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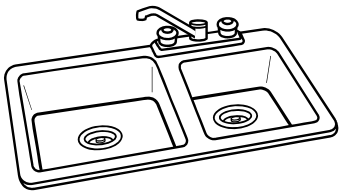
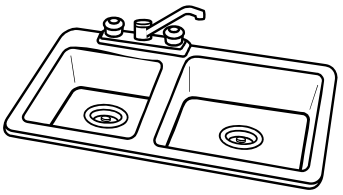
Memorandum to Clients

June, 2008 | *News and Analysis of Recent Events in the Field of Communications* | No. 08-06

Diversity 2008 - Everything but the kitchen sink II?



Small Businesses = Longer CPs + More Investment



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In the March, 2008, *Memo to Clients* we reported on the FCC's Diversity Initiative rulemaking activities involving numerous policy and rule changes, some of which were merely proposed, some of which had been adopted. Several of the new Diversity Initiative changes to the FCC's official rules are now due to become effective next month (July 15, to be specific). The new rules and policies coming on line in mid-July will:
(a) permit the 18-month extension of certain construction permits; (b) relax to some degree the limits on financial involvement for multiple ownership/attribution purposes; and (c) impose newly formalized prohibitions on certain commercial activities. (Note: a couple of petitions for reconsideration of the Commission's order have been filed and the Commission has sought responses; however, the effectiveness of the new rules has not been stayed.)

It appears that requests for CP extensions will be part of the normal application process for assignment/transfer of the permit.

The primary beneficiaries of the Diversity Initiative are "small businesses" (as that term is defined by the Small Business Administration (SBA)). To meet the SBA's definition of "small business", a radio station owner must have revenue of less than $6.5 million per year, and a television station owner must take in less than $13 million per year. To avoid abuse of this definition by larger companies creating new subsidiaries that have little or no revenue in order to fall within these limits, the FCC also adopted control tests requiring certain percentages of equity and voting power in the qualified permit-holding entity. (Check out the sidebar to our March, 2008 *Memo to Clients* article for details.)

CP Extensions – First, despite the fact that the FCC has held fast to its "no extensions of construction permits" policy for nearly a decade, under the new rules "small businesses" which acquire expiring CPs for new stations can obtain additional time to finish building. Specifically, a qualifying buyer will be entitled to a minimum of 18 months from the date of closing of the permit to complete construction.

For someone holding a close-to-expiring permit that will soon be worthless upon expiration, this new provision provides tremendous incentive to sell the permit to a small business at any price. The extension is available for any CPs for new TV, AM, FM, translators, boosters, and other various and sundry types of broadcast facilities. The extensions apparently do ***not*** apply to construction permits for modification of licenses of already-existing broadcast stations.

Although the precise procedures for obtaining a construction permit extension have not yet been spelled out, it appears that requests for the extension will be part of the normal application process for assignment/transfer of the permit. In the application, the proposed buyer should notify the FCC that it is seeking an extension and must submit evidence to the FCC that it qualifies as an eligible small business under the SBA

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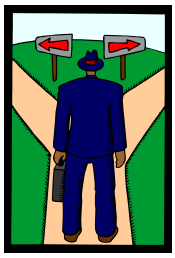
The Scoop Inside



[The other] Election 2008

Cable Carriage Considerations 101

Pitfalls: Posturing and Precision

By: Paul J. Feldman
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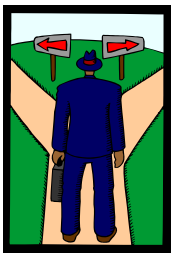

With the October 1, 2008 deadline for broadcasters to elect must-carry or retransmission consent for carriage of their TV stations on cable TV systems, broadcasters seeking retransmission consent should be entering into negotiations soon, in order to have time for the negotiation process to play out prior to the election deadline. Broadcasters generally should not place themselves in a position of electing retransmission consent without knowing the terms of the final agreement, since that creates a risk that the broadcaster may forsake its must-carry rights but not reach an agreement with a cable operator prior to January 1, 2009, potentially resulting in losing carriage on certain cable systems.

In the process of negotiating a retransmission consent agreement (RCA), there are many issues for a broadcaster to consider. Here are two "insider" tips for broadcasters to keep in mind:

Termination Date of the Agreement

The must-carry/retransmission consent election is made as part of an on-going three-year cycle, with elections due by October 1 of a year, with the election in effect for the following three years. For example, elections are due this October 1, 2008; those elections will be in effect from January 1, 2009 through December 31, 2011. It is thus natural and common for the terms of RCAs to be for three or six years, with the termination date being the last calendar day of the last year of a three-year election cycle. However, cable operators occasionally seek or demand that the termination date of an RCA be in the middle of a three-year cycle. Often the cable operator attempts to justify this practice by suggesting that it needs to "stagger" the termination dates of the RCAs for all of the stations that it is carrying on the cable system, in order to stagger the work load of negotiating the agreements.

Regardless of the alleged justification, a termination date in the middle of a three-year cycle creates a *potential trap for the station*: if for some reason the operator decides to drop the station at the end of the term of the RCA, then the station has no carriage rights for the remainder of the three-year election cycle, because the retransmission consent agreement has ended, but the station has no must-carry rights, because it could not effectively elect must-carry for a cycle in which it was being carried pursuant to retransmission consent, at least for the beginning of that cycle. Cable operators understand this result very well, and it gives them leverage against the station in negotiating carriage for the following cycle. There are ways to try to limit the damage of an RCA that ends in the middle of a three-year cycle, but the best approach is to avoid such a termination date in the first place.

Retransmission of the Station Using "Alternate" Technologies

Sometimes a cable operator will seek the right to retransmit the Station's signal not only on its traditional cable systems, but also on undefined "alternate platforms" or using undefined "alternate technologies." The cable operator may be attempting to provide for use of satellite master antenna TV systems (SMATVs) to serve apartment buildings. If that's what the cable operator wants to do, and if that's acceptable to the broadcaster, that's fine – but the RCA should then make specific reference to SMATVs. Most importantly, the RCA should avoid such vague terms as "alternate platforms", "alternate technologies", etc.

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Focus on FCC Fines

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FCC increases maximum fines – This month the FCC did what it had to do and raised the maximum guideline fine amounts to keep up with inflation.

This piece of regulatory housekeeping was mandated by Congress in the Debt Collection Improvement Act of 1996, which requires federal agencies to adjust maximum civil monetary penalties at least once every four years.

Accordingly, the FCC duly laid out a detailed formula for how it reached inflationary adjustments dating back to the consumer price index of a dozen years ago. Most of the adjustments in the FCC order dealt with various Common Carrier fines, but the FCC did take time to increase maximum per violation and per day fines for broadcasters.

With certain limited exceptions (broadcast indecency probably being the most noteworthy) broadcasters and cable operators formerly faced a maximum fine of $32,500 for each violation or day of a continuing violation. That amount has been increased by $5,000 to $37,500. Similarly, the maximum fine for a continuing violation has increased from $325,000 to $375,000. (Broadcasters should not feel bad; common carriers also face new maximum fines of $150,000 per day or $1.5 million total.)

The increases reflect a 15% increase based upon inflation. While inflation certainly was nowhere near 15% in the last year, arcane government rules require the FCC to adjust amounts only when they exceed certain thresholds. Aggregate inflation finally exceeded that threshold in 2007 and the maximum amounts were adjusted by at least $5,000.

Note that the maximum indecency fine is $325,000 per incident.

Broken EAS gear = $8,000; No EAS gear = $5,000 – From Woodward, Oklahoma, comes the story of how a station that completely ignored the FCC rules ended up with a lower fine than a station that tried to comply. An FCC inspector walked into the studios of co-located stations in Oklahoma and had a look at the EAS equipment. The inspector found that the equipment was missing audio inputs and that it had a faulty date and time mechanism. Weekly and monthly testing records were also nowhere to be found. The FCC inspector was not pleased and marched back to his office to draft up a violation notice.

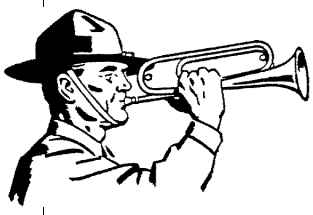
When the inspector arrived back at his office, he discovered that although the stations were co-located, they each had different owners. Flipping through his rule book, the inspector found Section 11.51(1), which permits stations to share EAS equipment *only* if they are both co-located *and* co-owned. One of the two stations (the one which had not bought the equipment) was in violation of FCC rules for not having EAS gear at all. The other, which *had* bought the gear, was in violation because the gear wasn't working.

The inspector finished his research and sent off two fines. The station with no gear at all was hit with a $5,000 fine for failing to install EAS equipment. The station that actually had equipment was ordered to pay an extra $3,000 (for a total of $8,000) for having faulty equipment. This should serve as a reminder to co-located stations that they can share EAS equipment only if they also share the same owner. Readers can draw their own conclusions regarding the meaning of the FCC's decision to issue a larger fine to the station that went to the effort of actually buying the gear.

Half a decade for a fine – Finally, we report on how the fast pace of New York City does not necessarily make its way 200 miles south to Washington. In March, 2003, an NCE in New York City began airing spots which were more advertisements than underwriting announcements. The matter was brought to the FCC's attention and an investigation began. The FCC wrote a letter to the station and the station wrote back. The FCC and the station attorneys met to discuss a solution and exchanged agreements. Eventually, the FCC and station entered into a consent decree.

While it is widely known that a Wall Street hedge fund manager can spend $5,000 on dinner in no time at all, it took the FCC and the New York radio station more than five years to agree on the $5,000 fine. In addition the station also agreed to implement certain self-monitoring plans and to send four letters to the FCC to report that it is complying with the rules. Of note, the station needs to send in those four letters over three years – two years less than the time it took the FCC to decide to require that the letters be sent.

A new "ask, tell" policy?



Embedded Analysts, Major Pain

Private arrangements, generally speaking?

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For those of you who successfully passed Payola 101: Pay for Play (back in the 1950s), and then had occasion a year or two ago to take the refresher course (Payola 102: VNRs – Threat or Menace?), get set for the next level: Payola 103: Embedded Analysts – the Hidden Persuaders. Recent disclosures by the *New York Times* describe an extensive, and apparently successful, years-long effort by the Pentagon to obtain favorable news coverage from "analysts" to whom the Pentagon has provided special access. While this may just be a temporary political tempest in a teapot, it does not bode well for broadcasters in a number of ways in view of the resurgence in official hand-wringing about perceived "payola" practices.

According to the *Times*, in an effort to get its side of the Iraq war out to the public, the Pentagon has been giving special access, information and non-pecuniary favors to retired military officers. Those former officers serve as "analysts" for broadcast and cable news services, providing expertise and gravitas for news stories and talk shows. These "analysts" are typically identified as independent experts with high-level military experience, the implication being that they are obviously capable of offering an expert's angle on the important but highly complicated developments in the prosecution of the war. Since those developments are often nigh on incomprehensible to the lay public, providing this kind of seemingly objective "expert" analysis has become a routine element of war coverage.

A resurgence in official hand-wringing about perceived "payola" practices does not bode well for broadcasters.

It turns out, though, that those analysts may not have been all that objective. According to the *Times*, the Pentagon fostered a cadre of military pundits who it deemed to be friendly to the Pentagon's cause. Those pundits were then given special access to Pentagon officials (up to and including the Secretary of Defense), along with exclusive trips and tours and briefings, all designed to highlight the stories the Pentagon wanted to highlight – as opposed to substantially more negative stories that journalists were reporting on their own. The result tended to be more upbeat – or at least more Administration-favorable – depictions of the war and related matters. The Administration's goal was to cultivate what modern spin-masters call "key influentials" who could, through the delivery of talking points, help win a "psyops" battle for domestic public opinion.

Further muddying the water here is the fact, noted by the *Times*, that many of the "analysts" also happen to be affiliated in one way or another with various defense contractors who have a pecuniary interest in the war effort. By giving the "analysts" extensive access to DoD officials, the Administration was arguably providing them (a) valuable information that their affiliated companies could use in negotiating deals with the government and (b) considerable personal cachet that would enhance the analysts' own perceived value as useful contacts with the government.

So the government was providing these "analysts" with entrée, which presumably has some value, both for them personally and for their non-media employers. The "analysts" were in turn going on-air and saying things that the administration wanted to hear. Not surprisingly, even though no one has alleged that any money actually changed hands in any of this, some leading Congressional Democrats are calling for an FCC investigation, claiming that this is all very redolent of payola and sponsorship non-identification.

In a letter to FCC Chairman Kevin Martin, House Commerce Committee Chair John Dingell complained (among other things) of possible culpability on the part of broadcasters for the airing of such pundits' views without appropriate sponsorship identification. With potentially dramatic political change on the post-November horizon, a Democratic-controlled FCC may be more amenable to the kind of stern investigations now being sought by such Democratic influential as Dingell.

As we all know, the Communications Act and the FCC's rules require appropriate disclosure when something of value is given in exchange for a broadcast message. Many newsrooms found out how far this regulatory lever could extend when they received official FCC inquiry letters about the use of Video News Releases (VNRs). (*See, e.g.*, the April, 2006 *Memo to Clients* for earlier coverage of VNR issues.) VNRs are materials created by third parties and provided to stations. In the FCC's view, because the third parties (or their clients) control the content of the VNR, and the station arguably derives benefit from using the VNR (through savings of time, effort and

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One difficulty, though, is that today's diffuse media land- scape tends to blur distinctions which were historically bright-line. What, after all, is "news" in this day and age? Today's audiences seem to shy-away from the old school, "we are oh-so-serious" news and public affairs of yesteryear. Infotainment sells. But the increasingly blurred line between the info' and the 'tainment also complicates the process for broadcasters.

As a practical matter, stations may want to develop and enforce clear policies requiring "experts" who appear on news, public affairs or talk shows to disclose their outside interests – and also any special access or privileges that they may have enjoyed beyond the courtesy of returned phone calls. The punditocracy needs air time to stay relevant – and thus should have no objection to filling out a quick question- naire if necessary to get that air time.

> *The various expressions of concern may just be a passing phenomenon which will be drowned out by the next flap-du-jour.*

Again, the Dingell letter and related ex- pressions of concern may just be a pass- ing phenomenon which will be drowned out by the next flap-*du-jour*. But it might also signal a serious shift in the interpretation of "sponsorship identifi- cation" – particularly if this issue is still on the front burner when the administration changes next January. While it can be difficult to completely inoculate against unpredictable political developments, broadcasters can at least create a record of good faith and good practices. Due diligence can make the difference between being (a) merely embarrassed for having been snookered by a paid [illegible] pert's clothing and (b) whacked with [illegible] illegal complicity.

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While such amorphous language would likely encompass SMATVs, it would also extend well beyond them. In particular, that language could be read to authorize cable operators to stream the s[illegible]on's TV signal on the Internet. But that would raise a [illegible]rld of potential problems for all concerned. A cable o[illegible]ator's attempt to stream the station's signal onto its I[illegible]net site: (1) would likely violate the station's syndi- c[illegible]d programming and network agreements; and (2) w[illegible]ld probably also create potentially large copyright p[illegible]lems for the station (as well as for the cable opera- tors). Moreover, [illegible] should not be giving away unknown distribution rights for free. If a cable operator wants to use SMATVs to distribute programming to apartment buildings, then the language in the RCA should explicitly limit the grant of that right to SMATVs.

Of course, there are many other issues to be mindful of in negotiating RCAs. It is always wise to consult with your attorney *during* the negotiation process – *i.e.*, *before* the RCA is signed – in order to avoid problems *after* it's signed.

Fish gotta swim, birds gotta fly

AM Array Approved After Eight-Year Environmental Battle

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Note to self: don't build in a flood plain.

If last month's article about possible monetary penalties didn't convince you that careful site selection and environmental compliance is of the utmost importance for new tower construction proposals (*see* the May, 2008 *Memo to Clients* at page 2), maybe this will: after ***more than eight years***, a full Environmental Assessment (EA), multiple amendments and supplements, dozens of informal objections, as well as local litigation, on May 30, the Commission finally granted the application for a minor modification of the facilities of Station KRKO(FM), Everett, Washington.

This case provides a sobering reminder of the seriousness of environmental compliance and the difficulties that can befall an applicant whose proposed site is subject to this kind of challenge.

Filed March 8, 2000 (barely a month into the Bush II Administration), the application proposed to relocate KRKO's facilities to a new site and increase power from 5 kW to 50 kW unlimited time, using a four-tower array. The application was subsequently amended to ratchet the daytime power down to 34 kW (while keeping nighttime at 50 kW), and to lower the height of the daytime nondirectional tower (10.4 meters above ground level *versus* the original plan of 129.5 meters; the other three directional towers are 59.4 meters).

The applicant's biggest problem may have been that it proposed to build these towers in a flood plain. Flood plain proposals automatically trigger a full EA and mandatory consultation with expert agencies under the Commission's rules implementing the National Environmental Policy Act of 1969 (NEPA). A full EA is no small matter. It requires, first, that the applicant undertake a detailed assessment of an extensive panoply of environmental, cultural, historical and other factors. The Commission then conducts an independent review of the EA and any comments received to determine whether the proposed facility is worthy of a Finding of No Significant Impact (FONSI) on the environment. If the Commission concludes that a FONSI is in order, then the application can be granted.

Or perhaps the applicant's problem was proposing to build not four but *eight* towers (as it revealed in the EA – but only four of those were to be used by KRKO) in the Snohomish River Valley, Washington, home of the wily native activist citizen as well as numerous migratory birds and endangered fish. From 2001 into 2007, individuals and citizen groups peppered the Commission with informal objections to the application, primarily citing environmental impacts. The initial wave of complaints apparently focused on wildlife concerns – it was said that the proposed towers would whack migratory birds, bald eagles and various other threatened species of birds and fish. Somebody claimed the towers' proximity to a private airfield was a problem. Others worried about the effect of the towers on the complainants' property values. Later complaints echoed these themes, and also suggested that the construction would pose "health risks" to children nearby, and might also create flooding. One guy even claimed that the RF would hurt migrating salmon.

It also appears that the FCC's application processing may have been put on hold for several years while a zoning dispute between the applicant and these citizens played out in the local county government and courts.

To counter the wildlife complaints, the applicant hired consultants to perform a "Biological Assessment" and a separate "Avian Risk Assessment". Those were in turn sent to the U.S. Fish and Wildlife Service (FWS) for its review. The FWS took a couple of years to think about it and, ultimately, gave the project the thumbs up – even though the FWS recognized that, birds being birds, it was likely that at least some birds would be killed by the towers.

The applicant also had to retain a professional to conduct a field survey to determine any possible adverse effects on nearby historical sites. That professional did double duty, providing a separate review and analysis of any potential effect on religious sites of significance to Native Americans in the area. Separate notices of the proposal were also sent to various tribes through the FCC's notification processes.

Even after the EA (based on all these studies and more) indicated that the proposal would not cause problems, and even after the local land use authorities signed off on eve-

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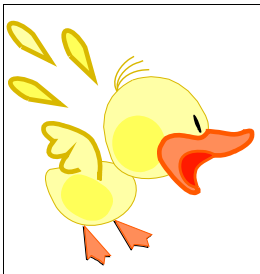
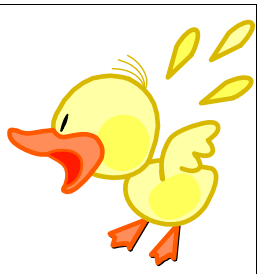


Like sand through the hourglass . . .

As the Bird Turns



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[*Previously, on "As The Bird Turns":* In 2002 a number of advocates for the avian asked the Commission to undertake a detailed environmental analysis of just about every new communications tower in the Gulf Coast Region. The chore would have included preparation of environmental assessments (EAs) of almost 6,000 towers that had already been constructed. The avian avengers also wanted the Commission to perform more detailed review (with opportunity for public comment) of new tower proposals *before* they get granted.

[In 2006 the Commission told the avian avengers that the FCC would not revisit the zillions of towers that had already been constructed. The birders took the Commission to court and, earlier this year, the court concluded that the FCC had not been appropriately respectful of the dictates of the Environmental Protection Act or the Endangered Species Act. The court shipped the whole matter back to the FCC for further action, specifically directing the FCC to craf some process to alert the public of pending applications so that the public may be meaningfully involved in the environmental evaluation of those applications.

[And now, the latest installment of "*As The Bird Turns*".]

Since the FCC will apparently have to adopt some form of pre-approval public comment for new tower construction, the IC seems intent upon shaping that process.

With more FCC proceedings looming and momentum clearly favoring the avian avengers, a number of groups representing various communications interests – including the NAB – have coalesced and, as "the Infrastructure Coalition" (IC), tried to get ahead of the curve by filing their own petition for rulemaking. Apparently conceding that, because of the court's decision last February, the FCC will have to adopt some form of pre-approval public comment for new tower construction, the IC seems intent upon shaping that process.

The IC has proposed a public notice process for antenna structure registrations (ASRs) similar to the current assignment /transfer of control application process. Under the process, certain new ASR requests would be subject to petitions to deny. The new process would be limited to applications proposing to register new antenna structures, increase the overall height and/or change the lighting and marking on existing structures.

Under the IC's proposal, following public notice of an ASR application, petitions to deny would be due within 14 days, followed by a 10-day period for oppositions and another five-day period for replies. (The public notice would be available on-line at the FCC's website, but not necessarily published elsewhere, *e.g.*, in the Federal Register.) On Day 21 following the public notice, if no petition to deny has been filed, the Commission would either grant the application (or, if circumstances warrant, deny it). If a petition were filed (or if the Commission elected to do so on its own motion), the application would be "off-lined" for 30 days. At the end of that 30-day period, the Commission would be expected to act on the application – grant, deny, or require the applicant to submit an EA (if no EA had already been submitted). The Commission could, however, still give itself one final 30-day period. And at the end of that second 30-day period, again the FCC would be expected to grant or deny the application or require an EA.

Any submission of an EA along the way would re-set the clock back to zero, starting back up the public notice/petition to deny/ etc. process.

A number of other communications companies, including Sprint and AT&T, support the IC proposal, subject to various tweaks generally designed to expedite the process. (Of particular note: United States Cellular Corporation (USCC) suggests that the FCC should be required to act one way or the other on any application within six months – otherwise, the application would be automatically granted.)

As might have been expected, components of the avian avengers expressed concern that the proposed timelines would not be sufficient to allow for meaningful public involvement. While they claim to agree that the process should be expedited, they advocate a 60-day petition to deny period with public notice available both on the Commission website *and* in the Federal Register. They also reject the IC proposal that routine requirements for petitions

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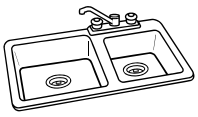

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revenue limits and the control tests. After the sale is completed and an official consummation notice has been filed, the staff will update the FCC's database to reflect the extended expiration date.

Importantly, we understand that no extension will be issued until *after* the deal has been consummated and the permit is held by a "small business" – but no extension can be granted if the permit has already expired. That means that anyone hoping to take advantage of this new provision should be sure to get the necessary assignment/transfer application filed *and granted* with enough time to get the deal closed *before* the permit is set to expire. (Normally, that kind of application takes at least 45-60 days to get granted in simple, uncontested situations.)

New Attribution Levels – The multiple ownership rules limit the amount of financial investment – debt or equity – that certain entities can provide to a licensee. Generally, these limits apply to entities which hold other stations in the same market and entities which provide programming to the licensee. Under the new rules, attribution can be avoided as long as the investing entity's constribution is limited as follows: either (a) combined equity and debt of up to 50% in the small business, or (b) total debt of up to 80% of the asset value of a station being acquired if there is no equity ownership interest. (The current rules limit such debt or equity interests to 33%.) These changes to the attribution rules will also affect eligibility for new-entrant bidding credits in future broadcast spectrum auctions.

Non-discrimination Requirements – As of July 15, discrimination in broadcast station sale transactions will be formally prohibited. The uncharacteristically succinct new rule reads, in its entirety: "No qualified person or entity shall be discriminated against on the basis of race, color, religion, national origin or sex in the sale of commercially operated AM, FM, TV, Class A TV, or international broadcast stations (as defined in this part [of the FCC's rules])." It is not clear to what extent (if at all) discrimination by private parties in the sale of broadcast stations has historically occurred, but from July 15 on any such discrimination will be officially against the rules. Eventually, the FCC will require assignment/transfer applicants to certify that they have complied with this new rule. In the mean time, though, if you are negotiating the sale of your commercial broadcast station, do not discriminate on the basis of any of these categories.

If you are negotiating the sale of your commercial broadcast station, do not discriminate on the basis of race, color, religion, national origin or sex.

As a final note of caution, the FCC's public notice of these new rules indicated that broadcasters, when renewing their licenses, will have to certify that (a) their advertising contracts do not discriminate on the basis of race or gender and (b) such contracts contain nondiscrimination clauses. According to the Commission, the goal here is eliminate "no urban /no Spanish" provisions that are purported to have been included in advertising contracts in the past. It does not appear, however, that the Commission plans to include this specific prohibition in any rule – rather, the FCC apparently intends simply to insert in the license renewal form a mandatory certification that the licensee has complied with that prohibition. As a precautionary matter, even though the next renewal cycle is still several years away, it would be prudent for all broadcasters to revise all of their advertising agreements to include a statement that the broadcaster does not practice or condone discrimination in the sale of advertising time.

(Continued from page 6)

rything (based on extensive local proceedings), the Commission still had to invite further public comment on the EA in 2007, and sure enough, a local community group responded. (Their response was late, and the FCC was not inclined to give them an extension of time since the group obviously knew about the proposal and the deadline for comments – but in the end, the Commission elected to consider their comments anyway.)

The result was a 20-page, single-spaced letter, containing more than 100 footnotes, in which the Commission's staff concluded that the applicant had jumped through all the right hoops the right way. And so, more than eight years after the application was filed, it was granted.

While this case ultimately worked out well for the applicant (at least we assume so – its application was granted, after all), it provides another sobering reminder of the seriousness of environmental compliance and the difficulties that can befall an applicant whose proposed site is subject to this kind of challenge. In some instances, of course, an applicant may have no choice – the only available and suitable site may be one that is bound to generate this kind of controversy. But if there is any choice at all, prudence dictates that the non-controversial alternative may be the best way to go, even if it has its own drawbacks. The effort, expense, delay and uncertainty inherent in the EA review process constitute factors which can weigh heavily against even the most desirable of sites.

Copyright Office plays catch-up ball

Copyright Office Considers Distant Digital Royalty Rules

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Ten years after televisions stations began digital broadcasts and just 260 days before digital completely replaces analog on February 17, the U.S. Copyright Office (CO) finally accepted that the digital transition will occur, issuing a Notice of Proposed Rulemaking (NPRM) regarding the retransmission of distant digital signals pursuant to the cable statutory license. The NPRM builds on comments received through a Notice of Inquiry (NOI) issued in 2006 to clarify existing rules and the Statement of Account forms which must be filed by cable systems.

Section 111 of the Copyright Act allows cable operators to retransmit a television station signal pursuant to a statutory license, eliminating the need to go to each and every copyright owner (which could be either the station itself or the source – *e.g.*, the independent program producer or distributor – from which the station obtained the programming) for permission to perform copyrighted works. This doesn't mean that cable operators avoid having to pay copyright royalties at all; rather, it merely provides a convenient (at least for the cable operator) way of taking care of that pesky obligation. The process calls for cable operators to make their royalty payments directly to the Copyright Office on a semi-annual basis for carriage of stations from outside the local market; those funds are then distributed to the copyright owners based on a formula outlined in Section 111.

In 2005, several copyright owners filed a Petition for Rulemaking with the Copyright Office when it became clear that the applicability of this statutory license to the multiple signals provided through digital transmission was decidedly unclear – partially because neither Congress nor the FCC has yet specified whether a cable system must carry every multicast signal offered by a broadcast station. The Copyright Office agreed a proceeding was necessary, noting that there is nothing in the Copyright Act, the legislative history of that Act or the implementing rules which limits applicability of the statutory license to analog signals; at the same time, there is no guidance with regard to the royalties pertinent to either a digital simulcast during the remainder of the transition period or any extra distant digital signals.

The key issue is the weight to be accorded to a distant digital signal for purposes of distributing royalties to the copyright owners. Each cable system's royalty obligation is primarily based on the cable system's gross receipts. The Copyright Office does not distribute funds equally to all copyright owners; rather, money is parceled out on the basis of several factors, including the type (independent vs. network vs. educational for distant signals) and location of the broadcast station, as well as whether the station is local or distant to the cable system.

The key issue is the weight to be accorded to a distant digital signal for purposes of distributing royalties to the copyright owners.

The earlier NOI asked whether a digital simulcast should be reported as a station separate from its analog counterpart. It also sought comment on the treatment of the extra "multicast" channels of each broadcaster that are carried by a cable system. Noting (with considerable understatement) that "Section 111 is not a model of statutory clarity" because the statute uses the terms "station" and "signal" interchangeably throughout, the NPRM turned to the Communications Act and related FCC regulations for assistance. The FCC addressed the question to some extent in 2001 by stating that a broadcast station could treat its analog and digital signals differently for purposes of retransmission consent (which allows a broadcaster to control who can carry its signal, and under what terms it can be carried) during the DTV transition period.

The CO's NPRM concludes that the FCC intended to protect broadcast "signals" rather than broadcast "stations", an interpretation supported by the legislative history of Section 325 of the Communications Act. Finally, the NPRM notes that the actual royalty computation and distribution scheme assigns different values to different types of distant signals, with independent station programs assigned one "distant signal equivalent" (DSE) and non-network programs on network stations and noncommercial programs each assigned one-quarter DSE.

The NPRM relies on this last factor to propose that cable operators *not* be required to pay additional royalties for the digital simulcast of an analog signal because "there is no unique non-network television programming retransmitted by the cable system". In other words, if a TV station is simply transmitting the same program simultaneously, but in two different formats (*i.e.*, analog and digital), the cable operator would not be required to pay extra royalties.

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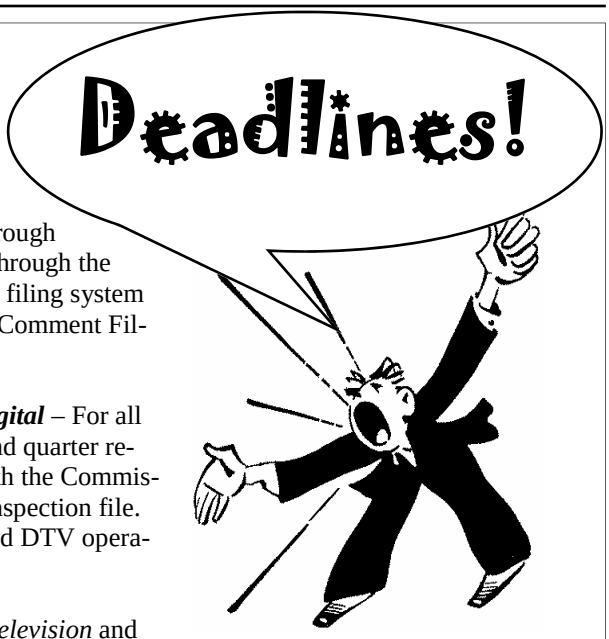

July 10, 2008

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 second such report but the first to cover an entire quarter. The period to be included is April 1 through June 30, 2008. Starting this quarter, these reports will be filed through the Consolidated Data Base System (CDBS), the normal electronic filing system for applications and reports, rather than through the Electronic Comment Filing System (ECFS).

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.

July 30, 2008

Rule Making to Promote Diversification of Broadcast Ownership – Comments are due to be filed with the Commission either on paper or through the Electronic Comment Filing System (ECFS).

August 1, 2008

EEO Public File Reports – All *radio* and *television* stations *with five (5) or more full-time employees* located in **California**, **Illinois**, **North Carolina, South Carolina**, or **Wisconsin** 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 **North Carolina** or **South Carolina** 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 **Illinois** or **Wisconsin** 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 **California**, **North Carolina**, or **South Carolina** 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 **Illinois** or **Wisconsin** must file a biennial Ownership Re-

(Continued on page 11)

Countdown to ecstasy?

Focusing On The Fine Points

By: Lee G. Petro
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With the major DTV rulemaking proceedings out of the way, the Commission has been working on fine-tuning the remaining DTV Transition issues as they crop up.

Most significantly, at the end of May the FCC lifted the freeze, in place since 2004, on maximization applications and channel change requests. The Commission had imposed the freeze on these filings to simplify the process of finalizing the post-transition DTV Table. With the final DTV table of allotments now largely set in stone (not counting a relatively small handful of special cases), the Commission opened a window from May 30 - June 20 for the submission of applications and petitions for rulemaking. These could include maximization applications (to expand beyond a station's original replication facilities) and even DTV channel change proposals.

All applications and petitions filed during this window will be reviewed to determine preliminarily if there are any timely-filed conflicting proposals. If a proposal is not subject to any conflicts, the proposal will presumably be granted promptly, to permit the station to effectuate the changes in advance of the February, 2009, transition deadline.

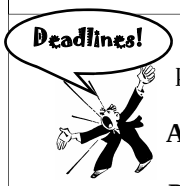
If the Commission does identify one or more conflicting proposals, the Commission will go ahead and grant all the conflicting proposals, with the condition that the parties resolve their conflicts within 30 days. If the parties cannot resolve the conflicts, then the Commission will dismiss the conflicting authorizations, and require the parties to re-file. Applications filed (or re-filed) after June 20 are to be processed on a first-come, first-served basis.

The FCC warned parties that they could not rely on these submissions for seeking extension of the February 17, 2009, transition deadline. We expect to have, in the very near future, information about the number of mutually-exclusive proposals identified by the FCC, and we will provide an update on our blog (www.commlawblog.com) to pass along important information released by the Commission. When it lifted the freeze on full-service modifications, the Commission also included language suggesting that the freeze on Class A TV stations may be lifted in the near future.

The Commission has also released a public notice reminding the public and TV broadcasters that the Second Quarter Consumer Education Initiative Reports (Form 388) are due no later than July 10, 2008. When the Commission first imposed the Form 388 requirement in April, it required the form to be filed through ECFS as, in effect, a rulemaking comment. Perhaps recognizing that such a report might better be filed like most other reports – *i.e.*, through CDBS – the Commission has now created a Form 388 in CDBS, and has ordered reporting broadcasters to file through CDBS from here on out.

Lastly, the Commission has issued an Order on Clarification relating to two aspects of its December, 2007, Report and Order. First, the Commission clarified that certain announcements made to the public over television stations relating to the early termination of analog facilities, or the extension of time to construct post-transition facilities, may be combined into a single spot, rather than aired as separate spots, to satisfy the Commission's requirements. The Commission also clarified that licensees do not have to update their Event Information Table on a real-time basis when circumstances change the program line-up. The new PSIP standard became effective May 29, 2008, and the Commission left open the possibility of changing the real-time requirements should the PSIP standard change in the future.

These various tweaks are to be expected as the Commission wraps up the broad strokes of the DTV transition and sets to work on various details. We can expect more of the same during the remaining seven-month countdown to transition. We will keep you updated with these changes as they occur. Always check our blog for late-breaking information.



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port. All reports filed must be filed electronically on FCC Form 323 or 323-E.

August 29, 2008

Rule Making to Promote Diversification of Broadcast Ownership – Reply comments are due to be filed with the Commission either on paper or through the Electronic Comment Filing System (ECFS).

Left Behind

Conversion – A Path To Salvation For Analog LPTV/Class A/Translators?

By: Patrick Murck
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Despite the years-long hype, the fact is that, when DTV Transition Day arrives next February, there will still be plenty of analog television signals available to the over-the-air viewing public. And it appears that, at long last, the powers-that-be may be taking that reality seriously and may be looking for ways to address it. But those efforts are arriving very late in the process.

The fantasy underlying Transition Day, of course, has been that we will all wake up on February 18, 2009, and find nothing but digital television service available over-the-air. And, true enough, the vast majority of full service over-the-air TV stations will be limited to digital at that point.

But TV Translator, Class A TV, and Low Power TV stations are *not* been subject to the same transition deadline as their full-service compadres, and the FCC has not made an effort to find digital channels for them. So as of now it is likely (if not 99.9% certain) that, on February 18, 2009, a very substantial number of those less-than-full-service licensees will still be plugging away in an analog world. Since there are some four times as many less-than-full-service TV stations (just over 7,000 in all) as full-service stations (fewer than 1,800), there will clearly be analog service widely available post-Transition.

The Feds may finally see that such stations need attention now in order to avoid disaster in February.

But, you say, can't we be sure (despite the FCC's best efforts) that there will still be a boatload of analog TV receivers in general use? So the remaining analog operators will still have an audience, right?

Not so fast. The government has taken unrelenting steps to minimize the number of sets out there that receive only analog signals. For a couple of years already retailers have been required to sell sets with DTV tuners and, most recently, have been prohibited from selling analog-only sets. Extensive point-of-purchase notices have been required to educate consumers about the importance of buying DTV receivers.

And for those die-hards who are not planning to buy a new DTV receiver, the government has undertaken an extensive campaign to encourage the distribution of digital-to-analog converter boxes which will permit analog receivers to display programming transmitted digitally. Through a Congressionally-authorized-and-funded plan being implemented by NTIA, the government is underwriting $40 of the total cost (approximately $60-$80) of converter boxes for anyone who wants one.

The problem is that virtually all the converter boxes that were available before the first round of government $40 coupons expired did not include "pass-through" capability which would allow easy reception of analog signals. Instead, they completely blocked analog signals. In other words, once you plug your analog set into such a converter box, your set will display analog transmission ***only*** if you disconnect the converter box or install a by-pass wire around it. This would obviously present a disincentive to trying to watch analog programming. More recently, retailers have started to offer analog pass-through boxes, which still block analog signals while they are turned on but will allow analog signals to be viewed if the boxes are turned off and you put aside the converter box remote control and use your TV set remote control.

So if you're a TV translator or analog Class A or LPTV station, you might be worried about what will happen come February 18. After all, if you are able to broadcast only analog signals, but the federal government has succeeded in convincing the over-the-air audience either to buy DTV receivers or install on their analog receivers converter boxes that effectively block analog signals, what's going to happen to your audience?

A trade association (ably represented by FHH member Peter Tannenwald) representing a significant chunk of the LPTV/Class A industry felt compelled to go to court in March to seek an order requiring the FCC to take action to assure the availability of pass-through-capable converters. While the court declined to grant the requested relief, the filing of the lawsuit attracted much needed attention to the issue, which had been largely downplayed by the government up to that point.

It appears that the Feds may finally be getting the message that such stations – and their audiences – need some attention now in order to avoid disaster in February. The FCC has released three Fact Sheets providing detailed descriptions (complete with pictures!) of how to set up a converter box. One of these three Fact Sheets is specifically directed to viewers who intend to watch analog stations on analog receivers through a converter. And in June the Commission held a "consumer education workshop" focused solely on converter boxes. One interesting piece of information that came out during that workshop is that if you like to record

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FHH - On the Job, On the Go

Kudos and congrats to our colleagues **Joe Di Scipio** and **Howard Weiss**, who were both recently honored by the Federal Communications Bar Association. **Joe** was given the FCBA Distinguished Service Award for exemplary service to the bar over an extended period. **Howard** was given the FCBA Foundation Volunteer of the Year Award for leadership and dedication in carrying out the charitable initiatives of the Foundation. (**Howard** is now a two-time winner of that award.) Way to go, guys.

And ditto on the kudos and congrats to **Frank Montero**, who has been named to the Minority Media Telecommunications Council's Hall of Fame. **Frank** will be inducted during the MMTC's Annual Access to Capital and Telecom Policy Conference in Washington on July 21-22. At the conference **Frank** will also be participating in an "Ownership Summit" panel moderated by **Commissioner Tate**.

Raymond Quianzon will attend the O.P.A.S.T.C.O. Summer Convention in Quebec from July 12-16.

On July 18, the other Frank, **Frank Jazzo**, will discuss broadcast-related issues (along with NAB Executive VP **Laurie Knight**) at the "FCC, Legal & Legislative Issues Luncheon" at the annual convention of the Arkansas Broadcasters Association in Little Rock.

And our *Media Darling of the Month* is **Harry Cole**, who was quoted in a recent *Washington Times* article about the proposed XM/Sirius merger *and* in an *Inside Radio* article about the death of George Carlin.

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to deny be deemed applicable. And in a twist on USCC's proposed tweak, the birders propose that, if the FCC fails to act on an application within six months, then the application should be deemed to have been denied. In addition to this, the avian avengers would cease all tower registrations and re-registrations until the FCC's EA is completed and the U.S. Fish and Wildlife Service has been consulted to prepare a programmatic environmental impact statement. According to their comments, the birders are planning to file their own formal rulemaking proposal shortly.

ASRs are technically the domain of the Wireless Bureau, and not the Media Bureau. Because of that, this particular battle may seem a bit arcane and irrelevant to many broadcasters. Think again. Broadcast applications involving new towers require environmental certifications, and no permit will in any event issue until the subject tower has been issued an ASR. In the past the issuance of an ASR has not generally been a problem, largely because ASRs could ordinarily be obtained through the no-muss-no-fuss process (with no provision for pre-grant objection) which the court has now tossed. As a result of that development, if a new ASR is required, the potential for delay is now considerable. Obviously, the procedures and timetables that are ultimately imposed will determine how big that potential delay could be. Because of that, we suggest that all broadcasters pay attention to this proceeding as it progresses.

(Continued from page 12)

programs from full service stations on your VCR, but you use a converter box, you won't be able to set your VCR to record from more than one channel without returning to your TV set. The VCR will now have to remain tuned to Channel 3 or 4, and the channel selection will have to be done in the converter box, which has no provision for programming to change channels automatically.

In the private sector, the NAB has been pushing for assurances that ample numbers of converters with analog pass-through capability will be available, particularly in the Wilmington, NC area which will serve as a test site for the transition in September.

An important point to remember is that if your analog TV set is hooked up to a cable or satellite service, you will have nothing to worry about, and you will not need a converter box (unless if you have extra sets not hooked up to your pay service). The FCC has ordered cable and satellite operators to take care of converting digital broadcast signals to analog until at least 2012, so your cable/satellite provider should keep giving you a signal that you can watch on any TV set.

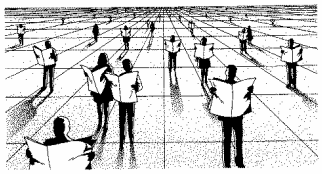
Additionally, Congress is looking to make $65 million available to non-full-service TV licensees to assist them in the digital transition, although the money is not available yet, and the present law requires grant priority to non-profit licensees and stations in communities of under 10,000 population. The grants will be administered by the National Telecommunications and Information Administration (NTIA), which in a separate grant program for translators decided not to give any money to stations in communities with a population over 20,000.

Are you as a broadcaster confused about who will be able to watch what starting February 18, 2009? Think of how confused your friends and neighbors must be, especially technically challenged senior citizens. We are now less than eight months away from the Transition, which leaves precious little time for educational efforts to take hold. We'll keep our fingers crossed.

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

Updates on the News

Embedded advertising in the cross-hairs – As we were about to send this issue to print, the Commission has released a Notice of Inquiry and Notice of Proposed Rule Making (NOI/NPRM) expressing concern about "embedded advertising" – and its two primary components, "product placement" and "product integration" – in current programming, particularly as those practices implicate the sponsorship identification rules. The FCC describes "product placement" as the mere use of commercial products as props, while "product integration" entails the inclusion of such products in the dialogue and/or plot of a program. It has recently been reported that, with the increased use of digital recording devices, TV audiences in particular are affirmatively skipping traditional commercial breaks; accordingly, advertisers, with the cooperation of program producers, have gravitated toward embedding techniques to assure access to the audience. The Commission fears that such embedding, when combined with established sponsorship ID techniques, may not adequately inform the public of the nature – or even the fact – of the embedded advertising. The NOI/NPRM is short on detail. It simply describes the concerns which have been expressed by some groups about embedded advertising, and seeks comments on those concerns. Interestingly, the FCC does suggest, in the NPRM portion of the item, that sponsorship ID notifications on TV be required to be of a certain minimum size and on-air for a particular length of time. The NPRM does not indicate what size/length the agency might have in mind, but it does allude to political broadcasting requirements specifying lettering at least four percent of the vertical picture height and duration of at least four seconds. We will report on the NOI/NPRM in greater detail in next month's *Memo to Clients.*



Power grab for HD Radio ™? – In a tacit admission that the HD Radio ™ digital audio service may not deliver all that everybody hoped in the way of signal strength, a group of broadcasters and equipment manufacturers has filed a proposal for increased HD power by up to 10 dB . . . except that the increase would not necessarily apply to some Super B stations (because higher digital power for those stations were found to have potential adverse effects on the analog signal of first adjacent Class Bs). The proposal would, according to its proponents, result in significantly greater HD coverage areas and improved signal penetration into buildings. Of course, the proponents say nothing but nice things about HD service, but one may well wonder why, if HD service is everything it's cracked up to be, a significant power increase might be called for. Additionally, the fact that even the proponents – who seem to be avid cheerleaders for the HD service – have to carve out some exceptions because of interference concerns does not inspire confidence. While it may be possible that interference would be limited to a particular class of station in particular circumstances, the acknowledgment of any potential interference at least establishes, well, that there is a potential for interference at all. The proposal was filed as a letter in MM Docket No. 99-325. As of this writing the Commission has not requested comment on it.

Plus ça change, plus c'est la même chose – Rep. Anna Eshoo (Gesundheit!) has introduced the Commercial Advertisement Loudness Mitigation Act (H.R. 6209). If signed into law, her bill would require the FCC to prescribe regulations to assure that: (a) ads accompanying video programming (from broadcasters and/or MVPDs) not be "excessively noisy or strident", and (b) ads not be "presented at modulation levels substantially higher" than the programming they accompany; and (c) the average maximum loudness of ads not be "substantially higher" than the accompanying programming. Putting aside the obvious observation that her proposals are lacking in necessary definitions of important terms – how should we define "strident" or "excessively noisy", for example? – we are constrained to note that Rep. Eshoo appears not to be aware that the FCC has already struggled with the issue of loud commercials for more than 40 years. In 1962, the FCC commenced an inquiry into that very question. (Check it out – Docket No. 14904, 27 Fed. Reg. 12681 (December 21, 1962).) After three years of fact-finding, though, that inquiry was terminated "with little new information gained". Between 1965-1973, the FCC conducted spot surveys to determine whether any broadcasters were deliberately jacking up their levels during spots – but no such evidence was found.

In 1979 the FCC opened yet another inquiry into the subject. (You can look that one up, too – BC Docket No. 79-168, 44 Fed. Reg. 40532 (July 11, 1979).) After five more years of tests, public comments, industry studies, etc., etc., the FCC concluded that "due to the subjective nature of many of the factors that contribute to loudness, it would be virtually impossible to craft new regulations that would be effective." The FCC observed that "loudness" includes many factors, such as "audio processing, mood of the listener, listener's experience with the product being advertised, and method of presentation."

It appears that Rep. Eshoo eschewed a look back at the record before she introduced her bill. Or perhaps she has been able to ferret out information that the FCC's own multi-year efforts failed to – although one could not tell that from her bill. Ideally, this item will die on the vine, leaving the Commission free for more useful and fruitful activities.

FM ALLOTMENTS ADOPTED –4/22/08-6/19/08

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
TX	Harper	101 miles W of Austin, TX	256C3	07-211	TBA
Guam	Dededo		243C1	08-12	TBA

FM ALLOTMENTS PROPOSED –4/22/08-6/19/08

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
OR	Prairie City	177 miles NW of Boise, ID	272C	08-67	Cmts-08/04/08 Reply-08/19/08	Accommodation Substitution
WY	Laramie	51 miles NW of Cheyenne, WY	283C2	08-58	Cmts-08/04/08 Reply-08/19/08	Drop-in

Notice Concerning Listings of FM Allotments

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

(Continued from page 9)

But a clear corollary to this is the proposal that the cable system must pay royalties for each separate and distinct multicast signal. The royalties would be determined by the DSE value of each multicast signal as discussed above.

The NPRM admits that Congress could not have contemplated multicasting when it passed the Copyright Act of 1976, a circumstance requiring further massaging of these rules with regard to special broadcast services that can be offered in digital format. Consistent with the simulcast/ multicast dichotomy described above, the NPRM proposes that a separate multicast channel offering a variation of the same programming would be considered the same program-related event, as it is "intended to be seen by the same viewers…related to each other since they are different perspectives of the same event, and they are an integral part of the same broadcast." The example offered is a station which simply offers a different camera angle of the same event (such as a baseball game), but we assume this would also include a multicast station offering Spanish-language commentary of such a sporting event.

These are just the highlights of the proposed rules. Other proposals of more specialized interest address the retransmission of digital audio broadcast signals (a digital audio signal is to be treated the same as an analog signal), the marketing of digital broadcast signals, and various equipment issues. The Copyright Office refused to propose rules for the Internet retransmission of digital broadcast signals, preferring to address that in a future proceeding after it presents findings to Congress on that issue later this year.

Comments are due to the Copyright Office on July 17, 2008. Reply comments are due on September 2, 2008.

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