, 2008, issues and elsewhere in this issue (*see* related story on page 1), enhanced program reporting rules for television stations have already been approved (and just about everybody assumes that those same reporting rules will ultimately be applied to radio as well). While those new reporting requirements are ready to go into effect as early as this summer on the TV side, the most sweeping reregulation proposals directed at the chimerical "localism" problem in both the TV *and* radio industries appeared in a *Notice of Proposed Rulemaking* (NPRM), released on January 24, 2008.

The proposed rules are designed to address the perception that broadcasters may not be addressing the needs and interests of their communities sufficiently.

Comments in the proceeding are due March 14, 2008, with Reply Comments due one month later. (FHH, on behalf of a number of its clients, will be preparing comments, as will the NAB and others industry representatives. We encourage all broadcasters to give serious thought to letting the FCC know their views on the various proposals in the NPRM.)

The release of the NPRM, with its laundry list of tentative conclusions and proposed rules, sent immediate shockwaves throughout the broadcast industry. Many observers have suggested that if the NPRM proposals are adopted as written, the FCC will be turning back the clock nearly three decades.

According to the Commission, the proposed rules are designed to address the perception that broadcasters may not be addressing the needs and interests of their communities sufficiently. Over the past several years, the Commission has solicited comments from the public and engaged in localism hearings at venues in various parts of the country. From some ge essentially unsupported assertions advanced by some individuals during that process, the Commission has tentatively concluded that "many stations do not engage in the necessary public dialogue as to community needs and interests and that members of the public are not fully aware of the local issue-responsive programming that their local stations have aired."

(Note that, while the Commission refers to "necessary public dialogue", there is no requirement for any such dialogue in the Commission's rules, nor has there been for more than 25 years. Also, while members of the public may not be "fully aware" of available programming, that would appear to be more the fault of the "unaware" public than of broadcasters. After all, broadcast programming is, well, broadcast – meaning that it's available for one and all to receive, at no cost. In other words, if members of the public claim that they're not "fully aware" of available programming, the fault for that lies with the public, not broadcasters).

Many feel the Commission has gone overboard with the tentative conclusions presented in the NPRM, which was adopted back in December but not released until late January. In the eyes of many, there is, at a minimum, serious doubt that there is any lack of localism warranting this type of sweeping reform.

The following is a summary of the nitty-gritty of the NPRM. While the re-crafted ascertainment proposals are a highlight of the NPRM, there are many other equally problematic suggestions lurking throughout the document.

Ascertainment for the 21st Century – The Commission has tentatively concluded that each licensee should be required to form a permanent advisory board consisting of community leaders and officials. Regular, quarterly licensee meetings with this board would be mandatory. As the FCC sees it, these meetings would assist each licensee in ascertaining the issues of primary interest in its community, leading to more localism and diversity-focused programming.

The Commission is also considering the adoption of additional rules/guidelines to foster improved communication between licensees and their communities, including the following:

- *Ad hoc* viewer surveys via telephone or Internet;
- Focus sessions or "town hall" meetings with viewers to help prioritize issues to be covered through news, public affairs, public service, and special programming;
- Participation by station managers/personnel on community boards, councils and commissions;

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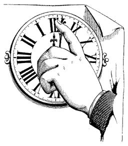

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Dedicated telephone numbers, websites and email addresses, publicized during programming, to facilitate community dialogue.

The advisory board proposal in particular has drawn considerable fire from observers. Why, after all, should the FCC require licensees to implement some new "board" to involve itself in programming decisions? Does that not contravene the fundamental notions that the licensee is solely responsible for the content of its programming and that the government should not interfere with the licensee's programming judgments? Also, by mandating the establishment of an "advisory board", isn't the FCC indicating that licensees should pay more attention to the board than to other members of the audience who don't happen to be on the board – thereby effectively de-valuing input from non-board members?

Further, the board requirement would likely give rise to practical problems. How are the board members to be selected? Will a person not selected be able to challenge his/her non-selection at the FCC? Will certain persons – say, the mayor of the station's community of license – be absolutely entitled to be on the board? What happens if individuals who a licensee would like to have on its board decline to participate because they are already committed to serve on the board(s) of other station(s) in the market?

The board requirement could also present an irony if, particularly in smaller communities, the boards of all local stations consist of the same individuals. Since such boards would, by the FCC's design, be intended to influence station programming, would not nearly identical board membership for all competing stations in a market run against the conceptual grain of the Commission's multiple ownership rules?

Finally, is this really a good use of the time and efforts of broadcast licensees? The amount of effort, time and money it will take for broadcasters to form and implement the boards will naturally detract from the time, money and effort they have available to actually serve their communities with programming.

Programming reporting – As noted above, the Commission has adopted for TV licensees a new program reporting requirement. We expect that that requirement will be extended to radio licensees soon, probably in the context of the digital radio proceeding. The reporting requirement raises a host of issues and is guaranteed to impose very substantial busywork burdens on all affected licensees.

Round-the-clock staffing – The Commission is renewing suggestions, first advanced last year in the fine print of the digital audio decision, that stations may be required to have personnel staffing their facilities during all hours of operation. If that proposal is adopted, you can kiss unattended operation good-bye: as long as the station is on-the-air, a live person would have to be present at the station's facilities. In advancing this proposal, the Commission appears not to have focused on the fact that, if adopted, that proposal would likely have the effect of ***reducing*** service to the public. After all, most unattended operation occurs during the all-night hours. It is no real secret that it's hard to sell advertising during those hours – since, after all, the audience tends to be considerably smaller then than during drive time. The ability to operate unattended during late-night hours means that broadcasters can provide service to the community without the additional payroll cost of having a live body at the station. If unattended operation is no longer an option, the broadcaster will be faced with a choice: (a) continue to operate all-night with no apparent increase in revenues but with increased payroll costs, or (b) simply turn the station off at 11:00 p.m. or midnight. It's hard to imagine that many folks would ordinarily pick (a), meaning that all-night service to the public would likely be dramatically reduced.

If the proposal is adopted, you can kiss unattended operation good-bye.

Program percentage processing guidelines – Again dipping into its bag of 1970s-era tricks, the Commission has also proposed to bring back program percentage processing guidelines as a means of encouraging licensees to provide at least a certain minimum level of certain types of programs. This is a variation of the standard "good cop/bad cop" routine. It starts with a requirement that broadcast renewal applicants report amounts (in, *e.g.*, percentages of overall programming) of the types of programs the FCC wants to encourage. Back in the day, those types included "news", "public affairs" and "other nonentertainment" programming. As long as the reported percentages exceed whatever guideline limit the FCC might establish, then the Media Bureau – *i.e.*, the "good cop" – would have the authority to grant the renewal application. But if the reported percentages were to come in *below* the guidelines, then the Media folks would be powerless, and they would have to refer the subject application to the full Commission – *i.e.*, the "bad cop" – for processing. That would mean, at a bare minimum, delay in getting the renewal granted. Plus, the implication is (as it always is in "good cop/bad cop") that the "bad cop" is a real tough cookie that is likely to be totally unsympathetic and mete out unpleasant results.

The Commission is seeking comments on the content of these guidelines and how they would be measured. What the Commission neglects to mention is that, even when such guidelines were in effect decades ago, they didn't work. In the 1970s, for example, the Commission routinely granted, without much criticism, scores of renewal applications coming in below the guidelines. By contrast,

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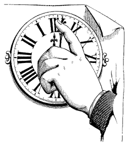

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they virtually never took any serious action against such short-falls. And even if the FCC were willing to take this approach seriously, consider the fact that no-nonsense, hard-nosed enforcement of such guidelines would likely impose a crushing burden on the Commission's limited resources, which are already stretched relatively thin.

Main studio location limitation – The Commission is considering a reversion to its pre-1987 main studio rule. In other words, each station's main studio would have to be located ***within its community of license***. Yikes! As most readers are doubtless aware, that hasn't been a requirement for decades. Rather, as a result of repeated relaxations of the main studio rule, a station's main studio may currently be located within either (a) the principal community contour of *any* station, of *any* service, licensed to its community of license, or (b) 25 miles from the reference coordinates of the center of its community of license – either way, stations may now locate their main studios at considerable distance from their communities of license. The Commission is looking at eliminating that flexibility, which would be a splash of very cold water in the faces of many broadcasters who have established main studios which may be central in their markets, but not necessarily located in their communities of license.

*Each station's main studio would have to be located **within its community of license,** which would be a splash of very cold water in the faces of many broadcasters.*

Internet posting of pre- and post-filing notices – The Commission is also proposing that the pre- and post-filing announcements that must be broadcast with respect to renewal applications *also* be posted on-line. While this would probably not impose much immediate burden on each licensee, it is still legitimate to wonder precisely what regulatory purpose would be served by such a requirement.

Pre-clearance of network programming – In an attempt to promote accountability of local network affiliates, the Commission is seeking comment on whether it should require that network affiliates be given the opportunity to review network programming sufficiently in advance of airtime to determine whether the programming is unsatisfactory, unsuitable or contrary to the public interest. The theory here is that such a requirement would give local stations the opportunity to determine ahead of time whether network programming is appropriate for their audiences.

Possible regulation of voice-tracking – The Commission is seeking comment on voice-tracking. Voice-tracking is a practice which became increasingly prevalent as the radio industry tended toward consolidation following the 1996 amendment of the Communications Act. It involves an announcer who records a full radio show, complete with various local references suggesting that the announcer is physically located in the station's community, when in fact the announcer is in some recording studio tens, hundreds or even thousands of miles away. Companies with multiple stations scattered across the country can use voice-tracking to avail themselves of particularly popular announcers by creating the impression that any one such announcer is local to a number of different communities. The FCC is inquiring into whether anything can and/or should be done to limit its practice.

Recordkeeping on local music – While rejecting the prohibition of national music playlists by licensees (and a corresponding requirement that stations give airplay to local artists), the FCC is seeking comment on whether it should require licensees to maintain and make available data regarding the broadcast of local music. This disclosure would also include descriptions of how each station's playlist happens to be compiled. The information would be considered in connection with each station's renewal applications.

Upgrading LPTV status – The Commission has tentatively concluded that it should allow additional qualified low power television (LPTV) stations to be granted Class A status. The FCC is seeking comment on a wide variety of related questions, including how to define (or re-define) Class A eligibility, and whether the FCC even has the statutory authority necessary to take the action.

In addition to the proposals described above, the NPRM discusses a number of other proceedings – both proceedings which have actually been initiated and proceedings which are still just a glimmer in the Commission's regulatory eye – designed to promote "localism" in one form or another. This includes such disparate subjects as: the timely provision of emergency information by broadcasters; promoting access of cable/satellite subscribers to local broadcast stations; regulatory assistance to new entrants and small businesses seeking to gain access to spectrum; protection of low power television stations; and tackling sponsorship identification issues such as clamping down further on payola and possibly even regulating product placement.

One thing is abundantly clear: if the FCC's proposals are adopted, the broadcast industry will be subject to very substantial new paperwork and recordkeeping obligations. Moreover, those obligations will almost certainly expose each broadcaster's programming decisions to second-guessing – both pre-broadcast and post-broadcast –

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White Spaces In A Gray Area

By: Lee Petro
703-812-0453
petro@fhhlaw.com

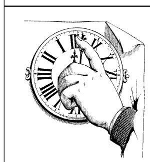
There have been several changes in the white spaces landscape over the past few months. New parties have jumped into the fray proposing alternative uses for unused portions of the television spectrum, and new devices have been delivered to the FCC for testing. Alas, *plus ça change, plus c'est la même chose* – as Microsoft and the National Association of Broadcasters do not appear to have made much progress on a New Year's Resolution to get along in 2008.

The first salvo in the latest flare-up of the white spaces war was a white paper supported by Sprint T-Mobile, Fiber Tower, and the Rural Telecommunications Group. Under their proposal, the Commission would license the unused TV spectrum in rural areas as "back haul" spectrum for their wireless system for a fixed, point-to-point or point-to-multipoint use of the spectrum. Importantly, that proposed use would be secondary in nature to full-power television stations *and* those low-power television stations and television translator stations that are licensed as of a certain date – thus giving incumbent broadcasters on that spectrum protection from interference. The power limitations would be in line with what is currently permitted in the TV auxiliary rules (*i.e.*, 35 dBw EIRP), and would protect the Grade B signal of co- and first-adjacent channel television stations. These guys did their homework, as they would also take steps to limit their channel selection (UHF only) to protect wireless microphone users, and would also not operate on Channels 36, 37, or 38 to protect medical devices. This proposal has not yet been put out for public comment. Note that broadcasters are also studying the implications of the proposal on their post-transition DTV service.

As with all warfare, the white spaces battle is also being waged to win the Hill. In this case, the bombs are made of paper (mostly green…some black and white), with the ultimate goal of legislation directing the Commission to resolve the white spaces proposals one way or the other. According to recent reports, as many as 100 signatures have been obtained on letters sent to the Commission to hold off on the white spaces initiative, while the Wireless Innovation Alliance has at least 20 members of Congress supporting their initiative.

Finally, the war is being fought at the FCC, with the Commission announcing a new round of testing of white spaces devices. The testing commenced on January 24 with Microsoft , Philips, Adaptrum, Motorola, and Google submitting devices. The first casualty in this skirmish was a Motorola device, which was ruled defective by the FCC in early February due to power issues. While the NAB argued that Microsoft was now "two-for-two" in proving that their devices would not work, Microsoft responded by calling the NAB's comments "absurd and extreme." No clear word has yet emerged on whether the second prototype Microsoft provided worked, or on the status of the other devices, but the testing process is still ongoing.

It should be obvious from observing the war on multiple fronts that all involved parties face uphill battles in reaching a resolution on this issue. The proponents of white space technology must both produce a device that actually works, and be able to sell it to Congress and the FCC. The detractors must be able to point out the deficiencies of the plans and devices provided without losing their legitimacy before the FCC and Congress. Congress must be sure not to step on the toes of the expert agency (the FCC) by legislating technology that may not work under any circumstance, and the FCC must live up to its role as the "expert" agency by following the physician's creed of "first, do no harm". Finally, the public is put in the position of a spectator at a championship ping-pong match, trying to keep an eye on the ball without falling out of their seat.



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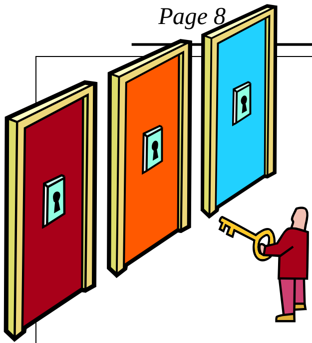
by self-appointed monitors in the community. Further complicating things, the proposed rules, if adopted, are likely to create in those second-guessers a sense of entitlement or empowerment over broadcasters. A logical result of that confluence of factors will be a significant increase in petitions and/or complaints concerning perceived broadcaster failings (real or imagined, big or small, meaningful or otherwise), petitions and complaints the resolution of which will require considerable effort and expense. While useful and productive interaction between licensees and the public can and should be encouraged, the FCC's proposals creates a substantial potential for mischief and worse. It is not at all clear that the FCC has thought through the logical consequences of its proposals.

Clients wishing to join FHH's efforts to challenge the new localism rules and proposals should contact their local FHH attorney immediately. Also, it is important to keep abreast of all of the developments in the proceeding, including coverage on FHH's blog (commlawblog.com). We encourage everyone to subscribe to the blog on the front page of the site. Contact us for further information.



Next stop, the palace of wisdom?

The Road Of Access

FCC outlines the lease you can do

By: Peter Tannenwald
703-812-0404
tannenwald@fhhlaw.com

Some three months after adopting new rules governing the leasing of channels on cable television systems for commercial use, the FCC has finally released those rules. The rules will go into effect 90 days after they are published in the Federal Register. These rules will *not* initially apply to channel leasing by entities that offer sales presentations and program-length commercials, but the FCC has invited comment on whether the scope of the rules should be expanded to include those entities.

The new rules require cable operators to: (a) post detailed information about their channel leasing policies on their websites; (b) to respond to requests for leasing information within three business days; and (c) conclude contract negotiations and make channel capacity available within 35-60 days after receiving a request.

Upon request, cable operators must supply prospective lessees with information about their channel leasing policies and processes; the geographic area in which leasing is available, the number, location, and available time periods for each leased access channel; a rate schedule, any charges for studio facilities and other services; available methods for delivery programming; a sample contract; and information about their launch timetable.

Cable operators will not be required to lease channels covering a geographic area smaller than the area served by a single head-end, unless they make smaller areas available to other program services, in which case channel leasing must be made available in the same smaller geographic units.

A new formula has been adopted for determining the maximum permissible rate, reducing the maximum from the average amount a cable operator earns from other channels to the amount earned on the least profitable marginal channels, with an absolute cap of 10 cents per subscriber per month. When quoting a rate, a cable operator must include justification for that rate. Rates may vary between channel tiers with more than 50% subscriber penetration and tiers with less penetration. If a prospective lessee wishes to challenge a rate, procedures will be available for requiring cable operators to provide more detailed justification, including information about the terms on which they make other channels available; but some information may be provided subject to a written confidentiality agreement that will shield the information from any decision-making personnel of competitors. While the change to the marginal rate should be helpful to channel lessees, we anticipate that the calculations will still be complicated enough that most lessees will opt for the absolute 10-cent ceiling.

The new rules require any charges separate from the basic leasing rate to be reasonable, and it indicates that it will take a hard line on excessive insurance requirements, unreasonable contract provisions that are not applied uniformly to all program services, and unjustified technical assistance fees than it has in the past.

Cable operators must consider any reasonable method of delivery of programming suggested by a lessee.

Cable operators must consider any reasonable method of delivery of programming suggested by a lessee. They must also provide information about leased channel program content in their program guides, provided that the information is provided to them far enough in advance and in a way that is compatible with the technology the cable system uses to generate its program guide. A cable operator may not charge for listing leased channel content information in its program guide, except to the extent that it charges other program providers for the same service.

Complaints about channel leasing policies must be filed with the FCC within 60 days after the claimed offense takes place. The cable operator must respond within 30 days, and the FCC says it will resolve complaints within 90 days after conclusion of the pleading cycle. Complainants will no longer have to obtain a rate analysis by an independent accountant prior to filing a complaint. Prospective lessees may also ask the FCC to discipline cable operators for failure to respond to requests for information in a timely manner without filing a formal complaint. A simple letter will suffice, and the FCC will fine cable operators $500 a day for dilatory conduct.

Finally, cable operators must file an annual report showing their leased access actual and maximum rates, usage, channel placement, requests received, requests rejected, differences in treatment of channel lessees, incidence of requir-

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Post-transition viewability eyed

Must Carry Musts

FCC adopts new carriage rules to protect analog subscribers

By: Paul J. Feldman
703-812-0403
feldman@fhhlaw.com

With the February 17, 2009 digital TV transition date approaching, the FCC recently adopted rules designed to ensure that cable subscribers that receive only analog cable service can continue to view the signals of must-carry local broadcast stations after the transition. These new rules do not apply to broadcast stations carried pursuant to "retransmission consent."

Section 614(b) (4) (B) of the Communications Act requires cable operators to transmit the signals of must-carry stations "without material degradation." In its new rules the FCC interprets this "viewability" provision to require cable operators to choose to either: (a) continue to provide an analog tier, but down-convert the digital signal of must-carry stations into analog format, or (b) for cable systems that provide only digital service, transmit the signal of must-carry stations in digital format, but ensure that all subscribers (including those with analog TVs) have the necessary equipment to view the broadcast content.

> *The "viewability" requirements are largely being perceived as a "dual carriage" requirement by the cable TV industry.*

After February 17, 2009, cable operators will be responsible for the costs of any down-conversion of DTV must-carry broadcast signals, though they may charge subscribers for the purchase or rental of set top boxes necessary for analog TV sets to receive digital signals. The FCC also retained the current requirement that high definition must-carry broadcast signals be carried in HD, along with the current requirement that such broadcast signals not be materially degraded by the cable operator. While the Commission did not define such prohibited "material degradation," it specifically declined to require cable operators to pass "every bit" of digital data in the broadcast signal. The intent here was to give cable operators the flexibility to use digital compression, as long as the average viewer experiences the picture quality as at least as good as the quality of any other programming carried on the system. In addition, the FCC's Order requires cable operators to notify subscribers if they decide to go to an all-digital system.

These viewability requirements extend to February 17, 2012, with the Commission committing to review them during the last year of this period in light of the state of technology and the marketplace. During this transition, small cable systems with activated channel capacity of 552 megahertz or less may request a waiver of the viewability requirements.

The Commission is also seeking comment in a Further Notice of Proposed Rulemaking on a number of issues, including how channel positioning rules should apply to operators carrying both the analog and digital versions of a station's signal, how to properly adjust down-converted signals to different aspect rations (16:9 to 4:3), whether material degradation rules should apply to stations carried pursuant to retransmission consent as well as must-carry, and additional ways to minimize any economic impact on small cable operators while still complying with the statutory requirements for carriage of local TV stations.

The "viewability" requirements are largely being perceived as a "dual carriage" requirement by the cable TV industry, and while the NCTA has agreed to comply with the requirements, a number of cable programmers have already filed suit in federal court, seeking to overturn the requirements. It is difficult to predict at this time how the appeal will be resolved, but we will keep you informed.

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ing lessees to move to a different channel, and complaints. Reports will be due April 30, and the public may file comments by May 15.

While the cable industry claimed that leased channel access is an unconstitutional restraint on their speech and taking of their property, the FCC said that these matters have previously been decided in court in favor of regulation of channel leasing.

We will be happy to assist any clients who have any difficulty in negotiating when the new rules go into effect. We suggest that if you think that the new rules will offer you a better opportunity to lease than you have had in the past, it would be wise to open negotiations with cable operators sooner rather than later, so that desirable channel capacity is not taken by others.

(Continued from page 1)

Local News Programming produced by entities other than the station – Same potential problem as above, but with the added twist that the station will presumably have to depend on the categorization which the program producer puts on the programming. Note that the non-station, non-network source of the news programming will have to be disclosed.

Local Civic Affairs Programming – This is where things start to cloud up big time. According to the definitions provided by the Commission, this kind of programming "is designed to provide the public with information about local issues", but the definition is considerably more detailed than that. In particular, this type of programming includes, but is not limited to, "broadcasts of interviews with or statements by elected or appointed officials and relevant policy experts on issues of importance to the community, government meetings, legislative sessions, conferences featuring elected officials, and substantive discussions of civic issues of interest to local communities or groups." Precisely how the FCC defines the term "issue of importance" is not indicated. Ditto for "relevant policy expert". . . and for "substantive discussion".

If a for-profit organization is engaged in some charitable activity, promotion of that activity would apparently not qualify as a PSA.

Local Electoral Affairs Programming – This term is the subject of a two-sentence definition. The first sentence reads: "Local electoral affairs programming consists of candidate-centered discourse focusing on the local, state, and United States Congressional races for offices to be elected by a constituency within the licensee's broadcast area." While this sentence leaves open at least a couple of questions – *e.g.,* What is "candidate-centered discourse"? Does coverage of primaries fall within this definition – it at least appears to provide a comprehensive definition . . . until, that is, you get to the next sentence, which reads: "Local electoral affairs programming includes broadcasts of candidate debates, interviews, or statements, as well as substantive discussions of ballot measures that will be put before the voters in a forthcoming election." So it also includes non-candidate "ballot measures", including, presumably, referenda, bond issues and the like. That's good to know.

Independently Produced Programming – For the purposes of the new Form 355, programming fitting this description is "programming aired during prime-time that is produced by an entity not owned or controlled by an owner of a national television network, including but not limited to ABC, CBS, NBC, and Fox." Note the limitation here to "programming *aired during prime-time*". As far as we can tell, this is the only program category so limited. Further muddying the water with respect to this category is the following caveat from the Commission: "If an owner of a national television network owns or controls more than a one-third financial interest in the program, acts as the distributor of such program in syndication, or owns the copyright in such program, the owner of a national television network will be considered to be the producer of that program." So before you include any programming on your report under this category, you should be double-checking not only its producer, but also the ownership/control of its producer as well as its distributor and the owner of its copyright. Good luck with that.

Other Local Programming – The Commission has not defined this term, so you're on your own here.

Public Service Announcements – While "PSA" is a long-used term, the definition provided here is somewhat more limited than many might think. First, it cannot involve any consideration of any kind flowing to the licensee (or any organization or entity "associated with the licensee"). In view of the Commission's apparent willingness, evident in the VNR inquiries, to construe the concept of consideration very, very broadly – and also in view of its inclusion of the next category ("Paid Public Service Announcements") – licensees may want to exercise caution with respect to that element of the definition. Also, this definition is limited to announcements which "promote programs, activities or services of federal, state, or local governments or the programs, activities or services of nonprofit organizations". That seems to indicate that, if a for-profit organization is engaged in some charitable activity, promotion of that activity would *not* qualify as a PSA, paid or otherwise.

Paid Public Service Announcements – The definition here differs from the preceding definition only with respect to the consideration question. If any consideration of any kind is given to the licensee (or any associated entity) in return for the broadcast of such an announcement, then it's a "paid PSA" – as long as it meets the rest of the PSA definition from the preceding category.

Closed captioning – The Commission has provided no separate definition of this term, but its meaning seems readily apparent.

So much for the initial "average weekly number of hours" tabulation that leads off the Form 355 festivities.

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Note, though, that in making those calculations, you are not supposed to double-count "Local Civic Affairs" or "Local Electoral Affairs" programming – so if any such programming happens to have been included in the tabulation of local or national news programming, you're supposed to deduct it from those latter categories before including it elsewhere.

Itemization of separate programs/program segments/announcements – Next, Form 355 requires detailed information about each program or program segment listed for nine of the 11 categories described above (the two exceptions are "high definition" and "closed captioning" – but don't get all excited about that latter, because more information about closed captioning is required later in the form). The detailed information to be provided includes the title of each separate program or program segment for each category, the date/time of its broadcast, its length and some other "check-the-box" data. For "independently produced programming", you also have to state the total number of times each such program aired. For PSAs (paid and unpaid), the form requires disclosure of the sponsoring organization for each PSA, the name of the PSA, its "general goal", its length, the number of times it was broadcast and the percentage of times it aired during prime time.

The Commission adds two more categories of programming for itemized treatment: "Underserved Communities" and "Religious Programming".

Oh, and by the way, the Commission adds two more categories of programming for such itemized treatment. Those two are "Underserved Communities" and "Religious Programming". For the latter, you are expected to list any broadcasts of religious services "or other locally produced religious programs that were aired at no charge" – providing title, length, and date/time of broadcast for each.

As to the "Underserved Communities" category, here's what the Commission has to say:

> List the programs aired that were aimed at serving the needs of underserved communities, *i.e.*, demographic segments of the community of license to whom little or no programming is directed.

The term is not otherwise defined in the form. We can probably assume correctly that when the Commission uses the term "little or no programming", it really means "little programming", since by reporting *any* programming in this category, the station is eliminating the possibility that "no programming" was directed to the "demographic segment" in question. However, precisely what the FCC may mean by "little programming" is not at all clear. We would expect this to be a potential bone of contention at some point down the line. Listings of programs/segments in this category must include title, type or format, length, date/time of broadcast, identification of the "underserved community" being served by the program, and a description of how the "programming met the needs of the underserved community". You're also supposed to indicate whether the station or any related organization received any consideration of any kind for the broadcast.

Question 3 – "Meeting Community Needs" – If you're not having fun yet, you will with this question. You have to indicate (by answering "yes" or "no") whether you "undert[ook] any efforts to determine the programming needs of its community" and, if so, did you "design any programming to address" the needs so identified. If the answer to either question is "yes", you are then required to provide a narrative description of the steps you took.

Question 4 – "Service for Persons with Disabilities" – Remember how we mentioned "closed captioning" earlier on? Well, here is the itemization that was not required earlier. In this section the licensee is asked ("yes/no") whether it has met the closed captioning requirements, and then is required to state the number of hours and percentages of each category of non-exempt video programming (*i.e.*, "new English language", "pre-rule English language", "new Spanish language", "pre-rule Spanish language"). And if any programs were not captioned "due to exemption ", each such program must be separately listed, with a statement about the basis for the exemption.

Additionally, the form asks whether the station voluntarily provided video description services for the vision impaired. If the answer is "yes", then still more information must be provided (total number of hours with video description, type of program, channel containing video description).

Question 5 – "Current Emergency Information" – The form here expects the licensee to state whether it "broadcast information about a current emergency that was intended to further the protection of life, health, safety, and property as defined in 47 C.F.R. 79.2". If the answer is "yes" then – you guessed it – the form requires a listing of the "channels that contained the emergency information and the situation that prompted its use". Then you have to state whether the emergency programming so described was accessible to persons with disabilities "as required in 47 C.F.R. 79.2" and, if not, you're supposed to list "the current emergency that was not accessible" and explain why it wasn't accessible.

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DTV Update

In the wake of the Third Periodic

Updates From the DTV Front

NOTICE

FOR NOW, THE FINAL DTV CONVERSION DATE IS:

February 17, 2009

CHECK BACK LATER FOR FURTHER UPDATES.

For those of you still trying to digest all the fine print details of the Third Period Review of the DTV transition process (described at length in the cover piece in last month's *Memo to Clients*), here's a quick update on a few DTV developments.

New forms now available – The forms to be used by TV stations applying for their final DTV facilities – Form 301 for commercial stations, Form 340 for NCEs – are now available on CDBS. Also available is Form 337, for stations asking for more time in which to construct their DTV facilities. These forms have all been approved by the Office of Management and Budget and can be completed and submitted. As discussed in last month's issue, some deadlines apply for new CP applications, so be sure to doublecheck whether any such deadline applies to you. The FCC is offering an attractive come-on to entice folks to file early: CP applications filed by March 17 have been promised "expedited processing". Note, however, that that promise comes with a disclaimer: "expedited processing" does ***not*** necessarily mean "expedited grant". Rather, it just means that, if you get in the door by March 17, the staff will give your application the once-over sooner rather than later and, if it's grantable, you'll be good to go . . . but if it's *not* grantable, they'll let you know and you'll be expected to fix whatever the problem is before you get your CP.

Form 387 status reports filed – February 19 was the deadline for filing DTV Transition Status Reports (FCC Form 387). At last check (on February 27), more than 1,400 reports were available for review on CDBS – a tad shy of 100% of all licensed stations, but still not a bad response.

Help for LPTV? – Chairman Martin took up the cudgel on behalf of low power TV folks in February. LPTV and Class A stations, of course, have not yet been allowed to board the DTV transition train, which means that when that train leaves the station in February, 2009, they could still be stuck in Analogville while the viewing public has all moved on down the road (at the government's insistence) to Digitaltown. According to one published report, Martin has circulated a proposal that would force the cable industry to carry hundreds of low power stations that don't currently have such access. He also sent a letter to cable, broadcast and consumer electronics executives urging them to take steps to help low power stations through the transition. It remains to be seen exactly what, if anything, will be done – by the government and/or the private sector – to try to prevent what could be a serious problem come for low power TV come next February.

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Question 6 – "Local Marketing Agreements, Joint Sales Agreements, and Similar Agreements" – This is the last question. It asks whether the licensee "leases or sells three hours or more per day to an entity other than the licensee pursuant to a local marketing agreement or time brokerage agreement, or has entered into a joint sales or similar agreement". If the answer is yes, the licensee is asked "to explain" in a narrative statement.

Simple, huh? Just do that four times a year, every year, and you'll be in compliance.

What should be clear to one and all is that this form will require considerable effort to complete. Each reporting station will have to establish some recordkeeping process by which to maintain a current and accurate database of information from which the quarterly reports can be generated. That will likely entail the development and maintenance of detailed program logs, together with some method of memorializing any and all efforts the station might undertake to (a) identify community issues and (b) address those issues in programming. We emphasize that these are not duties that any station should take lightly – the burdens that they are likely to impose on reporting stations are substantial.

While Form 355 has not, as yet, become effective – *Federal Register* publication and OMB approval have not occurred, as of this writing – we anticipate that it will become effective soon. After all, the Commission appears to be dead-set on this approach, and the remaining hurdles that need to be cleared are largely administrative (although some hope does exist about interposing objections to the new form at OMB in a last ditch attempt to get reason to prevail).

Finally, even though Form 355 is currently limited to television licensees, it is clear that the FCC plans to require similar reporting by radio licensees in the foreseeable future. Accordingly, folks on the radio side of the universe should pay close attention here, even though they have dodged this particular bullet for the moment.

New meaning to the term "butt ugly"?

NYPD Blue Moon Attracts $1.23 Million Fine

FCC slashes licensee response time to meet deadline

Next up: *Married By America*

By: Jeffrey J. Gee
703-812-0511
gee@fhhlaw.com

The FCC issued two forfeiture orders in February for allegedly indecent television programs, barely beating statutory deadlines that might have placed the broadcasts beyond the reach of FCC sanctions. In the first case, the FCC concluded that some 45 ABC stations broadcast indecent material during a February 25, 2003, episode of *NYPD Blue*, and concluded that each station should pay a $27,500 fine – for an aggregate forfeiture amount of $1,237,500. In the second order, the FCC reached back to an April 7, 2003, episode of *Married By America* broadcast by the FOX Network. That order, however, was limited to just 13 stations and $7,000 per station ($91,000 in total).

While these orders would be noteworthy on a number of fronts, the timing issues involved are particularly dramatic. Both of the programs at issue aired five years ago. After a Notice of Apparent Liability (or NAL) was issued in 2004 with respect to the *Married By America* program, the FCC seemed to have forgotten about them in all the fuss over the Super Bowl/Janet Jackson/Billboard Awards orders and court appeals.

Time between broadcast and NAL – 59 months. Time between NAL and response deadline – 27 days. Time for payment – two days.

Then, on the evening of Friday, January 25, 2008, the FCC dropped an NAL on the ABC stations for the *NYPD Blue* broadcast (the title of the episode in question was, perhaps regrettably, "Nude Awakening"). After summarizing the content at issue and the relevant legal standards, the FCC found the stations "apparently liable" for forfeitures of $27,500 each for violating the FCC's indecency restrictions. The FCC then ordered the stations to either pay the fine or file written responses by February 11, 2008 – a mere 17 days after the Friday night issuance of the NAL (licensees facing an NAL are typically given 30 days to pay or respond). Reportedly, requests for extension of time were ignored as ABC and its affiliates scrambled to blow the dust off their case files and file the required responses by the deadline. Despite the shortened response time, the responses were filed by February 11th.

It then took the FCC just eight days to carefully consider and flatly reject the responses in an order that (a) concluded that the program violated the FCC's indecency restrictions, and (b) gave the stations a whopping 48 hours to pay the forfeitures (again, the usual turn-around time for forfeiture payments is 30 days). For those of you keeping score: Time between broadcast and NAL – 59 months. Time between NAL and forfeiture payment/response deadline – 27 days. Time for payment – two days.

Two days after the *NYPD Blue* forfeiture order was released, the FCC followed that bravura performance with the release of the *Married By America* forfeiture – 40 months after the NAL in that case.

What drove this frenzy of enforcement activity was an obscure statute of limitations on certain federal collections actions. The statute in question states that an action for enforcement of any forfeiture must be commenced within five years from the date when "the claim first accrued." While there is some debate in some circles as to just when a "claim" in fact "first accrues", the smart money – and at least a couple of courts – are convinced that, in cases like this, the FCC's claim would accrue as of the date of the broadcast which constitutes the violation which in turn triggers the fine.

Apparently, someone with a calendar noticed that the claims in these cases therefore accrued when the programs aired in 2003. That meant that the FCC's ability to bring a collection action would expire on February 25, 2008, for *NYPD Blue* and April 7, 2008, for *Married By America*. By slashing the customary response periods, the FCC was able to bring its case against *NYPD Blue* in under the wire. If the ABC stations failed to pay or respond by the 21st, the FCC would have until the 25th to prevail upon its compatriots in the Justice Department file actions in the federal District Courts.

The *Married By America* order, by contrast, gave the FOX stations the usual 30 days to pay or respond – the statute of limitations deadline for that action was a more comfortable 46 days after the date of that order.

In the end, the FCC's panicky scurrying to get the *NYPD Blue* order out the door proved to be a tad unnecessary. Within the 48-hour payment period, ABC paid the

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$1,237,500 forfeiture on behalf of itself and its affiliates, thus eliminating the need for the FCC to fire up any collection action at all. ABC's payment should not be seen as any kind of capitulation, though: under the somewhat Byzantine provisions of the Communications Act governing fines and forfeitures, a party who gets whacked with a fine can***not*** appeal the fine ***unless*** it has paid it. In other words, if you get hit with a fine and you're reasonably confident that it's an unlawful fine that you want to appeal ASAP, your only recourse is to pay the fine first. (Alternatively, you could simply ignore the fine, in which case the FCC would have to get DOJ to sue you in U.S. District Court – it is that kind of collection action which is subject to the statute of limitations that apparently had the FCC's regulatory knickers in such a twist.)

And sure enough, within hours of making the payment, ABC filed an appeal with the U.S. Court of Appeals for the Second Circuit (the same court that reversed the FCC's Omnibus Indecency Order last year). ABC was careful to note that paying the forfeiture was not an admission of guilt but rather a necessary pre-condition to bringing its case to the appeals court.

Actress Charlotte Ross should be congratulated for being officially certified by the federal government as "an attractive woman".

While the FCC appears to have beaten the clock, waiting until the last moment may still have consequences for the FCC's position. For starters, the FCC acknowledged in the *Married By America* order that the pending statute of limitations deadline forced it to stick with the relatively low $7,000 per station forfeiture amount proposed in the 2004 *Married By America* NAL. The FCC noted that it would have imposed a far higher forfeiture but to do so, it would have needed to issue a new NAL, which would have pushed the final order past the statute of limitations deadline. In addition, ABC and its affiliates complained in their responses that the shortened response periods left them less able to respond and therefore deprived them of due process. While the FCC waved away those complaints, the Second Circuit may not take the FCC's departure from long-established practice so lightly.

In addition to proving that the FCC is capable of moving quickly when it wishes to do so, these cases offer a few other insights for broadcasters.

First, broadcasters should consider themselves on notice that the FCC has ***not*** stopped enforcing its indecency rules, although the type of material involved may play some role in the cases the FCC will choose to pursue. Prior to the *NYPD Blue* NAL, the FCC had not released a new indecency decision in over a year, apparently waiting for the courts or Congress to clarify its authority on indecent material. Indeed, after the Second Circuit overturned the FCC's "Omnibus Indecency Order" (which included the Billboard Awards incidents with Cher and Nicole Richie), FCC Chairman Kevin Martin complained that the Second Circuit's June, 2007, order all but tied the FCC's hands in enforcing indecency cases. The material in the Omnibus Indecency Order involved naughty words, however, while the *NYPD Blue*/*Married By America* episodes involved naughty body parts and naughty gestures.

In the case of *NYPD Blue*, the scene that the FCC found indecent involved a woman disrobing before a shower, exposing her naked buttocks to the camera before turning to expose the side of one breast. *Married By America* involved a bachelor/bachelorette party featuring both male and female strippers. None of the strippers were shown fully naked – the apparently naked breasts and buttocks of the female strippers were pixilated – but the party-goers were shown, at various times and to varying degrees, touching, straddling, kissing, and licking whipped cream off various body parts.

This suggests that while the FCC may be constrained from issuing new enforcement decisions based on bad language, it may feel itself far less constrained with respect to naughty visuals. Anyone looking for guidance on what kind of visuals would be acceptable in the future, however, will not find it in these cases. ABC and its affiliates noted case after case in which the FCC found comparable material not indecent. In each case, however, the FCC found the comparable material "easily distinguishable" from the material in *NYPD Blue* – any difference at all seeming to be a distinguishing factor.

The bottom line (so to speak) for the FCC seemed to be that an unobscured view of unclothed derrière of an "attractive woman" is "pandering and titillating" and therefore sufficiently offensive to warrant sanction, regardless of the complete lack of any sexual activity or sexual or erotic response from any character on screen. Indeed, the FCC's finding was solely based on the actress's bottom line – the FCC found that the partial views of her naked breast from behind and from the side were not sufficient graphic to support an indecency finding. (As a side note, actress Charlotte Ross should be congratulated for being officially certified by the federal government as "an attractive woman".)

One would assume, then, that if the view had been obscured by pixilation (or perhaps if Ms. Ross had been, in the words of Lyle Lovett, "ugly from the front"), the scene would not have been pandering or titillating and therefore not indecent. Pixilation, however, was no cure for *Married*

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By America. While the FCC conceded that no actual nudity was shown, "it is unmistakable that the partygoers are participating in sexual activities and that sexual organs are being exposed" – "exposed" *under* the pixilation, that is.

One might, then, conclude that the rules are: no nudity (with or without sexual activity) and no sexual activity (with or without nudity). Unfortunately, a long line of prior cases contradicts these conclusions. The FCC itself asserted in the *NYPD Blue* order that there is no "per se" rule against nudity, and the FCC previously found frontal male and female nudity not indecent in *Schindler's List* and a *Today Show* news segment. Likewise, several prior cases have found no indecency in televised sex scenes where the participants are supposedly naked under the bedsheets or out of bed but clothed. While certain FCC Commissioners continue to claim that these are simple, common sense distinctions, we sympathize with programmers who find this "guidance" to be less than helpful.

One might conclude that the rules are: no nudity (with or without sexual activity) and no sexual activity (with or without nudity).

An additional point for broadcasters to remember is that the "safe harbor" still provides shelter. As our readers know, the indecency restrictions do not apply during the "safe harbor" hours between 10:00 pm and 6:00 am. This was a critical factor in the *NYPD Blue* case, as ABC stations in the Eastern and Pacific Time zones aired the episode after 10:00 pm and, thus, were beyond the rule's reach. ABC stations in the Central and Mountain Time zones, however, aired exactly the same material in sync with the east coast and therefore before 10:00 pm local time. It was these Central and Mountain stations that made up the 45 station subject to sanction, while their ABC brethren on the east and west coasts received no penalty for airing exactly the same programming.

Third, the FCC is continuing to follow its policy of limiting enforcement action to those stations that are the subject of a complaint from a viewer/listener located in the same local market. Application of this policy excused the majority of the FOX stations found "apparently liable" for rule violations in the *Married By America* NAL. Dozens of FOX stations were named in the *Married By America* NAL, but the FCC fined only those thirteen stations that were the subject of an actual complaint (despite clear acknowledgement that the other stations had aired exactly the same material). The FCC applied the same policy to the ABC stations in question.

Broadcasters should be mindful of a related point to this policy, however. Once it receives a complaint about a particular station, the FCC will not be fussy about the quality of the complaint. "Form letter" complaints generated by an out-of-state advocacy group will count, even when the "complaints" don't include any indication that the person complaining actually saw the show in question. As long as the complaint is from someone in the market, it appears that the FCC will credit the complaint and proceed with enforcement action.

Finally, stations should keep in mind that the forfeiture amounts in these cases are much lower than they would have been if these programs had aired in 2008, rather than 2003. The forfeitures imposed were based on the then-applicable maximum forfeiture amount – $27,500. As noted above, only a lack of time seems to have kept the FCC from reissuing the *Married By America* NAL to impose the maximum fine in that case. If these programs had aired in 2008, the ABC forfeitures would have totaled over fourteen million dollars (45 stations times the current $325,000 maximum) and the FOX forfeitures would have exceed four million dollars (13 stations at $325,000 each).

As noted above, ABC has already filed its notice of appeal to the Second Circuit and it is widely expected that a FOX appeal will follow shortly. These cases will add to the growing federal docket of pending indecency cases. As of this writing, we are still waiting on the Court of Appeals for the Third Circuit to weigh-in on the Super Bowl/Janet Jackson case and, by the time you read this, we may know whether or not the Supreme Court has agreed to hear the FCC's appeal of the Second Circuit's decision on the Omnibus Indecency Order. We will continue to update you here and at the FHH CommLaw Blog.

Hey, sports fans, Joe Di Scipio says:

YOU
make the call!!!

Okay, so you all remember last year about this time – just after the Super Bowl – when a number of us here at the *Memo To Clients* expected a great hue and cry following Prince's halftime show during Super Bowl XLI, a show which featured 32 seconds of Prince's silhouette cast on a white sheet as he played his guitar excitedly. (In case you missed it, we're providing a screen grab image that should give you an idea of what it was like.) In light of the big flap-doodle about Janet Jackson, we figured that the FCC would be all over this one like a cheap suit. Were we wrong!

So this year, strictly as part of our *Memo to Clients* editorial duties, we watched the Super Bowl again. How does the half-time show start off? With a suggestively-shaped "guitar" shooting straight toward a roundish set of lights, and when the "guitar", er, penetrates the, um, circle, everything explodes in a dazzle of light and sound. (Check out the screen grab, showing penetration minus about two seconds.) Surely, we figured, the FCC would not allow such obvious imagery to pass without comment.

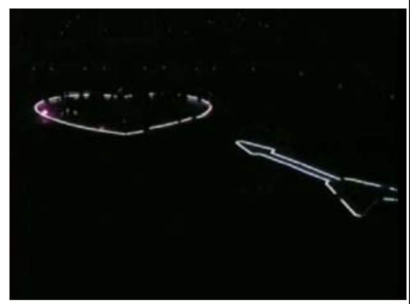
Wrong, wrong, wrong again. We have heard nary a peep from the Commission. We're like that guy in the beer commercial – "Dude!?!"

Of course, the FCC just fined ABC and its affiliates in the central and mountain time zones something north of $1,200,000 for a 2003 episode of *NYPD Blue* where the viewer was treated to the "viewing of an attractive woman disrobing as she prepares to step into shower." As best we can figure the FCC's approach, it's something like: attractive female nudity (Janet Jackson, Charlotte Ross in *NYPD Blue*) – bad; graphically symbolic displays of male genitalia – good. Perhaps the Commission is saying (with apologies to Rudyard Kipling) that a woman is only a woman, but a good guitar is . . . No, wait, maybe the FCC is paraphrasing Freud's supposed *bon mot* – sometimes a guitar is just a guitar.

You make the call!

Photo from blogs.usatoday.com

Prince playing his, uh, guitar during half-time at Super Bowl XLI.



Countdown to ecstasy, or at least to half-time at Super Bowl XLII. It didn't last up to four hours.

FHH - On the Job, On the Go

Frank Jazzo participated as a panelist in an FCBA seminar on "The FCC's New EEO Rules: Five Years Later" on February 12 in Washington. By the way, **Frank** has been appointed to the FCBA's Nominations Committee.

On February 23, **Joe Di Scipio** appeared on a panel at the Syracuse University College of Law Communications Law Symposium.

On February 25, **Kevin Goldberg** attended the SanFran Music Tech Summit in San Francisco.

On March 10, **Jim Riley** and **Harry Martin** will appear on a panel with FCC veteran **Roy Stewart** at the National Religious Broadcasters' convention at the Opryland Resort and Convention Center in Nashville. Their panel will address recent FCC developments.

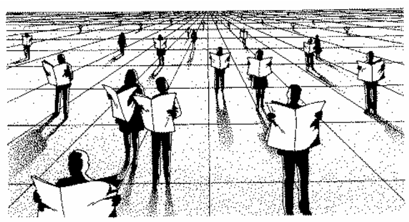
Let the NAB festivities begin! **Matt McCormick** reports that he will be a panelist for a session on "Current Issues in Law and Policy" at the Broadcast Education Association convention in Las Vegas on April 17, following the NAB convention. Check this space next month for further information about other FHHers who will be kicking up their heels in Las Vegas for the NAB.

And finally, our *Media Darling of the Month* is (drum roll, please) . . . **Howard Weiss**, who was quoted in a Multichannel News article on Chairman Martin's call for increased cable carriage for some LPTV stations.

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

Updates on the News

St. Louis blues – Last month we reported that the FCC had announced that it was changing its Fee Filing lockbox from the Mellon Bank in Pittsburgh to the U.S. Bank in St. Louis. The announcement was made in an item released by the Commission on January 25. It said that the shift in lockbox locales would be effective immediately upon the publication of that item in the *Federal Register*. No problem with that (other than the inconvenience of having to check the *Federal Register* every day until the item appeared). But within a day or so, the FCC had placed a banner notice that popped up when you accessed your CDBS account. The notice indicated that the shift to St. Louis would be effective on February 4 or 5. That seemed to indicate that the FCC figured that *Federal Register* publication would occur on that date. But that date came and went, and the item did not appear in the *Federal Register*. Then the banner disappeared from CDBS. Adding further mystery, on February 12, the Commission announced that the Mellon Bank would, effective immediately, not accept FCC-related payments (except for payments relating to the 700 MHz auction), but the U.S. Bank would replace Mellon as of February 14 – leaving an apparent two-day gap. And still nothing showed up in the *Federal Register*, even as of February 12, and then February 14. Finally, the notice appeared there on February 19. So as of now, the shift has been made and is final and there is no doubt where to send your payments. But we're still kind of curious about where payments due on February 13 were supposed to go.



Translator apps on the move? – Rumor has it that some movement in the processing of at least some of the FM translator applications filed five years ago or so has been observed. As you may recall, in early 2005 the FCC imposed a freeze on processing those applications for a variety of reasons. But when the FCC adopted a number of new rules for the LPFM service late last year, it said that it would be lifting the freeze – and it looks like they really meant it. By the way, the new LPFM rules were published in the *Federal Register* on January 17, 2008, and will become effective on March 17, 2008.

FCC puts out the Valcom mat – After looking over extensive test results, the FCC has announced that AM CP applicants specifying Valcom antennas will not routinely be required to submit proofs of performance, current distribution measurements, or a formula for the vertical plane radiation characteristic for non-DA facilities. That sounds like a good deal to us – but since we're not engineers, you should check with your technical consultant to see if this is something you might be able to take advantage of. Valcom antennas are self-supporting whips which are shorter and more streamlined than your typical one-quarter wavelength lattice tower. They require a 120-radial buried ground system, but being "low-profile", they provide some greater degree of flexibility in areas where taller towers are unacceptable. The Commission has released an extensive field test report on Valcom antennas which establishes radiation efficiency values for the 75- and 85-foot models within the frequency ranges for which each has been approved (FYI – the 75-foot model may be used at frequencies from 1390 – 1700 kHz; the 85-footer is good from 1200 – 1700 kHz). The test report and related materials should be reviewed and utilized by anyone proposing a Valcom antenna. Note that, at least for the time being, Valcoms may be used only for nondirectional operations.

Spring forward – A reminder from The Contracts Guy: Don't forget that Daylight Savings Time begins this year at 2:00 a.m. on **Sunday**, **March 9**.

Concentrate and ask again later – As noted in the story (*see* page 13) about the *NYPD Blue* NAL, the reason the FCC felt compelled to dramatically shorten its usual processes was an obscure statute of limitations. That statute – hidden in the bowels of Title 28 of the U.S. Code (28 U.S.C. §2462, to be precise), *not* in the Communications Act – was not an item familiar even to many seasoned litigators, and not something which had been invoked in this context in the last decade or two, as best we can determine. So when the NAL first appeared with its super-expedited response time (coupled with the FCC's terse "no extensions" response to informal inquiries about more time), a number of us were puzzled. So one plucky colleague took the direct approach and emailed the Enforcement Bureau to ask for an explanation of the Commission's haste. Back came a two-sentence response: "The NAL correctly specifies that affected licensees have only until February 11, 2008 to either pay the proposed fine or submit a response. The Commission determined that it needed a response by February 11th to ensure that it preserves its forfeiture authority." Since that response was not particularly informative, our colleague was still nonplussed, so he wrote back asking for a brief explanation of "what hinges on the date of the [licensee's] response." The answer, in its entirety, read as follows: "The

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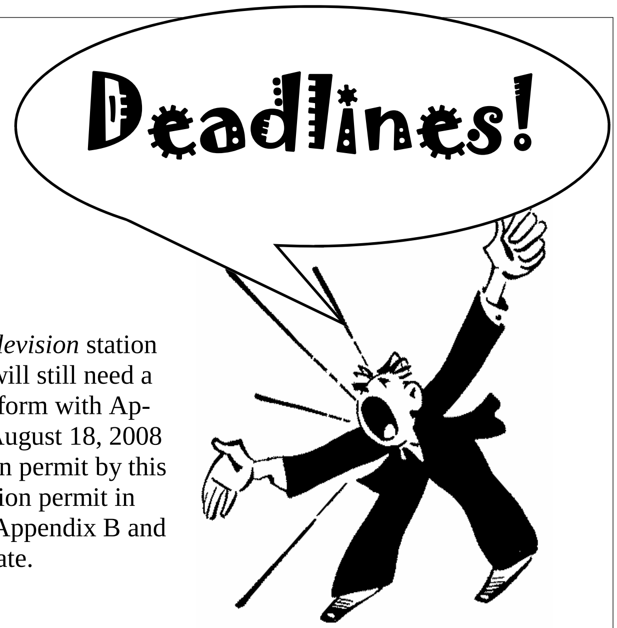

March 14, 2008

Broadcast Localism Comments – Comments in the broadcast localism proceeding (MB Docket 04-233) are presently due to be filed no later than March 14, with reply comments due by April 14.

March 17, 2008

DTV Construction Permit Applications – Any full-service *television* station that is already operating on its final DTV channel but which will still need a construction permit to build out and have facilities which conform with Appendix B specifications, as well as any other station with an August 18, 2008 construction deadline, ***must*** file an application for construction permit by this date. All stations which otherwise need to file for a construction permit in order to build their final DTV facilities in conformance with Appendix B and which wish to obtain expedited action must also file by this date.

March 19, 2008

DTV Construction Permit Extension Applications – All *DTV permittees* which have a construction deadline of May 18, 2008, and which will require an extension of time in which to complete construction must file an extension application on FCC Form 337.

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.

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

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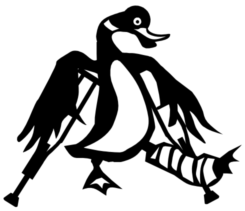
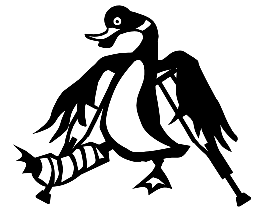


Court ruling for the birds

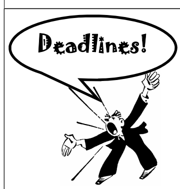
FCC Must Study Impact Of Bird Impacts



By: Donald J. Evans
evans@fhhlaw.com
703-812-0430

The U.S. Court of Appeals for the D.C. Circuit dealt prospective tower constructors a potential setback in a decision issued on February 19. The FCC had been petitioned by bird lovers to adopt rules providing for the protection of migratory birds in the tower permitting process. The bird people insisted that the National Environmental Protection Act requires the FCC to take the impact on birds into account in its licensing decisions by the preparation of an environmental impact statement (EIS). The FCC gathered extensive comments on this petition but ultimately concluded that the evidence was conflicting about whether migratory birds are or are not significantly affected by communications towers. (The bird people estimated that 4 to 50 *million* birds are killed each year by collisions with towers or associated wires, while industry groups said hardly any are killed.) The FCC decided that because the evidence was conflicting, it would continue to investigate the matter but not adopt the rules requested by the petitioners.

Not so fast, the Court ruled. Because the evidence was conflicting about whether there will be an impact on protected species, the FCC was required to at least consider an environmental assessment to try to determine whether there would be an adverse impact. This assessment is less burdensome than the full EIS demanded by the birders but considerably more than what the FCC does now. In addition, the Court required the FCC to get input from the folks at the federal Department of Fish and Wildlife who presumably know more about birds than the FCC. The Court also required the FCC to permit more meaningful pre-grant participation by members of the public who want to evaluate proposed construction for bird impact. All of this promises to be good for birds but less good for people want to construct towers along the migratory path. One solution might be to re-name such towers "bird motels" where tired avians can rest and perch on their way south.



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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.

April 14, 2008

Broadcast Localism Reply Comments – Reply comments in the broadcast localism proceeding (MB Docket 04-233) are presently due to be filed no later than April 14.

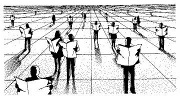
May 29, 2008

DTV PSIP Compliance – All *DTV* facilities must comply with the new Program System and Information Protocol by this date.

June 19, 2008

DTV Construction Permit Extension Applications – All *DTV permittees which have a construction deadline of August 18, 2008,* and which will require an extension of time in which to complete construction must file an extension application on FCC Form 337.

DTV Construction Permit Applications – All *television stations with a DTV construction deadline of February 17, 2009,* must file applications for construction permit to implement DTV facilities on their final channels.



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Commission has determined that February 11th is the appropriate deadline to prescribe for receipt of payment or a response given its interest in preserving its forfeiture authority."

It seems at least a little strange that the Commission was twice unwilling to provide a simple and straightforward answer to a simple and straightforward question. If the Commission does believe that Section 2642 imposes a limit on the FCC's ability to collect fines, why not just say so? (For the record, there apparently are a number of differing interpretations of how that section might actually work in practice, and it has rarely, if ever, been invoked relative to the FCC – so it may be anybody's guess as to how and when it might preclude collection actions.) Obviously non-responsive answers to reasonable inquiries do little to encourage good relationships between the agency and those it regulates.

Oh, you mean THAT KPLY – We close with the tale of a new AM CP applicant in Nevada. It was originally filed in 2000, and granted in 2003. But a petition for reconsideration was filed in 2003 alleging that the proposed station would cause interference to Station KPLY(AM), Reno. Almost five years later, in January, 2008, the Commission issued a decision rejecting the petition for reconsideration and re-affirming the grant. So far, so good. But it turns out that, between the time the reconsideration was filed and the time that the staff finally got around to looking at it, the station which had had the call sign KPLY in 2003 (and which was said to be subject to interference) had changed its call sign, and another Reno station had picked up the discarded KPLY call. So when the staff analyzed the petition for reconsideration and determined that no interference would be caused to "KPLY", that should not have been a surprise because they were looking at the wrong station. Oops. After that decision was announced, though, a little bird apparently whispered into the Commission's ear that it might want to take a closer look at things and, sure enough, out popped yet a further decision acknowledging the miscue. But the applicant need not worry. The Commission concluded that, even if the interference question were studied relative to the "correct" KPLY, the result would remain the same.

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provide at least seven hours a week of local newscasts.

So there appears to be something here for everybody, or possibly nothing for anybody (other than those lucky few in the top-20 markets).

Adding to the less than pellucid quality of the new rule, the Commission promptly announced that it was granting waivers of the rule to a number of pending applicants.

Commissioners Copps and Adelstein dissented, bemoaning virtually every aspect of the decision.

> *Commissioner Copps described the prohibition against new newspaper/TV cross-ownership as having "the firmness of a bowl of Jell-O."*

The bottom line on the new rules appears to be that, with respect to newspaper/TV cross-ownership in the top-20 DMAs, the likelihood of success can be predicted with reasonable reliability, given the specific considerations enumerated in the rules. But once you get outside the top-20 markets, it becomes far more of crap shoot. While the new rules may appear to provide detailed criteria and at least semblance of an analytical method to be followed, careful analysis of the rules – with their double negatives, various "presumptions" of consistency and/or inconsistency, reversal of presumptions, descriptions of relevant factors, etc., etc. – indicates that anyone outside the top-20 markets has little if any clear idea of whether any particular cross-ownership proposal will be approved.

While it might be said that some of the language of the new rules indicates that new newspaper/TV combinations will be looked on with disfavor, other language seems to indicate that that is not the case. While the rules at least hint that there may exist some path to waiver, the location and direction of that path are far from clear. The dissenting Commissioners, observing the waivers granted by the Commission even as it adopted the new rules, are concerned that any perceived prohibition will have (in Copps's words) "the firmness of a bowl of Jell-O". But should, for example, a new administration take over the reins of government next year – with the attendant change in control at the FCC – the new rule language could be applied, as is, to prevent new newspaper/TV combinations.

Late word is that at least one appeal of the new rules has already been filed, so the courts will have yet another opportunity to weigh in here. That could mean that, a year or two down the line, the Commission may have to do this all over again. And so it goes.

FM ALLOTMENTS ADOPTED –1/21/08-2/19/08

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
VA	Norfolk	93 miles SE of Richmond, VA	299A	05-150	None
VA	Windsor	71 miles SE of Richmond, VA	287B	05-150	None
CA	Susanville	217 miles NE of Sacramento, CA	264A	07-221	TBA
CO	Blanca	73 miles E of Durango, CO	249C2	07-165	TBA

FM ALLOTMENTS PROPOSED –1/21/08-2/19/08

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
Guam	Dededo	Guam	243C1	08-12	Cmnts: 3/24/08 Rply: 4/8/08	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.

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

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