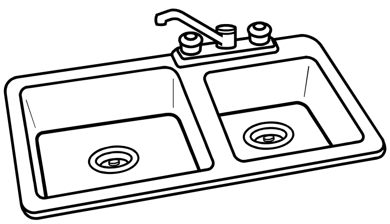
FLETCHER, HEALD & HILDRETH, P.L.C.

Memorandum to Clients

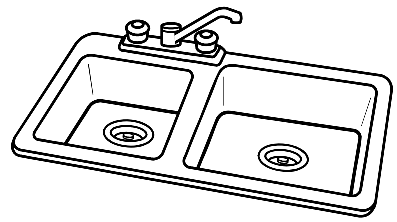
March, 2008 | *News and Analysis of Recent Events in the Field of Communications* | No. 08-03

Everything but the kitchen sink?



Diversity 2008

FCC explores all its options



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In a 40-page order that might best be described as phantasmagorical, the Commission finally took the wraps off its wide-ranging "diversity" initiatives. Those initiatives were adopted last November and described generally in a public notice (*see* the December, 2007 *Memo to Clients*), but the nitty-gritty details were not publicly released until the early March order ("the Diversity Initiatives order"). The initiatives include new and amended rules, a sprinkling of new and revised policies, some expressions of good intentions, and a bunch of proposals.

> *Rather than give preferential treatment only to minorities and/or women, the FCC has decided to accord preferences to small businesses and new entrants (dubbed "Eligible Entities").*

In one sense, the FCC's action is about "diversity" because it is intended generally to promote ownership of radio and television stations by a wider variety of people. In another sense, however, the action is about "diversity" because it covers an extraordinarily wide range of broadcast regulatory issues. That range includes not only pure "ownership" issues, but also construction permit deadlines, the equity/debt plus attribution rule, distressed station sales, grandfathered radio station clusters, cable must-carry, AM expanded band give-backs, and re-purposing TV channels for FM use, among (many) others. Issues from no fewer than seven already pending FCC rulemaking dockets are included within the scope of the Diversity Initiatives order. The only thing missing appears to be the kitchen sink (and if we look hard enough in the fine print, we might even find that).

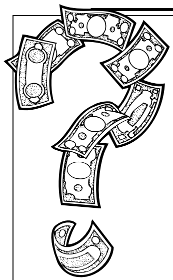
The FCC's overarching goal here is to bring more minorities and women into the broadcast ownership ranks. Historically, these groups have not been represented in those ranks in the same proportion as their numbers in the overall U.S. population. While the FCC may view it as desirable policy to try to change that, the Constitution generally prohibits race-based (and, to a lesser degree, gender-based) governmental policies except under certain limited circumstances not present here.

To get around that pesky constitutional problem, the FCC has taken a route favored by other governmental units facing the same problem. Rather than give preferential treatment only to minorities and/or women, the Commission has decided to accord preferences to small businesses and new entrants (dubbed "Eligible Entities"), the theory being that such entities are more likely to be comprised of minorities and/or women. Of course, since the operative definition does not limit the term, a white Anglo-Saxon Protestant male will be able to benefit from the new rules just as much as an African-American Muslim woman, if they both meet the Eligible Entity criteria.

The Commission has also thrown in potential benefits for large existing broadcasters, who may be entitled to special consideration if they help foster participation by Eligible Entities in broadcasting. There is something for almost every-

(Continued on page 10)

The Scoop Inside



Rate cards – good; profits – bad

Commercial Limitations On Translators "Clarified"

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FM translators don't have to be non-profit – they just can't raise more money than their operating costs. Got that?

The FCC recently had the opportunity to explain, and reaffirm, its rules limiting the ability of FM translator owners to raise money by selling airtime (*i.e.*, commercials). The re-affirmance was clear, the explanation not so much.

As we all know, translators are not supposed to originate programming. Rather, they merely rebroadcast (on a different frequency – hence the term "translator") programming from one or another source permitted by the Commission. But the rules *do* provide that a translator may sell (and originate) one 30-second spot per hour for the purpose of acknowledging financial support for the translator's operation.

Back in the day – like, before 1990 – many believed that translators were supposed to be operated on a non-profit basis, which led some to conclude in turn that, like full-service noncommercial stations, translators could not sell "advertising". Historically, the 30-second hourly announcement was even thought by some to be limited to solicitations for funds, as opposed to promotional announcements paid for by commercial advertisers. But in 1990, the Commission made clear that translators could use their 30's for, among other things, "advertising messages of contributors". The Commission even went so far as to proclaim that the rules don't "require licensees of FM translators to operate non-profit facilities".

That may have been an overstatement, however. While the FCC's proclamation was technically correct, it overlooked the fact that the rules did (and do) limit the translator operator to "the defrayal of the costs of installation, operation, and maintenance of the translator or acknowledgements of financial support for those purposes".

Fast forward to the present. Out in Alaska, one company which already had a number of translator stations was trying to get some more. Another broadcaster in the area opposed the applications, claiming that the translator operator was (gasp!) selling advertising time off a rate card for the translators, which (it was alleged) indicated that the translator licensee might be in the business for (double gasp!!) a profit. Underscoring his client's seriousness of purpose, the opposing broadcaster's counsel filed a request for declaratory ruling seeking a definitive interpretation of the translator rules.

The Commission took the opportunity to "clarify" the rules, kind of. First, it reaffirmed that, while translators are not necessarily non-profit facilities – that is, after all, what the FCC said in 1990 – a translator operator is nevertheless limited in what it can collect from revenues derived from spots originated on the translator. As indicated above, such revenues are limited to the defrayal of expenses . . . which sounds a lot like "non-profit". The Commission did not resolve that particular conundrum, but as a practical matter it probably doesn't make any difference. The take-home lesson here is that the revenue from the sale of the 30-second hourly spots on translators is not supposed to exceed the translator's expenses.

As to the second point raised by the objector, the Commission held unequivocally that use of a rate card to sell translator time is ***not*** a *per se* violation of the rules.

So while translators may look a lot like noncommercial stations, they are in a class by themselves when it comes to commercial announcements.

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Focus on FCC Fines

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News Rooms: Use caution with phone interviews – As another election cycle begins, the FCC issued a $6,400 fine to a Mississippi AM station that serves as a reminder to news rooms across the nation: Do *not* assume that frequent telephone guests who call the station don't need to be notified that the call is being broadcast or recorded for later broadcast.

FCC rules require licensees to inform any party to a telephone call of the intention to broadcast the conversation prior to broadcasting or recording it. The rules provide an exception where a party is aware, or may be presumed to be aware from the circumstances of the conversation, that the conversation is being, or likely will be, recorded and/or broadcast. However, the definition of when a party is aware or may be presumed to be aware is not completely clear. To avoid problems, broadcasters should ensure – *before the recording or broadcast have started* – that the person on the line is aware of the broadcast or recording, and then they should verify the same after the recording or broadcast has started.

Fines for violations of the FCC's telephone rule frequently are leveled against drive-time shows and personalities who have a few laughs with the occasional prank call. However, the FCC can also zap journalists and news rooms for the same kind of violation. This month, a Mississippi AM station was fined when a local official called the station and allowed himself to be interviewed. While some of us might assume that a call to a radio station could end up on-air, the FCC does not share that opinion.

In this case the local official had previously participated in call-in interviews with the local radio station. The host of one of the station's news shows called the official and, failing to make contact, instead left a message. Later that day, the local official called the station and was interviewed by the host. The next day, the host aired the interview and it seems that the local official was not pleased with the report. That afternoon, the local official fired off an e-mail to the FCC complaining that, while he did call the station and conduct the interview, he was unaware that the call was being recorded for broadcast.

The station defended itself by pointing out that the local official initiated the call to the station, he had previously participated in interviews with the station, and that he "has always been aware of the taping for broadcast." The FCC did not agree with the station and hit it with a fine. Although the station faced an $8,000 bill, it was reduced to $6,400 for being a first time offender.

Towers, Towers, Towers – The FCC continues with its fines against stations for violations of its tower rules. All tower owners should carefully review their authorizations to ensure that towers are painted and lighted in accordance with their authorizations. More fundamentally, broadcasters should inspect lights and paint daily to ensure that they are not creating a hazard.

A Wyoming AM station was hit with a $5,400 fine because a six-foot section of its fence was missing. An FCC agent visited the station and found a wooden fence panel missing. That afternoon, the station repaired the fence, but the FCC did not give them a break. The fine works out to $900 per foot of missing fence – much more than the going rate per linear foot at Home Depot.

A Louisiana AM station faces a $10,000 fine for a broken light and a mis-programmed transmitter. Two FCC agents monitored the station two nights in a row. The agents took power measurements after sunset and noted that rather than reducing its power, the station was increasing its power after sunset. On the third day, the agents took their findings to the station's chief engineer. The engineer reviewed the transmitter's computer and discovered that the clock had been set incorrectly with AM and PM switched. Rather than powering up at sunrises, the station was operating at low power during the day and powering up during the evening. Ooops. The agents also observed the top beacon of the tower was extinguished. While the beacon was immediately replaced and the incorrect transmitter set right pronto, the station was fined $10,000.

A Cumulus tower near Savannah, GA, netted the mega-broadcaster a $10,000 fine for poorly painted towers. Cumulus engaged in legal maneuvers that held off the payment of the fine for seven years, but ultimately the FCC's Enforcement Bureau prevailed. Let's give some props to Cumulus for an inventive (if unsuccessful) defense, though: it argued that it was reluctant to scrape off the old paint from the tower because doing so might expose wetland inhabitants to lead paint. Another failed argument included a claim that the towers were in such disrepair they should have been condemned rather than painted. However, the arguments were not convincing and Cumulus must now write a $10,000 check.

FCC haruspicy

When Is A TV Duopoly Not A TV Duopoly?

FCC approves elaborate entanglements between same-market TV licensees

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The Commission talks a good game about trying to promote diversity of ownership at the local level, but when the chips are down, it seems reluctant actually to do anything about it. This was illustrated recently when the FCC blessed an arrangement between two television stations which seemed to bear many of the hallmarks of a duopoly that would not have been legal in the market in question.

The case involved Nexstar Broadcasting, Inc. and Mission Broadcasting, Inc., which both own stations in a number of markets throughout the country. In fact, here's a noteworthy coincidence: in every market that Mission owns a station, Nexstar also happens to own a station. Go figure.

Even after slicing and dicing the petitioner's showing, the Commission found two aspects of the Nexstar/Mission arrangement too hard to swallow.

In the recent case, Nexstar had purchased two TV stations in the market, with one operating as a satellite of the other due to economic conditions in the market. The purchase of two stand-alone TV stations in the market would not ordinarily have been permitted under the multiple ownership rules. But Nexstar argued that the continuing inability of the satellite station to operate as a stand-alone facility warranted a continued satellite exemption to the multiple ownership rules. The Commission agreed – which meant that Nexstar could own both stations, but also that the satellite had to operate as a satellite, essentially rebroadcasting the other station's programming.

Just over a year later, however, Nexstar decided to spin off the satellite station to Mission and indicated that, upon closing, the satellite station (which would then be operating as a stand-alone) would acquire a network affiliation.

As it turned out, though, the network in question was already on-the-air in the market on a Class A station, which became understandably upset at the prospect of losing that affiliation. The Class A licensee petitioned to deny both the assignment and, later, the stations' license renewal applications. The petitioner pointed out that not much had changed in the market since Nexstar's initial acquisition of both stations, so the sudden claim that the satellite station was able to operate as a stand-alone facility raised questions. The logical inference was that either (a) Nexstar had misrepresented facts to justify the continuing satellite waiver when it first acquired the station, or (b) Nexstar and Mission were misrepresenting the future status of the station, the obvious suggestion being that both stations would actually be operated effectively under the control of Nexstar in apparent violation of the multiple ownership rules.

To support its argument that both stations would remain under the control of Nexstar, the petitioner pointed to a series of agreements between Nexstar and Mission through which significant aspects of the two stations' operations would be linked. Those included a joint sales agreement to cover the sale of advertising time on the former satellite station and a shared services agreement to cover technical support, back-office support, and the production of newscasts for the former satellite station.

Loyal *Memo to Clients* readers will recognize that such operational agreements (such as shared services agreements) have generally been accepted by the Commission. (*See* the related article in the September, 2007 *Memo to Clients*.) But wait, there's more! In addition to those agreements, Nexstar and Mission also hold reciprocal loan guarantees. Nexstar's filings with the Securities and Exchange Commission indicate that it has a controlling financial interest in Mission for financial reporting purposes, and Nexstar's website lists all of the Nexstar and Mission stations without making any distinctions. Furthermore, the petitioner cited a newspaper article which seemed to demonstrate that Mission's sole shareholder and President has only a limited knowledge of Mission's operations. Finally, the parties' agreements provide that each of the two stations will air its DTV programming on the other station's second DTV programming stream.

Taken together, this collection of evidence certainly seemed to indicate more than an arm's length arrangement between the two parties.

The FCC nonetheless decided that this arrangement passes muster. Since the various pieces of evidence, taken together, might have been difficult to swallow, the Commission chose to examine not the totality of petitioner's showing, but rather each piece, separate and apart from the other pieces. For example, the Commission noted that the shared services agreement and joint sales agreement both leave control over programming with Mission, aside from the newscasts which would not occupy more than 15 percent of

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Recent sales in your neighborhood

Former UHF Spectrum Fetches $19 Billion

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After nine weeks of bidding, the FCC has sold off a substantial portion of UHF channels 52-69 to wireless companies who were hungry for the 700 MHz frequencies. For those that follow the wireless industry, the overall process was a year-long forced march driven by a Congressional demand that the auction be finished by this June. For those in the television broadcasting industry, the results provide an interesting glimpse into what the broadcast spectrum can be valued at when it gets duded up for the cell phone companies.

Former UHF channels 52 and 57 - $ 4 billion
Former UHF channels 53 and 58 - $ 9 billion
Former UHF channel 56 - $1.3 billion
Former UHF channels 60, 61, 65 and 66 - $4.7 billion mostly from Verizon.

Because of FCC technical requirements for some channels and the way in which the FCC carved up the spectrum in some markets, the channels listed below are not interchangeable – that is, don't necessarily use these numbers to put a value on your own stand-alone TV station. But the auction figures do provide an indication of the commercial value of useful spectrum. Importantly, once the full-service television industry converts to digital, each station's spectrum can be multi-purposed to provide both television programming and other, more exotic (and possibly more remunerative) services.

Combined nationwide results are listed in the box, above; individual markets can be reviewed at the FCC web site.

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the broadcast hours of the station. (Of course, that leaves aside the substantial period covered by network programming, but who's counting?) The Commission also noted that the newspaper article reflecting the Mission executive's seeming unawareness of things was mere hearsay. And the fact that Nexstar has a controlling interest in Mission for financial reporting purposes? Well, of course, the standards for "control" in financial reporting are not the same as those of the FCC, according to the Commission, which also credited Nexstar's and Mission's assertions about maintaining separate managerial control and found the petitioner's arguments concerning the Mission president to be speculative.

Even after slicing and dicing the petitioner's showing, the Commission found two aspects of the Nexstar/Mission arrangement too hard to swallow. One of these was the reciprocal arrangement for carrying each other's DTV programming, as that provision violates the Commission's rule which prohibits a seller from reserving broadcast time on a station that it is selling. The other was the failure to report a previous petition to deny involving Nexstar and Mission which had raised character questions and was still pending at the time of the filing of the applications, but which had been withdrawn. But neither of those aspects was sufficient to kill the deal, in the FCC's eyes. The Commission imposed a condition requiring the parties to eliminate the reciprocal DTV programming arrangement, and then blessed the assignment.

The lesson from all of this appears to be that, as long as agreements between parties include language which satisfies the FCC that each licensee will be retaining control of its respective station, particularly over programming, and as long as there is no obvious and undeniable smoking gun (like, say, a confession from principals that one party is exercising control over another) contradicting the parties' claims, the Commission will approve the deal. This conclusion is particularly true when examining a future combination which has not actually started operation, as in the case of a purchase, as there is no track record for those particular stations.

There is an old fable about six blind men who encounter an elephant. Unable to see the elephant, each feels a different part of the animal and draws seemingly rational, but ultimately incorrect, conclusions about what it looks like. Some say that justice is blind. Perhaps that accounts for the Commission's willingness to ignore the totality of the evidence and instead parse the petitioner's showing into separate, supposedly acceptable, elements.

Witch hunt in Huntsville

Simple Snafu Or Sinister Censorship?

FCC investigates interruption of *60 Minutes* broadcast

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It was a classic *60 Minutes* story. A prominent Democratic politician – the former governor of Alabama, for crying out loud – had been prosecuted not once but twice by the Department of Justice – a Republican DOJ, mind you – and finally convicted on corruption charges as he was staging a come-back on the state political scene. And then, while he's doing his time in the Big House (and his family and friends are proclaiming his innocence), up pops a witness who claims that the campaign against the politician was orchestrated by none other than the ultimate Anti-Democrat, Karl Rove! Watch in fascination as Scott Pelley and the *60 Minutes* crew lay all the evidence out for the viewer.

Watch, that is, unless you happened to be living in Huntsville, Alabama, on the night of the broadcast in late February. While the local Huntsville CBS affiliate did broadcast *60 Minutes* that night, the segment about the former governor was mostly missing. Despite the fact that the piece was of obvious local interest, the station did not join the network until more than half-way through the story, meaning that the Huntsville public was largely prevented from seeing the startling allegations of dark and sinister skullduggery involving People Close To The President!

> *Why should a broadcaster's editorial discretion be withdrawn (or at least dramatically limited) when the arguably inappropriate programming is 60 Minutes rather than Married by America?*

Before long, suggestions of misconduct were popping up all over. The New York Times arched its editorial eyebrow and likened the non-broadcast to reported instances of editorial black-outs which kept footage of civil rights protests off the air in the Deep South decades ago. Democratic Commission Michael Copps promptly called for an FCC investigation. Alluding to a possible attempt to "suppress information on the public airwaves", Copps (supported by his sidekick, Commissioner Adelstein) said the Commission needs to get to the bottom of the *60 Minutes* blackout. A formal inquiry has since been delivered to the station.

According to the station, though, it was just a technical glitch. This kind of thing happens, it had happened the preceding night (during the closing minutes of a close NCAA basketball game), and it seemed to have happened with unfortunate timing during *60 Minutes*. Station personnel were at least able to get part of the controversial piece on the air. And immediately recognizing its audience's likely interest in the piece, the station made prompt and extraordinary efforts to assure that the piece would be available, in its entirety, to the audience. Through special arrangements with CBS, the station re-ran the whole story on its 10:00 p.m. newscast that night, and streamed the piece on its website. They ran the piece yet again the next day during the 6:00 p.m. news – after promoing it with crawls, email blasts, blogs, radio updates, notices to the print media, etc., etc. If the station was really trying to bury the story, it was not doing it very effectively.

What actually happened? Who knows? And what does it matter? Even if the station really did make a conscious effort to prevent the broadcast of a piece with which some Folks In High Places might have taken issue – and we hasten to note that we have no reason to believe that that's what was going on – might not that action have been an entirely appropriate exercise of editorial responsibility?

From our admittedly skewed perspective in the shadow of the FCC, the entire incident reflects a bigger and more troubling pattern: the FCC seems more willing today than at any time in recent memory to insert itself into the protected zone of editorial independence. The First Amendment is supposed to protect editorial decision-making from government management. While government, in its role as a newsmaker, may attempt to sway coverage, the First Amendment flatly forbids government regulation of editorial decisions made by and for newsrooms.

We have witnessed the FCC's eagerness to second-guess editorial judgments in the last several years. In 2006, for example, the FCC issued enforcement letters to licensees who may have used material from video news releases in news reports without disclaimers and attribution. According to the Commission, use of material produced by non-station sources saved the stations money on news gathering and, thus, was akin to the kind of bribes prohibited by anti-payola and anto-plugola rules.

But such use is also an everyday part of the newsgathering process. Newsrooms gather facts from myriad sources, including information supplied by private parties

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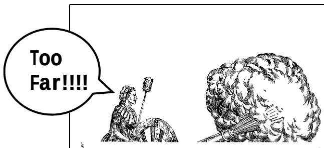
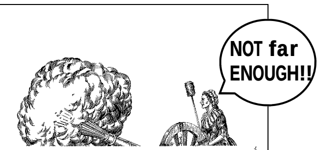
Cannon to the right of them, cannon to the left of them



Cross-Ownership In The Crossfire



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In our December issue, we reported on the barrage of criticism faced by Chairman Martin following his unorthodox previewing of his proposed way of dealing with the broadcast ownerships rule. Martin announced a planned vote on a proposed revision to the newspaper/broadcast cross-ownership rule through an op-ed piece in the *New York Times*, hardly a traditional means of alerting the public to the anticipated content of a proposed rule. While Commissioners Adelstein and Copps (along with some members of Congress) were vocal in their unhappiness about Martin's proposal, the Chairman moved forward with the vote on short notice in the Commission's December 18, 2007 meeting.

House Commerce Committee Chair John Dingell, Rep. Ed Markey and others warned Martin that Congress would take steps to strike the rules down. And sure enough, that's precisely what has happened. Sen. Byron Dorgan and Rep. Jay Inslee have launched a bipartisan effort to lay the big "tsk tsk" on Martin. Dorgan has introduced a "resolution of disapproval" against the FCC's new cross-ownership rule (and related waivers). *See* last month's *Memo to Clients* for a brief recap of that rule. Those opposed to the new rule suggest that it will lead to further industry consolidation and diminish localism, creating a loophole that will encourage newspaper/broadcast combinations particularly in smaller markets.

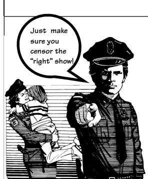
A passel of appeals of the new rules were filed with various Federal courts of appeals. Broadcasters are challenging the new rule as too stringent, while public interest groups are challenging it as too lenient.

Dorgan's resolution is designed to strike down the Commission's rule, and must be passed within 60 "congressional days", or days when Congress is actually in session. This would place the deadline into late summer or early fall, most likely. Inslee introduced a similar resolution on the House side one week later.

While Dorgan and Inslee are quarterbacking the effort to strike down the rules through Congress, the Federal courts will also have a say in whether the rules will stand. A passel of appeals of the new rules were filed with various Federal courts of appeals. Broadcasters are challenging the new rule as too stringent, while public interest groups are challenging it as too lenient. The various appellants filed their respective appeals in a variety of different courts of appeals across the country, presumably figuring that some courts might be more favorably disposed than others to their particular positions. (Some broadcasters filed in D.C., for example, where the Court might be more sympathetic to their arguments. Some public interest groups filed with the Third Circuit in Philadelphia, probably figuring that that court's 2004 reversal of aspects of the last change in ownership rules might bode well for their latest attack.)

Since all the appeals involve the same FCC order and, therefore, should all be consolidated in a single proceeding, the Federal court system (applying a "lottery"-type approach) has selected the Ninth Circuit in San Francisco (a venue chosen by some of the appellants) to hear the consolidated appeal. It is possible that more efforts may be made to move the case out of the Ninth Circuit.

We will keep tabs on how the challenges develop, both in future editions of the *Memo to Clients* and on FHH's blog (www.commlawblog.com).



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through press releases, spokespeople, websites and other sources. It is the editor's task, and her prerogative, to decide what is newsworthy and what isn't.

So if the Huntsville station had made a conscious and deliberate decision not to air the *60 Minutes* piece, would that not have been well within the station's proper editorial discretion? After all, haven't Commissioners Copps and Adelstein been among the loudest of voices arguing that local stations should have greater contractual rights to decline network programming that the stations may deem to be inappropriate for their audiences? Why should that discretion be withdrawn (or at least dramatically limited) when the arguably inappropriate programming is *60 Minutes* rather than *Married by America*?

Whatever you think of Karl Rove, the convicted Alabama politician, the various charges and counter-charges, or the behavior of federal prosecutors in the case, the Commission's latest incursion into newsroom decision-making should give pause to anyone who believes in or relies on free speech rights.

New meaning for "educational television"

No Viewer Left Behind

DTV "educational initiative" obligations imposed

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Remember back in college, when you had a big paper due at the end of the term, and you kind of let things slide until, like, the night before it was due, and then all of a sudden you got this really bad, panicky feeling in the pit of your stomach, so you started frantically doing something, anything, that might get the paper done?

It looks like the Commission, prodded in large part by Congress, knows that feeling: the DTV Transition is fast approaching, and the public (for one) might not be ready! Time to bolt into action! The trouble is, broadcasters are the ones that will end up having to do all the work.

In early March the Commission announced its DTV Consumer Education Initiative which requires broadcasters (and, to a somewhat lesser degree, cable and satellite operators, manufacturers, retail stores and telecommunications carriers) to educate the public regarding the DTV Transition.

Full-power TV stations will have to select one of three options calling for a combination of PSAs, video crawls, DTV count-down "bugs", and long-form infomercials.

Under the Education Initiative, full-power television stations will have to select one of three options calling for a combination of public service announcements (PSAs), video crawls, DTV count-down "bugs", and long-form infomercials on the DTV Transition. In addition to satisfying these requirements, stations will also have to file quarterly reports – on a new Form 388 – to let the Commission know which option the station selected and to certify that the station did in fact comply with the relevant requirements during the preceding quarter.

The various options are not uncomplicated.

Option 1 – The first option involves solely the broadcast of PSAs and video crawls. Simple, right? Not so fast.

The PSAs must be at least 15 seconds long, and the video crawls must be at least 60 seconds. Content-wise, both the PSAs and the video crawls need to inform the public that:

- full-power analog broadcasting will cease on February 17, 2009;
- analog-only televisions may not be operational after that date unless the viewer takes action; and
- viewers can get more information online or by telephone (website and/or phone number must be included.

In addition to this information, broadcasters must air PSAs that detail:

- what steps viewers should take to continue being able to watch the station, depending on whether they receive the station over-the-air or via cable or satellite; and
- specific information on the station's transition, including changes in the service area, channel numbering changes, the time when the station will cease analog operation, and whether the station will offer a high-definition channel.

Not enough micro-management for you? The Education Initiative also dictates a detailed schedule for these announcements. Assuming that each day is divided into four six-hour quarters (from midnight to 6:00 a.m., from 6:01 a.m. to noon, from noon to 6:00 p.m., and from 6:01 p.m. to midnight), the Commission will require:

- One PSA and one crawl during each quarter of each day from the effective date to March 31, 2008;
- Two PSAs and two crawls during each quarter of each day from April 1, 2008 to September 30, 2008;
- Three PSAs and three crawls during each quarter of each day from October 1, 2008 to March 31, 2009.

The Commission will require that at least one PSA and video crawl be aired each day during prime-time hours (8:00 p.m. – 11:00 p.m. in the Eastern and Pacific time zones and 7:00 p.m. – 10:00 p.m. in the Mountain and Central zones).

Option 2 – If the Option 1 diet of PSAs and crawls is not to your liking, check out Option 2, which is based on an NAB proposal.

Broadcasters who pick this option will have to air an aver-

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age of 16 PSAs per week. While each PSA must be at least 15 seconds in length, it will take two 15-second PSAs to equal one PSA for purposes of compliance with the Commission's rules. The station must also air an average of 16 crawls (each at least 60 seconds long) per week.

Oh yeah, did we mention that PSAs and video crawls that are aired between 1:00 a.m. and 5:00 a.m. will ***not*** count toward compliance with the rules. But at least 25% of the video crawls and PSAs aired each quarter must be broadcast between 6:00 p.m. and 11:35 p.m. Eastern and Pacific time (or between 5:00 p.m. and 10:35 p.m. Central and Mountain time). In addition, the Commission will require at least one 30-minute infomercial regarding the DTV transition to be aired before February 17, 2009, and that must run between 8:00 a.m. and 11:35 p.m.

But wait, there's more. Option 2 also requires a separate outreach initiative commencing on November 10, 2008, and running to February 17, 2009, consisting of:

- ***Graphic Display*** – a super-imposed graphic that (a) reminds viewers that there are "x" number of days before the end of the transition and (b) provides a toll-free number and/or website for more details. This graphic must be on the screen for between five and 15 seconds;

- ***Animated Graphic Display*** – a moving or animated graphic that (a) reminds viewers that there are "x" number of days before the end of the transition and (b) provides a toll-free number and/or website for more details. This graphic must be on the screen for between five and 15 seconds;

- ***Graphic and Audio Display*** – Either a graphic or animated/moving graphic that also contains an *audio* message containing the same information as above; and

- ***Long-Form Reminder*** – A two- to five-minute program that discusses the upcoming DTV Transition deadline. The Commission suggests something along the lines of an "Ask the Expert" segment in a newscast or other program.

At least one of these must be aired at least once per day on the station.

Option 3 – There is yet a third option, but it's available only to noncommercial TV stations. Under this option, eligible licensees must air a certain number of "transition-related educational PSAs" per day as well as the same 30-minute infomercial as required in Option 2, above. As with Option 1, above, the Commission-mandated schedule for these Option 3 PSAs increases as the February, 2009 Transition nears. In particular, stations picking Option 3 will have to broadcast:

- 60 seconds per day of PSAs from the effective date of the rules to April 30, 2008, with 7.5 minutes per month aired during the period from 6:00 p.m. to midnight;

- 120 seconds per day of PSAs from May 1, 2008, to October 31, 2008, with 15 minutes per month aired during the period from 6:00 p.m. to midnight; and

- 180 seconds per day of PSAs from November 1, 2008, to March 31, 2009, with 22.5 minutes per month aired during the period from 6:00 p.m. to midnight.

All options – Regardless of the option selected, all the information required by the Education Initiative will have to be closed-captioned, in the same language as a majority of the programming aired on the station, and placed on the station's analog *and* primary digital stream. And, as noted above, broadcasters will have to file quarterly reports on new Form 388 to provide information on their on-going compliance with whichever option they have chosen.

Broadcasters will have to file new Form 388 to report, quarterly, on their on-going compliance with whichever option they have chosen.

The effective date of the Education Initiative (including all three options *and* the new Form 388) hinged on when they would be approved by the Office of Management and Budget. OMB approved the whole shebang on March 27, and the FCC has announced that the new rules are effective as of March 31 – which means that each station should carefully consider the available options and prepare its first Form 388 report, due April 10, 2008. (That first report will almost certainly be somewhat, er, sparse, since the rules will have been in effect for only one day of the quarter covered by the report.)

As noted above, the Commission will also require outreach efforts by a number of non-broadcast entities. Multichannel video programming distributors (cable, satellite) and telecommunications carriers that provide service to low-income customers must place in their monthly bills notices that (a) the DTV Transition will end on February 17, 2009, and (b) after that date a television set with only an analog tuner will require a converter box to continue to receive over-the-air broadcasts. The statements must also refer the reader either to www.dtv.gov or to the service provider at a toll-free number to receive information regarding the transition and the subsidized coupons for the $40 converter boxes.

Additionally, any television receiver (or other equipment that works in conjunction with a television receiver) that is shipped after the effective date of the Education Initiative

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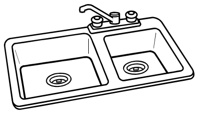

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one in these new rules. How's that for diversity?

For purposes of the new rules, the FCC has derived its definition of Eligible Entities from a similar concept used by the Small Business Administration (SBA). The SBA categorizes businesses as "small" based on industry grouping (for example, television is one such grouping, radio another) and revenue. A television station is considered a small business if it has annual receipts of no more than $13 million per year; the corresponding level for radio stations is $6.5 million per year in annual receipts.

Before you start trying to figure out ways to fit into those definitions, be aware that the revenues of any parent and/or affiliate companies are also included in the calculation. And there are several "control" tests designed to ensure that any governmental benefit does in fact flow to a qualified entity. (*See* sidebar on page 11 for more details.)

Rule Changes Adopted

The following summary reflects the variety of new rules adopted in the Diversity Initiatives order:

CP extensions – The new rules provide for extensions of new station construction permit expiration time when a permit holder sells the permit to an Eligible Entity. Currently, construction permits expire three years after they are granted, with only very limited opportunities to extend that term. But if an Eligible Entity acquires an unbuilt construction permit, it will have at least 18 months (or the remainder of the original permit term, whichever is longer) from the purchase of an expiring permit to complete the construction. The theory is that permit holders faced with possible loss of a permit through expiration of the time to construct would rather sell to an Eligible Entity at a lower price than lose everything if the permit expires.

If an Eligible Entity acquires an unbuilt construction permit, it will have at least 18 months (or the remainder of the original permit term, whichever is longer) to complete the construction.

EDP calculations – The new rules modify the existing Equity/Debt Plus (EDP) attribution rules for multiple ownership limits. Under EDP, an entity may find itself with an attributable interest in a broadcast licensee even if it is not an owner of that licensee. That occurs when the non-owner is (a) either a significant program supplier or an attributable owner of another same-market station holder *and* (b) holds a 33% or greater equity and/or debt position in the licensee. The rule is designed to prevent the aggregation of multiple non-attributable interests in a way that could have an actual significant (but unreported) influence on licensees. The FCC is now relaxing that rule to allow *up to 50% equity and/or debt interest* in a small business licensee or a *debt interest alone (no equity) of up to 80%* of the asset value of a station. These new limits will also apply when determining if a bidder in a broadcast license auction qualifies for the "new entrant" bidding credit.

Distress sale policy – The FCC is modifying its "distressed station sale" policy. That policy, created 30 years ago, was originally designed to benefit only minorities. Under the policy, a station owner whose license has been designated for a revocation or non-renewal hearing could assign the license as long as (a) the buyer was minority-controlled and (b) the price was no more than 75% of the station's fair market value. The constitutionality of that policy was called into question, a fact which the Commission has tacitly (and somewhat begrudgingly) acknowledged. To avoid that potential problem, the FCC has modified its rules so that a distressed station sale can be made to any Eligible Entity.

The ultimate practical usefulness of the distress sale policy is not clear, however, since its applicability requires, as a threshold matter, that some station's license be designated for hearing. The Commission has historically not dumped many stations into hearing, and it shows no sign of changing that. So the number of stations that might move into the hands of Eligible Entities through that policy is likely to be extremely low. (Of course, if that prediction were to prove inaccurate and the number turns out to be large, that would not bode well for broadcasters, since it would suggest an aggressive, enforcement-minded Commission suddenly designating license renewals for hearing – not something the industry as a whole is likely to want to hear.)

Non-discriminatory agreements – The FCC has adopted two new rules prohibiting discrimination – on the basis of race, gender or related protected categories – in the sale of commercial full-service and Class A television stations and full-powered radio stations ***and*** in the sale of broadcast advertising time.

With respect to station sales, proposed sellers will be required to certify compliance with this rule by checking the appropriate boxes on newly designed assignment application forms.

The ban on discriminatory advertising contracts specifically prohibits certain advertising contracts that appar-

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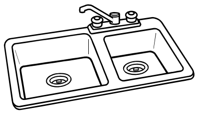

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ently have contained "No Urban/no Spanish" clauses. The FCC believes such clauses may violate existing federal anti-discrimination laws. The new rule requires licensees to certify in their license renewal applications "that their advertising contracts do not discriminate on the basis of race or gender and that such contracts contain nondiscrimination clauses." (Note that the FCC does not cite anything in the record indicating that "no women" advertising provisions have been a problem, but presumably the Commission sees no reason to take a chance.)

"Zero Tolerance" of ownership fraud – The FCC is also implementing a "Zero-Tolerance" policy to prevent ownership fraud. In the past, FCC attempts to promote minority and women ownership have been fraught by sham companies, in which the real owners are in fact neither minorities nor women. The FCC concludes that by having "zero-tolerance" for such fraud, it will deter and detect any such fraud in the future. The details are still a little sketchy about how this will be implemented – the only concrete item being a new policy of seeking to resolve ownership fraud complaints within 90 days (fast-as-lightning in terms of FCC typical actions).

While it's nice that the Commission feels comfortable announcing this bold policy and then making it subject to a very tight enforcement schedule, it's difficult to take this seriously. During the era of comparative broadcast hearings, when this kind of ownership fraud was routinely alleged by competing applicants, the factual issues proved notoriously difficult to sort out. And in a number of instances (at least), the Commission's conclusions seemed difficult to square with its rhetoric (for example, the FCC found one TV applicant to be "minority-controlled" even though the only minority involved in the entity had contributed a mere $200 of the entity's $22,000,000 capital). Whether a particular ownership structure constitutes fraud or good public policy often depends on the eye of the beholder.

Duopoly priority for incubators – The FCC has decided to reward anyone who helps to finance or "incubate" an Eligible Entity by giving the incubator/helper a priority should, in a market which can support only one additional duopoly, the incubator/helper happen to file for a television duopoly simultaneously with non-eligible entities. In reality, this seems to be limited to uncommon circumstances and therefore not likely to be relevant in many markets.

Divestiture flexibility – For situations in which a merger of two broadcasting companies requires divestiture of one or more stations in order to meet the FCC's multiple ownership caps, the FCC will now allow extended deadlines to divest the extra stations ***if*** the merging companies have actively solicited bids for such stations from Eligible Entities. Presumably, Eligible Entities may require more time to line up their financing, so the FCC reasons that extending the divestiture deadlines will encourage more sales to such entities. Merging companies getting this extension will, however, be required to actually sell the spin-off station(s) to an Eligible Entity or place the station(s) in an irrevocable trust for the sale to an Eligible Entity in order to prevent abuse of the extension process.

Grandfathered clusters – The FCC's rules for grandfathered station cluster sales (*i.e.*, sales of station groups that exceed the current multiple ownership caps, but that are permitted since they were in existence before the current ownership limits took effect) requires the cluster to be sold to Eligible Entities in order to keep the "grandfathering" exemption intact. The FCC is now modifying that rule to allow ***any*** buyer to retain the grandfathering ***so long as*** it agrees to re-sell the excess station(s) to an Eligible Entity within 12 months of the purchase.

Effective dates – In general, the new rules adopted by the Commission will become effective upon publication in the Federal Register. (That has not yet occurred as of this writing.) Rule changes that involve new reporting requirements, however, will not take effect until those requirements have been approved by the Office of Management and Budget. (Under the Paperwork Reduction Act,

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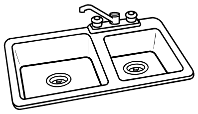
Another Memo to Clients Sidebar!!

The SBA Tests for Control

In addition to meeting the definition of "small" business for SBA purposes, if you want "Eligible Entity" status you must also satisfy the following control tests:

> [I]n order to ensure that ultimate control rests in an eligible entity that satisfies the revenue criteria, the entity must satisfy one of several control tests. The eligible entity must hold: (1) 30 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license; or (2) 15 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast licenses, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or (3) more than 50 percent of the voting power of the corporation if the corporation that holds the broadcast licenses is a publicly traded company.



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new "information collection" requirements imposed by an agency must first be approved by OMB before they can take effect.) The public will have an opportunity to advise OMB of any objections to the proposed information collection requirements. If OMB then approves the form, it will notify the FCC, which in turn will publish a notice concerning that approval, and 30 days later the reporting requirements will become effective. In view of the somewhat prolonged and convoluted nature of this process, it's possible that the reporting requirements won't take effect until some time in the Fall.

Rule Changes Proposed

In addition to the rules which were adopted, the Diversity Initiatives order includes a wide ranging list of proposed new rules and policies about which the FCC is seeking comment.

> *Some commenters observed that the FCC "has absolutely no idea" about the levels of minority or female broadcast ownership, an observation which really can't be denied.*

Presumption of qualification as "Eligible Entity" – Perhaps the most fundamental of the proposals involves a change in the definition of Eligible Entities to encompass companies that are owned and controlled by "socially and economically disadvantaged businesses," known as SDBs. Under a similar program sponsored by the SBA, businesses owned by U.S. citizens of African, Hispanic, certain Asian groups, and indigenous heritage are presumed to qualify as SDBs, while other businesses not fitting those classifications must prove that their owners are disadvantaged. The FCC is concerned that this definition might not pass constitutional muster, so it is considering a system of scrutinizing each applicant on a "full file" basis, similar to the college entrance preference system that has been adopted by various state universities in the wake of legislative bans on race- and gender-based affirmative action programs.

Modified Ownership Reports – In apparent acknowledgement that it doesn't really have a handle on the true race/ethnicity/gender of broadcast owners as a whole, the FCC is proposing to modify its existing ownership reporting forms to gather such information. The goal here is supposedly to enable the FCC to conduct "longitudinal" studies of minority and female ownership of broadcast stations. (Don't run to your dictionaries – we already did that. A "longitudinal" study is a study involves the repeated observation or examination of a set of subjects over time.) Apparently some commenters had observed that the Commission "has absolutely no idea" about the levels of minority or female broadcast ownership, an observation which really can't be denied because the Commission has not even tried to collect comprehensive data on that for 20 years or so (and its last attempt was ultimately scuttled by Congress).

In the Diversity Initiatives order, the Commission disagrees with the commenters' claim, of course, but the fact that the FCC then proposes to "augment" the ownership information it routinely collects suggests that even the FCC knows that the claim is essentially correct.

The Commission does not specify precisely what changes might be made to the ownership report forms themselves, but it does propose a number of changes relating to the filing of those reports. For instance, individuals and partnerships composed exclusively of natural persons have historically not been required to file biennial ownership reports. That would change under the Commission's proposal. And the FCC is also looking at the possibility of having all broadcast ownership reports filed on a single day. Historically, ownership reports have been due on the anniversary date of the filing of the reporting station's renewal application.

Sharing HD FM channels – Under another proposal, FM licensees would be permitted to share their HD channels with Eligible Entities. This would allow the Eligible Entity to rent or buy the second or third HD multicast channels and thereby gain access to the radio airwaves and, presumably, increase the diversity of available programming. Along the same vein, the FCC is considering allowing AM expanded band station owners to sell one of their paired frequencies. Under the AM expanded band rules, the recipient of a new expanded band license is required to give back one of its authorizations (either its original license or its expanded band license) at the end of a five-year transition period. Since the original purpose of the expanded band program was to eliminate congestion in the AM band, this particular proposal – which would leave the AM band more congested than before, not less – appears to run counter to that original goal. The FCC is seeking comment as to whether the benefit of putting stations into the hands of Eligible Entities would supersede the congestion reduction goal.

Other proposals – To say that the Diversity Initiatives order contains a wide range of other proposals is a dramatic understatement. Other proposed new rules include: encouraging incubation programs by waiving the radio multiple ownership rules in large markets for cluster owners who help "incubate" an Eligible Entity in the broadcast business; granting cable "must-carry" rights to Class A TV stations; and reallocating television channels 5 and 6 to FM broadcast service, thereby creating hundreds of new stations for Eligible Entities to apply for and operate. We note, however, that this latter proposal (sometimes referred to as the Mullaney proposal since it was first formally proposed by Mullaney Engineering, Inc., in the DTV conver-

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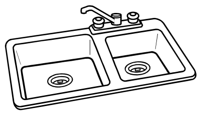

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sion proceedings) was shot down in flames by the Commission in a DTV order released the day after the Diversity Initiatives order. (*See* sidebar below for an illustration of the Commission's conflicting statements on the Channel 5/6 proposal.)

Additionally, the FCC asks for the record to be "refreshed" regarding some rule changes proposed by the Rainbow/PUSH organization in the 2002 biennial review of broadcast ownership rules. These proposals include examination of license assignment applications to determine their potential effect on minority ownership; elimination of the FCC's practice of granting temporary waivers for license transfer transactions in which multiple ownership caps are exceeded; treating local marketing agreements as attributable interests; and allowing minority owned companies to own as many stations in a market as the largest grandfathered station cluster in that market.

In addition to the rule changes described above, the Commission also took the opportunity of the Diversity Initiatives order to announce some, er, hopeful aspirations relating to diversity. For example, the FCC will increase its efforts to encourage local and regional banks to participate in SBA guaranteed loan programs with small business broadcasters. The FCC will "attempt" (the FCC's word, not ours) to organize a conference in New York City on the topic of access to capital. The FCC has committed itself to hold educational conferences whenever a significant ownership transaction is proposed to the FCC. Finally, rounding out the warm and fuzzy part of the diversity initiative, the FCC plans to create a guidebook on diversity, focusing on activities that companies can undertake to promote diversity in ownership and contracting.

Proving that it is not just a rubber-stamp for diversity advocacy groups, the FCC did list at least a dozen proposals that the Commission declined to adopt. These rejected proposals include items such as: initiation of discussions by the FCC with major pension funds to start a special fund for providing capital to minority-focused private equity funds (a so-called "fund of funds"); relaxation of foreign ownership restrictions; and repeal of the third-adjacent channel interference rules in order to open more spectrum to new entrants. The FCC rejected some of these proposals on the grounds that they are beyond the FCC's authority, and others on the grounds that there is other pending rulemaking or legislation which will cover the same issues.

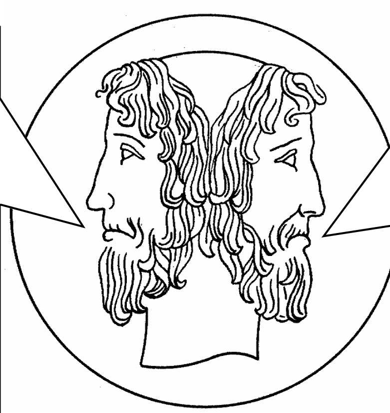
The Diversity Initiatives proceeding advances a number of far-reaching proposals. While the Commission has not provided much detail relative to many of those proposals, it is important to take them all seriously. The deadlines for comments and reply comments have not been established as of this writing. If you would like more information about this proceeding, or if you would like help in preparing comments to be submitted to the Commission, please let us know.

Yet another Memo to Clients Sidebar!!

Point/Counterpoint:
Should Channels 5 and 6 be re-purposed for FM Use?

Jack Mullaney, of Mullaney Engineering, Inc., proposed last Fall that it might be a good idea to re-allot TV channels 5 and 6 for use by FM stations of various types. (*See* related articles in the November and December, 2007, *Memo to Clients*.) On March 5, 2008, the FCC addressed that proposal in the Diversity Initiatives order with the language quoted on the left, below. And then on March 6, 2008 – that would be the ***very next day*** – the same Commission addressed the same proposal in the latest DTV order, using the language quoted on the right, below. So the FCC appears to have all its bases covered.

"Mullaney proposes that the Commission reallocate TV Channels 5 and 6 for FM broadcasting, thereby creating a 'staggering expansion of the existing FM band.' We agree with DCS that ***this proposal could yield tremendous opportunities for new entrants, and we seek comment on it***."
(footnote omitted, emphasis added)



"[W]e also will ***not*** reallocate TV channels 5 or 6 for use by FM radio broadcasting stations because these channels must continue to be available for use by stations in the television broadcasting service. In this regard, we stand by our now well-established determination that ***the additional opportunities for increasing FM noncommercial coverage do not outweigh the costs of eliminating channel 6 from TV service.*** For these reasons and various others we have expressed in our rulemakings on these issues, we deny the petitioners' requests that we reallocate one or more TV channels to the FM radio broadcasting service."
(footnote omitted, emphasis added)

The FCC thins the herd

Lost In Translation: All But 10 Applications

Dismissals of 2003 translator applications underway

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It's fish-or-cut-bait time for folks who filed more than 10 applications for FM translators in Auction No. 83 back in 2003: applicants with more than 10 short-form applications still pending from that window must decide by **April 3** which 10 they wish to continue to prosecute, and which others may be dismissed. If you don't make that call – and then tell the FCC, by April 3, which applications you want to hang on to – the FCC will make the call for you: all but the first 10 applications you filed will be tossed.

In a *Public Notice* released March 4, the Commission followed up on the "ten proposals per customer" policy which it had announced in its December 11, 2007, *LPFM Third Report and Order*. In the order (which we described in the December, 2007 *Memo to Clients*), the Commission established the 10-application limit. In so doing, the Commission was looking to clear the way for possible expansion of LPFM service (by reducing the number of new translators which might otherwise preclude new LPFM stations). The FCC was also concerned about promoting localism and deterring speculation.

The issue of potential "speculation" was particularly prominent in the FCC's thinking. It explained that, while 80% of filers in the 2003 FM translator window submitted 10 or fewer proposals, a handful of applicants filed many more. The two most active filers – Radio Assist Ministries and Edgewater – collectively filed a whopping 4,219 proposals, representing nearly a third of the total Auction No. 83 filings. Not surprisingly, Radio Assist Ministries and Edgewater, in conjunction with a group of other petitioners, are among those who have filed petitions for reconsideration seeking reversal of the 10 application cap. (They argue that the limit is arbitrary and capricious and an impermissibly retroactive forced dismissal. Good luck with all that.)

The likelihood that the FCC will suddenly re-think the 10-application limit, or even stay its effectiveness, is very, very small. And absent any such unlikely action, any applicant with more than 10 applications on file must advise the Commission by April 3 which 10 applications it wishes to continue to prosecute (and, therefore, which other applications may be voluntarily dismissed). If an applicant fails to notify the FCC of its decision by the deadline, the Commission will retain the first 10 applications filed by the applicant (based solely on file number) and will dismiss all later-filed applications.

The application limit applies only to short-form applications; applicants may retain more than 10 long-form applications. ***However***, parties should pay close attention to the Commission's guidelines to ensure that high-priority applications are not dismissed. Applicants with *more than 10 long-form* applications and ***no*** *short-form* applications on file will have ***all*** of their long-form applications processed. But where an applicant filed more than 10 long-form and short-form applications combined, construction permits granted from the group of pending long-form applications ***will*** be counted toward the limit of 10. Therefore, it may be in a party's best interest to voluntarily dismiss select long-form applications to avoid the dismissal of higher-priority short-form applications.

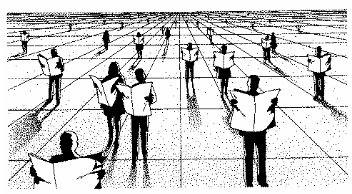
Once the dismissed applications can be cleared from the FCC's database, the Commission should be able to determine in short order which remaining applications are singletons and which comprise MX groups, and begin to process the applications accordingly. It should be noted, however, that the FCC has not announced a particular timeline.

Instructions on how to notify the Commission of voluntary dismissal selections are set out in the *Public Notice*. Please contact FHH if you have any questions or would like assistance in notifying the Commission of your application selections.

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

Updates on the News

Does anybody know where they're registered? – It may be time to start shopping for wedding presents, because the long-pending XM and Sirius nuptials took a giant step toward the altar this month when the Department of Justice gave their proposed merger a thumbs-up. After reviewing "millions of pages of documents" and analyzing "large amounts of data", DOJ concluded that XM and Sirius probably wouldn't compete with each other anyway, so why not let them merge if they want? DOJ did acknowledge the satellite guys' claim that they compete with a wide variety of "other sources of audio entertainment" – including AM/FM radio and iPods – and the Department concluded that the evidence before it "did not support defining a market limited to the two satellite firms". However, DOJ stopped short of saying explicitly that it is appropriate to assume that there is one big "audio entertainment" market which includes all these various services vying for the public's ears.



The question of market definition is not unimportant by any means, because it could have serious implications back at the FCC. Recall that the Commission's multiple ownership limits are justified in large measure by the supposed need to assure adequate diversity and competition in the marketplace. But an assumption normally underlying that approach is that the relevant marketplace consists only of broadcast stations. The notion that that the "audio entertainment" marketplace may, instead, include not only broadcasters, but also satellite services, iPods, internet devices, etc., etc., could necessitate revaluation of the need for multiple ownership rules. So, while some broadcasters (notably the NAB) seem horrified by the notion of the XM/Sirius merger, the fact is that a governmental green light for the merger could prove beneficial in the long run on the multiple ownership front.

While we may want to flip through catalogues for wedding presents, it's still a bit early to rent the tux and hire the limo. The FCC also has to weigh in on the merger, and while staff members are reportedly working on it, we hear that the FCC's decision won't be ready until April, at the earliest. Moreover, speculation suggests that, if the FCC were to approve the merger, it might do so with a number of regulatory strings attached. Those might include required "à la carte" program choices, some spectrum set-asides for non-profit educational programming, mandatory leasing of capacity to rival service providers, and the like. Needless to say, it is far from clear that the happy couple would be willing to tie the knot if it were to entail such extra baggage – but you never know, sometimes love conquers all. Stay tuned.

Indecency developments – The big news this past month was that the Supreme Court has agreed to hear the FCC's appeal of the Second Circuit's decision in the *Fox TV* indecency case. That's the case in which, last summer, a three-judge panel of the Second Circuit voted 2-1 in favor of totally trashing the Commission's most recent take on the "fleeting expletive" policy. The Supremes' willingness to wade into this particular case was something of a surprise. The Court did not have to take it on. The Court routinely declines to consider more than 95% of the cases presented to it, and the ones it does take generally involve constitutional issues about which the various federal circuit courts are in disagreement. Here, as far as we can tell, there have been no other circuit court cases that are at odds with the Second Circuit's *Fox TV* opinion, and the Second Circuit went out of its way to stress that its decision was based ***not*** on the Constitution, but rather on far more mundane issues of routine administrative law. Of course, the Second Circuit did throw in a discussion that it emphasized was ***not*** essential to the disposition of the case – and in that discussion, which amounted almost to judicial trash talking, the court opined that the FCC's policy would likely not survive a constitutional challenge, if one were brought.

With this background, it's not entirely clear what the Supremes have in mind. It takes only four votes (out of a possible nine) to get the Supreme Court to agree to hear a case, and the number and identities of the justices who voted to hear the FCC's appeal have not been revealed. It is tantalizing to speculate about what might happen, but it would only be speculation. Until the case is briefed and argued – no schedule yet, but the argument before the Court is likely to happen in the Fall – we won't have a clue. And even after the case is argued, the chances are good that we'll all still be completely in the dark.

Meanwhile, back at the Commission, Fox appears to be putting the stall on in another long-running indecency battle. The FCC has issued a forfeiture order directed to a number of Fox stations for the broadcast of *Married by America.* Rather than pay the fine in order to take the case to a Federal appeals court (like ABC did in February in the *NYPD Blue* case), Fox has gone back to the Commission for reconsideration, and has declined to pay the fine for the time being. With a potential landmark Supreme Court decision on indecency looming in the near term, we suspect that Fox was happy to sit tight in the *Married by America* case and play wait-and-see. So it's likely to be a relatively quiet couple of months on the indecency front before the fireworks start to

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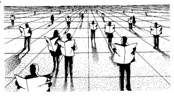


(Continued from page 15)

go off in the Fall.

Ownership waiver withdrawn – About six years ago, the Commission decided that in-market radio joint sales agreements should be deemed to create attributable interests for the entity selling the time. That is, if one station (let's call it the "seller") in a market was selling all the time on another, separately-owned station ("the other guy's station"), then the seller would be tagged with an attributable interest in the other guy's station even if the seller had no other connection with the other guy – and that attributable interest would count against the seller in determining whether he was within the multiple ownership limits. In Fargo, North Dakota, Clear Channel happened already to own a cluster of five FM stations, one more than the limits would ordinarily permit. But it was a grandfathered cluster, so the limits didn't apply. Another licensee in town owned four FM's and had a JSA to sell a fifth, which put it at parity with the Clear Channel cluster. Life was good. But then that whole JSA-as-an-attributable-interest thing happened, putting the second licensee over the line. Wait, it argued, since Clear Channel has a five-FM cluster, it would make sense to waive the ownership limit to allow me to keep my JSA, so that I too will have five FM's, and we can compete fair and square. The Commission was agreeable, and the temporary waiver was granted.

But then Clear Channel sold its cluster, and the grandfathering went away. Clear Channel's buyer got only four FM stations. So what does the buyer do to even things up? It went to the FCC and argued that, with the Clear Channel overage a thing of the past, no basis existed for leaving the other guy's waiver in place: in other words, pull the plug on the waiver and require the termination of the JSA. And that's just what the Commission did. In a surprisingly terse decision released in March, the Commission agreed that the original rationale for the waiver had evaporated with the elimination of the five-FM Clear Channel cluster. The waiver will terminate 90 days from the decision, at which point the parties to the JSA will presumably have to bring themselves into compliance with the rules.

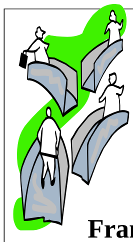
A dose of its own medicine? – With the Commission's recent enthusiasm for imposing a slug of reporting requirements on broadcasters, it was ironic that the Commission itself would find itself saddled with reporting chores of its own. Rep. John Dingell, Chair of the House Committee on Energy and Commerce, sent Chairman Martin a six-page, single-spaced *billet doux* in which he demanded that the FCC produce for the Committee "all e-mail communication (and attachments), memoranda, electronic and handwritten notes, records of telephone conversations, talking points, and meeting schedules since January 2005" relating to 12 separate matters. And when we say "matters", we are not talking about specific, easily segregable items. Rather, Dingell was looking for materials relating to "delay or postponement in preparing and transmitting Congressionally-mandated reports", and "the FCC's policy on nature and scope of permissible communications between FCC personnel and outside entities". Or how about "personnel reassignments and/or details of FCC employees that are GS-13 staff and above"? Dingell also asked for all documents relating to any "new hires, personnel reassignments and details and telecommuting arrangements" and travel records for all Commissioners (and some other agency officials, to boot). Oh yeah, and did we mention that Dingell insisted that a copy of his letter be made available "to each and every employee and contractor that works at FCC headquarters and satellite offices"? And that all those employees should be told that they can contact Committee investigators and/or submit anonymous information?

And get this – Dingell gave the Commission two weeks to respond. Snap.

While Dingell's letter seems a bit silly in the real world – after all, does he really expect to find a smoking gun conclusively establishing some awful misconduct? – it is still somewhat enjoyable to see the tables turned on the agency. And in a (possibly) related development, at least one published report has indicated that morale among the agency's rank and file employees has sunk dramatically.

Form 355 update – And speaking of new and burdensome reports, a word about the new Form 355 "enhanced" programming report for TV licensees. The Commission has sent the form to OMB, but the FCC has also seek comments from the private sector relative to the new form. You have until May 12 in which to chip in your two cents' worth. As we understand it, the Commission will then bundle up its proposed form and all the comments, together with its own "analysis", and send the whole package over to OMB. It's possible that OMB will solicit further comments on its own – that much is not entirely clear right now – and OMB will have a total of 60 days in which to think about it. If and when OMB approves the form, it will so advise the FCC, and the FCC will then issue a public notice about the approval, and the new form will become effective 60 days after that. So all in all, it's looking like, if the form is approved by OMB, it's likely that it won't go into effect until sometime in the Fall, at the earliest. And with the opportunity for the industry to challenge the need for the form and the burden it will place on the industry, there's at least some hope that the form will get derailed along the way. (Late update – the NAB has appealed the "enhanced localism" ruling which includes Form 355.)

Oh, in case you're interested, the FCC has announced its estimate of how long it expects broadcasters will need to complete Form 355: somewhere between 2.5 and 50 hours. And in making that rough estimate, the Commission didn't happen to mention that that will be a burden not once a year, but once a quarter. But their estimate is probably close enough for government work . . .



FHH - On the Job, On the Go

On February 26, **Ron Whitworth** and **Patrick Murck** appeared on a panel entitled "How to Get a Job in Communications Law" hosted by the Columbus School of Law at the Catholic University of America.

Also in February, **Ron**, along with **Frank Jazzo** and **Michelle McClure** attended the "Satellite 2008" confab in Washington. And on the social side, **Frank J** and **Michelle** attended the Society of Satellite Professionals International Gala.

On March 7, **Kevin Goldberg** addressed the National Newspaper Association's Government Affairs Conference on the topic of credentialing sports reporters. The title of his presentation: "The Price of Admission Gets Higher: Leagues Asking for More in Exchange for Access".

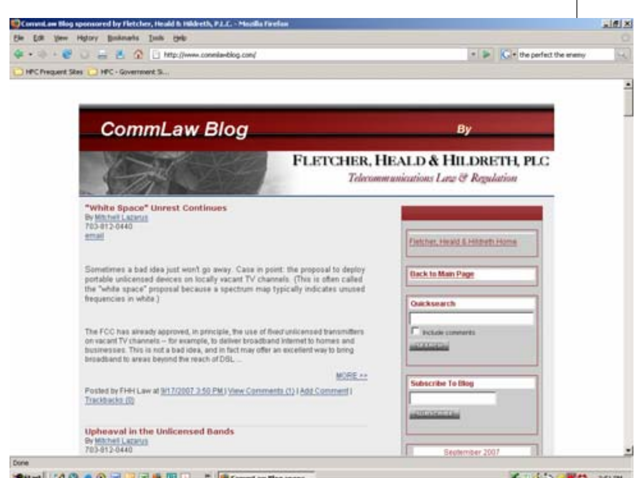
On March 13, the other Frank, **Frank Montero**, represented the National Association of Minority Media Executives at an FCBA lunch discussion at Georgetown Law School concerning the newspaper/broadcast cross-ownership rule.

For the second year in a row, **Frank J** has been named a "Super Lawyer" in communications law by "Super Lawyers" ® magazine, which is published by Law & Politics. The selection process is rigorous, encompassing an extensive nomination pool followed by careful evaluation of the candidates. Kudos to **Frank**, who, by the way, will be attending the Louisiana Association of Broadcasters 60th Anniversary Convention in Baton Rouge in April. He'll be on panels on April 25 and 26.

And if it's March, can the NAB be far behind? No way! If you're going to Las Vegas for the NAB, count on seeing both of the **Franks** (that would be **Frank J** and **Frank M**), along with **Michelle**, **Joe Di Scipio**, **Jeff Gee**, **Scott Johnson**, **Matt McCormick**, **Lee Petro**, **Jim Riley**, **Peter Tannenwald**, **Kathleen Victory**, and **Howard Weiss.** While he's out there, **Frank M** will be attending a board meeting of the Spanish Broadcasters Association. On Sunday, before things get rolling at the NAB, **Joe** will be moderating a panel at the annual ABA conference held in conjunction with the NAB. On Tuesday, April 15, **Frank J** will appear on the panel devoted to "Everything You Want to Know About FCC Regulation But Have Been Afraid to Ask". **Peter** will be speaking at the CBA@NAB session on Monday, April 14 and will discuss CBA's recently filed lawsuit against DTV converter boxes that block analog reception. And **Matt** will appear on the "Current Issues in Law and Policy" panel at the Broadcast Education Association convention (held in conjunction with the NAB) on Thursday, April 17.

And the *Media Darling of the Month* is (cue the 21-gun salute) . . . **Kevin Goldberg**, for his stunning (there is no other word that does it justice) performance as the Guy With All The Answers Standing In Front Of The Washington Monument in a video produced by the Gannett News Service to celebrate, and increase public awareness of, Sunshine Week. Check it out at http://gns.gannettonline.com/apps/pbcs.dll/article?AID=/20071025/SUNSHINEWEEK01/71025006
As we all know, Sunshine Week is a project to educate the public about the importance of open government and freedom of information.

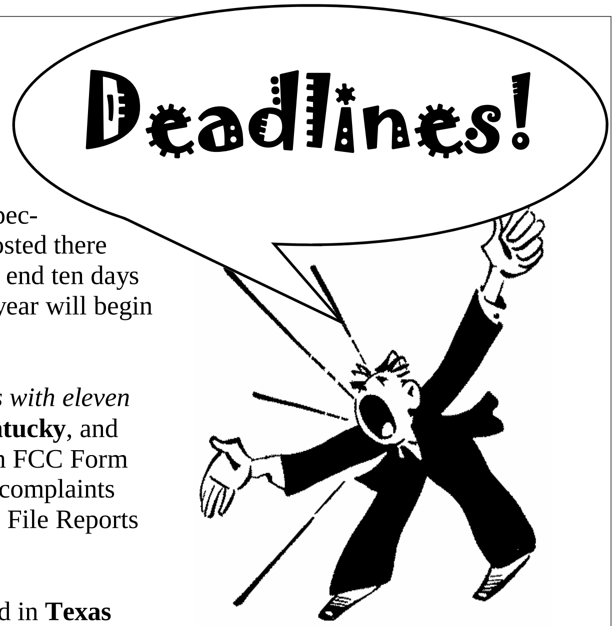
Late Breaking News???



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 almost 60,000 visits to our site to date! Click on over and see why.



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

DTV Consumer Education Quarterly Activity Reports – All *television* stations must file a report on FCC Form 388 and list all station activity to educate consumers about the DTV transition. This will be the first such report and will cover the period from the effective date of the DTV Consumer Education Initiative rules through March 31, 2008.

Children's Television Programming Reports - Analog and Digital – For all *commercial television* and *Class A television* stations, the second quarter reports on revised FCC Form 398 must be filed electronically with the Commission, and a copy must be placed in each station's local public inspection file. Once again, information will be required for both the analog and DTV operations.

Commercial Compliance Certifications – For all *commercial television* and *Class A television* stations, a certification of compliance with the limits on commercials during programming for children ages 12 and under must be placed in the public inspection file.

Website Compliance Information – *Television* station licensees must place and retain in their public inspection files records sufficient to substantiate a certification of compliance with the restrictions on display of website addresses during programming directed to children ages 12 and under.

Issues/Programs Lists – For all *radio*, *television*, and *Class A television* stations, a listing of each station's most significant treatment of community issues must be placed in the station's local public inspection file. The list should include a brief narrative describing the issues covered and the programs which provided the coverage, with information concerning the time, date, duration, and title of each program.

May 29, 2008

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

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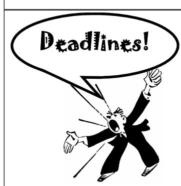
will have to include a notice discussing the effect the DTV Transition will have on the operation of the product. This requirement will apply not only to televisions, but also to DTV players, VCRs, and monitors.

The Commission will also require DTV.gov partners to report on a quarterly basis regarding their educational initiatives. The partners include the television networks, cable and satellite operators, retailers, manufacturers, and the leading trade organizations such as NAB and CEA. The Commission did not specify a form for the reports, but the Commission indicated that those that fail to provide reports may lose their "partner" status.

Finally, the Commission will work with NTIA to require retailers that sell the NTIA-subsidized converter boxes to take steps to fully train their employees regarding DTV-transition issues. The Commission and NTIA will continue to conduct site visits to "assess" retailers consumer education and employee training efforts.

(On the subject of DTV converters, we should also note that FHH's Peter Tannenwald has led the charge into Federal court on behalf of the Community Broadcasters Association. Many CBA members (and other Class A, LPTV and TV translator licensees) won't be converting to digital any time soon, and yet the converter boxes which are being flogged by the NTIA (and the FCC) through a government-subsidized coupon plan will, in most cases, *not* permit easy viewing of analog signals. That appears to be a clear violation of the All Channel Receiver Act, so CBA and Peter have asked the U.S. Court of Appeals for the D.C. Circuit to step in and force the Commission to comply with the law. Watch these pages for further developments.)

Needless to say, these additional "educational" requirements will require very substantial efforts in the very near term. All stations which will be subject to the Education Initiative requirements should be sure to map out a compliance strategy to implement the requirements of their chosen option, and keep useful records of their efforts, with a minimum of unnecessary hassle.



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June 1, 2008

EEO Public File Reports – All *radio* and *television stations with five (5) or more full-time employees* located in **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **Michigan**, **Ohio**, **Nevada**, **New Mexico**, **Utah**, **Virginia**, **West Virginia**, and **Wyoming** 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 *television station employment units with five (5) or more full-time employees* and located in the **District of Columbia**, **Maryland**, **Virginia**, or **West Virginia** must file EEO Mid-Term Reports electronically on FCC Form 397. All *radio station employment units with eleven (11) or more full-time employees* and located in **Michigan** or **Ohio** must file EEO Mid-Term Reports electronically on FCC Form 397. For both radio and TV stations, 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 **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **Nevada**, **New Mexico**, **Utah**, **Virginia**, **West Virginia**, and **Wyoming** 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 **Michigan** and **Ohio** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323 or 323-E.

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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First Class

FM ALLOTMENTS ADOPTED –2/20/08-3/24/08

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

FM ALLOTMENTS PROPOSED –2/20/08-3/24/08

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
MI	Evart	83 miles NE of Grand Rapids, MI	274A	08-26	Cmnts: 5/05/08 Rply: 5/20/08	Drop-in
MI	Ludington	96 miles NW of Grand Rapids, MI	249A	08-26	Cmnts: 5/05/08 Rply: 5/20/08	Accommodation Substitution

Notice Concerning Listings of FM Allotments

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