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

Memorandum to Clients

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

The time to start is NOW!!!

Political Broadcasting 101

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As the country segues from primary season to general election season, now is a good time for broadcasters to check their policies and procedures on political advertising to ensure that their stations remain in compliance during the coming months. The broadcast of political messages is covered by a complex set of laws and regulations and ***all*** station personnel involved with programming, sales and traffic should be aware that decisions about what ads to run, when to run them and how much to charge for them may have serious consequences for the station.

> *A crash course highlighting a few issues that broadcasters should be thinking about before the political broadcast season begins in earnest*

A complete review of the federal political broadcasting rules is far beyond the scope of our humble Memo to Clients. Nevertheless, what follows is a crash course highlighting a few issues that broadcasters should be thinking about before the political broadcast season begins in earnest.

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Who's who?

One of the first things stations need to do is determine which elections are likely to generate requests for advertising time. On November 4, 2008, the general *federal* election will include races for the offices of the President, Vice President, all of the House of Representatives and one-third of the Senate. Several state and local offices also will be up for election on November 4. Your local board of elections should be able to give you a list.

Once you know which offices are up for election, you will need to decide which of those races will be permitted to buy time on your station. ***All*** candidates for ***federal*** offices are entitled to "reasonable access" to your station. That is, you ***must*** sell time (within certain limits) to the candidates for President, Vice President and the US Congress.

By contrast, candidates for ***state*** and ***local*** office have ***no absolute right*** to reasonable access – stations can refuse to sell time for such races. If, however, a station sells ads to one candidate for a particular office, the FCC's "equal opportunities" rule requires that station to sell ads to all qualified candidates for that particular office. Stations may pick and choose among the state and local races, however. For example, a station could choose to accept ads from state senate candidates but refuse them from county council candidates.

Non-candidate advertising – advertising from groups (including "public interest" groups) or individuals other than candidates or their committees – are never entitled to access as a matter of right. Stations are free to accept or reject "issue ads" as they see fit, although certain liabilities and record-keeping requirements may be attached to accepting such ads.

What's what?

One of the most important things the station will do prior to the election season is prepare its political disclosure statement – a written statement that will be provided to candidates that

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Update from Planet Kidvid

Processing standard mutates into program mandate

Not enough KidVid? That'll Be $20K!

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The FCC has issued its first fine to a station for failure to have a sufficient amount of children's educational/informational programming, as opposed to failure to have sufficient record-keeping with regard to programming. The victim in this case was a Class A television station that was hit with a $20,000 fine for failure to air "core" children's programming for a portion of its license term. According to the Commission, this failure constituted a violation of Section 73.671 of the Commission's rules. Adding insult to injury, the Commission then more that doubled the base fine for Section 73.671 violations, from the standard $8,000 to a whopping $20,000.

The problem is that the rule cited does ***not*** contain an absolute requirement that three hours per week – or *any* specific amount – of core programming be broadcast.

For purposes of the kidvid rules, "core programming" is defined as educational or informational programming for children ages 16 (and under) which is: (a) aired between 7:00 a.m. and 10:00 p.m.; (b) a regularly scheduled weekly program; (c) at least 30 minutes in length; (d) described in the station's children's television programming report; (e) listed in information provided to program guide publishers; and (f) broadcast with the E/I logo or "bug".

Section 73.671 of the Commission's rules specifies that a station that has broadcast an average of three hours per week of core programming will be presumed to have met the requirements of the Children's Television Act, and it can have its license renewed routinely by the FCC's staff. The rule also provides that a station may demonstrate that it has fulfilled its obligations through an alternate package of programming that shows an equivalent commitment to the educational needs of children. Further, the rule specifies that a station which does not meet the processing standards for routine renewal will be referred to the full Commission, where the licensee will be provided a full opportunity to comply with the Children's Television Act.

In this case, after the station obtained its Class A license, it sought out good quality E/I programming but did not regularly air core programming for approximately three years, although the station did undertake other initiatives for children. Starting in the second quarter of 2004, the licensee began airing core children's programming. The licensee also submitted information to the Commission about its other efforts for children.

The Commission, however, did not take that additional information into account. Moreover, the staff did not refer the matter to the full Commission as provided by the rule. Instead, the staff's decision merely stated that the failure to broadcast at least three hours per week of core programming constituted a willful and repeated violation of Section 73.671 of the Commission's rules. There was no discussion whatsoever of the fact that the rule section in question establishes an average of three hours per week as a processing standard, ***not*** an absolute requirement. Indeed, there is a significant First Amendment question as to whether the Commission could legally establish a fixed requirement that broadcasters air a particular amount of programming of a certain type.

Here, however, the Commission's staff simply ignored those issues and assessed a substantial fine. There also was very little discussion of how it arrived at the amount of the fine beyond stating that the base fine is $8,000. Clearly, the Commission's staff viewed the violation as a serious one, since the fine assessed was two and one-half

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Focus on FCC Fines

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This is a test, this is only a ($5,000) test – Many readers may recall how a test emergency alert signal is followed by the reassuring phrase "this has been a test." In contrast to using those words – or any words – a Virginia FM station interrupted programming, broadcast the EAS tone . . . and then returned to regular programming. The result? A $5,000 for the unaccompanied tone.

Having heard the EAS tone with no explanation, an angry (or perhaps panic-stricken) listener fired off an e-mail reporting the incident to the Commission. In response, the FCC sent an inquiry to the station. (Urgency was apparently not a concern to the Commission – the inquiry went out two months after the complaint arrived.) The station replied that the alert signal was aired by mistake.

According to the station, one of its employees was listening to an EAS weekly test on backup equipment. Unbeknownst to the employee, the back-up gear was hooked up to the studio, providing a data connection link to the live transmission system. The station explained that the back-up equipment was rigged to trigger a live broadcast of the EAS tone –so when the EAS test was fired up on the back-up, the tone went out live on the air. Oops. The station returned to normal programming after the tone aired and the chief engineer logged the mistake in the EAS log.

Although the FCC recognized that the alert was aired by mistake, it went digging through its rules to find a reason to fine the station. Buried in footnote 6 to the "Analog and Digital Broadcast Station" table of Subsection (a) of Section 11.11 of the FCC's rules is a requirement that the EAS two-tone signal can be used ***only*** before an actual emergency message or a monthly test. The FCC also noted that every licensee is charged with responsibility for "preventing accidental operation of the equipment used to generate the EAS tone."

This $5,000 fine should alert stations to take all measures possible to avoid an accidental trigger of the EAS system. The facts of this case should also remind stations that an unhappy listener can start an FCC investigation by doing little more than writing a quick e-mail to the FCC.

Radio stations fined for broadcasting – A Florida station faces an $8,100 fine for broadcasting on the wrong frequency while a Michigan station is looking at a $10,000 fine for broadcasting 18 months after its license expired. In both cases, the stations were fined after the FCC received complaints about the broadcasts.

The Florida station held a valid FCC license to transmit at 93.3 MHz using a Shively antenna. However, when an FCC agent paid the station a visit, the general manager explained that its signal did not work very well at 93.3 MHz, so the station had relocated itself to 92.7 MHz. The station corrected its frequency after the inspector's visit. On a follow-up visit, the FCC noticed that although the station corrected its frequency, it was broadcasting with approximately three times its authorized power through an unauthorized antenna. The FCC fined the station $8,100 for the failure to operate in accordance with its license.

In the Michigan case, the station was fined $10,000 for broadcasting with an expired license. The Battle Creek AM station's license to operate (at 1500 kHz) expired in October, 2004. FCC agents from Detroit visited the transmitter in July, 2006, and determined that the station was still up and running. The agents contacted the licensee and advised it that its license had expired. However, the station continued broadcasting.

In its defense, the station explained to the FCC that it could not file a renewal application because it did not have a computer. The FCC did not accept that excuse. Instead, the FCC pointed out that even ten years ago, when it made electronic filing mandatory, Internet access was readily available at public institutions such as libraries. The station was fined $10,000 (the equivalent of 20 entry-level laptop computers).

Please press "submit" only once, do not reload page – In contrast to the station that failed to renew on time because it had no computer, the FCC fined a station for *not* using its computer properly. FCC rules require stations to submit renewal applications at least four months prior to their license expiration date. Several weeks in advance of its renewal deadline, a Michigan station went on-line, prepared its renewal application and thought that it had submitted the forms on time. Unfortunately, the station's staff had not in fact submitted the application at all. FCC staff determined that the station failed to complete the computer program in the correct order and failed to press one of the buttons dur-

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FCC Ponders Embedded Advertising ID's

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P.T. Barnum – or maybe it was H. L. Mencken – once supposedly said "You'll never go broke underestimating the intelligence of the American public". In some respects the advertising industry was built on the truth of that concept.

And then there's the FCC, which often seems to do its best to underestimate the intelligence of the American public.

Put the advertising industry and the FCC together, and it's like Diet Coke and Mentos – a near-explosive release of gas with considerable visual effects and, in the end, nothing really to show for it.

The FCC continues to try to protect an unwary public from the dangers lurking in (organ crescendo, please) embedded advertising.

With that introduction, we alert you to the latest development in the Commission's efforts to protect an unwary public from the dangers lurking in (organ crescendo, please) embedded advertising.

In response to several recent reports about the changing landscape of television advertising and some petitions for rulemaking from concerned citizen groups, the Commission has released a Notice of Inquiry and Notice of Proposed Rulemaking (NOI/NPRM) seeking comment on the increased use of "embedded advertising" in the forms of "product placement" and "product integration".

"Product placement", in the FCC's lexicon, refers to the insertion of branded products into programming in exchange for fees or other consideration. For example, when Simon, Randy and Paula are seen at the *American Idol* judges' table with over-sized, easily-identifiable cups of Coca Cola ® in front of them, that is almost certainly an instance of "product placement". "Product integration", by contrast, refers to the integration of a product into the dialogue or plot of a program. So when an episode of *The Apprentice* requires contestants to create a new food-item for sale at Burger King ® restaurants (with repeated references to Burger King ® woven into the dialogue and visuals throughout the show), you're looking at "product integration".

It is clear that use of both forms of embedded advertising is on the increase, presumably to make up for advertising revenues that are being lost as viewers use digital video recorders (*e.g.*, TiVo ®) to skip commercials (or as viewers simply watch programs commercial-free on the Internet). The NOI/NPRM cites one published estimate that "between 1999 and 2004, the amount of money spent on television product placement increased an average of 21.5 percent per year" and in 2005 "the net value of the overall paid product placement market in the United States increased 48.7 percent to $1.50 billion."

But the FCC's sponsorship identification rules haven't changed. They require only one announcement during the course of the broadcast of a sponsor's corporate or trade name (or the name of the product) when the sponsor offers consideration in the form of money, product or services in exchange for airing programming. They also contain several key exceptions that stand out in the era of embedded advertising:

- The sponsorship ID rules are not triggered when service or property is offered without charge or for a nominal charge. In other words, products can be shown in the background of a program or mentioned in dialogue as long as no payment occurs in exchange for their use and the extent of on-air display is not disproportionate to the subject matter. For example, an incidental reference to eating at Burger King ® would in many instances not require a sponsorship ID, but repeated statements by characters about the superiority of Burger King ® products – statements obviously designed to highlight Burger King ® – would need to be ID'd.
- The rules are not triggered when both the identity of the sponsor and the fact of sponsorship of a product or service are obvious.
- The rules apply only to broadcasting, *not* to the also-expanding realm of cablecasting.

Whether or not one agrees that the rules are a broadcast anachronism, neither the efficiency nor the efficacy of the FCC's response to the changing market is likely to instill confidence from interested parties. This proceeding was begun in response to a petition for rulemaking filed five years ago by Commercial Alert. (Interesting factoid:

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***(Embedded Advertising** - Continued from page 4)*

Commercial Alert also filed an identical petition with the Federal Trade Commission, alleging that product placement without full disclosure constitutes an unfair and deceptive practice in violation of the Federal Trade Commission Act. In response, the FTC held that product placement does not necessarily constitute false or misleading objective material claims about a product's attributes.)

Perhaps underestimating not only the intelligence but also the attention span of the average TV viewer, Commercial Alert also requested that the FCC mandate disclosure of sponsorship concurrently with any product placement and/or integration because "requiring disclosure only at the beginning or end of the program disadvantages viewers who might miss the announcement."

Think about the likely effect of a concurrent sponsorship ID requirement on the broadcast of sporting events, such as NASCAR, Major League Baseball or MLS Soccer.

We pause momentarily so that you, the reader, might contemplate that suggestion. Anyone who remembers "Pop-Up Videos" (from VH-1 ®) can envision what television with product placement or product integration would look like if "concurrent" sponsorship ID's were to be required. Even a single product placement would result in a distracting, in-program identification. Multiple product placements, as might be found in a feature film appearing on broadcast or cable television, would result in more time spent looking at subscripts or superimpositions than looking at programming. And then think about the likely effect of such a requirement on the broadcast of sporting events, such as NASCAR, Major League Baseball or MLS Soccer, where sponsors pay the event, the league and perhaps the broadcaster for the right to prominent placement of their logos or products. Will each such placement require its own concurrent ID?

Some commenters – notably the Washington Legal Foundation and the Freedom to Advertise Coalition – argued that the proposed rules would create a nuisance, at the very least, for viewers, and would raise very serious constitutional problems. Despite those concerns, the FCC has pressed forward with the NOI/NPRM.

The NPRM portion seeks comment on specific proposals that fall just short of the rigors sought by Commercial Alert. Specifically, the FCC proposes to change the sponsorship identification rules to require that announcements (1) have lettering of a particular size and (2) air for a particular amount of time – in effect, appearing to apply to all sponsorship ID situations the disclosure requirements imposed on political advertisements. However, the FCC also seeks "suggestions on any other requirements for these announcements." Recognizing the particular confusion embedded advertisements pose for children, the NPRM invites comment on whether more stringent rules should be applied to children's programming. The NPRM also asks whether all of these rules should be extended to cablecasting.

The NOI portion generally seeks comment on whether and how Sections 73.1212 and 76.1615 of the Commission's rules should be amended to ensure that the public's right to be informed about advertising is protected as embedded advertising increases. In true FCC fashion, the NOI asks every conceivable question applicable to these rules, seeking comment on the extent of embedded advertising, how the rules apply to every variation of embedded advertising, whether broadcasters are fulfilling their obligations under the current rules and whether the current exemptions are adequate. The Commission engages in similar interrogatory overkill relative to the concept of concurrent sponsorship ID.

It is hard not to be skeptical of the NOI/NPRM when the FCC once again appears to disregard the First Amendment rights of broadcasters much as it recently did with regard to the use of the related area of video news releases (VNRs). The reader might recall that the Commission issued a "reminder" to broadcasters as to how the use of VNRs as background in news programming might somehow violate sponsorship identification rules. (*See* the April, 2005, *Memo to Clients*.) Not content to leave well enough alone, the Commission followed this up with intrusive questionnaires sent to scores of broadcasters regarding their use of VNRs (*see, e.g.,* the April, 2006, *Memo to Clients.*). It then attacked Comcast for its use of VNRs, even though the sponsorship identification rules are not applicable to cablecasters (*see, e.g.*, the October, 2007, *Memo to Clients*).

We hope that when the comment period for this NOI/NPRM ends, the FCC will act in a way that respects the public's intelligence and ability to understand that television programs are sponsored by certain goods and services. Particularly, we hope the FCC will recognize that force-feeding this information to the public will only reduce the public's critical viewing abilities and the integrity of the medium at large. Unfortunately, given the Commission's historical (and somewhat hysterical) actions in this area, we are not optimistic.

Comments are currently due by September 22; reply comments by October 22. Let us know if you would like any assistance in preparing comments for submission in this proceeding.

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describes the station's political ad rates, time classes, and sales practices. The disclosure statement is not technically required by the FCC's rules, but it is vitally important that every station is clear, upfront and consistent about the types of advertising time it will sell, which races will be allowed to buy time and the rates the station will be charging for the time. Obviously, a written statement will be infinitely helpful to station personnel in this regard and can also serve to avoid disputes about what information may or may not have been relayed by station personnel in less formal, oral interactions.

The disclosure statement should be kept up-to-date, and all personnel involved with the sale of advertising time should be familiar with the disclosure statement and adhere to the policies set forth in the disclosure statement at all times. Sophisticated political campaigns keep a close eye on how much time their opponents buy and how much they pay for the time. Any discrepancies between the rates or access given to different candidates will almost certainly subject a station to complaints. In addition to information on the classes of time that may be purchased and the rates that will be charged for each class, the disclosure statement should include information on how and when preemptions may be made, payment policies, and any other station policies that could reasonably affect political advertising buys.

*Stations must keep a political file that includes records of **all** requests for political time made by or on behalf of any candidate.*

How much?

As part of preparing the disclosure statement, each station will need to determine the "lowest unit charge" (LUC) to which qualified candidates are entitled. Calculating the LUC can be tricky. Simply stated, the LUC is "the lowest rate of the station for the same class and amount of time for the same period." Put another way, it is the rate for any given class of time granted to the station's most favored advertisers once all discounts, bonuses and other considerations have been taken into account. Keep in mind that most stations will have several different LUCs because they sell several different classes of time (different day parts, preemptible/non-preemptible, etc.).

Not all political advertising is entitled to LUC rates. As a threshold matter, LUC rates apply only during the "LUC windows". For the general election, the LUC window begins 60 day prior to the general election date (*i.e.*, September 5, 2008). During the LUC rate window, the LUC rates must be offered to all qualified federal candidates and their authorized committees and all qualified state and local candidates and their authorized committees (assuming the station has decided to run ads for that particular state or local office).

To qualify for the LUC rate, the advertising must include a "use" of the broadcast station by a qualified candidate (a "use" is defined as any "positive appearance of a candidate whose voice or likeness is either identified or is readily identifiable"). In addition, to qualify for LUC rates, federal candidates must meet the "stand by your ad" certification requirements described below.

Advertising that is not sponsored by a qualified candidate (*e.g.*, issue ads run by political action committees or so-called 527 groups) is ***not*** entitled to LUC rates. Prior to the LUC window (*i.e.*, between now and September 5th), stations are not required to offer LUC rates, but qualified candidates are entitled to rates that do not exceed "the charges made for comparable use of such station by other users thereof." While not as burdensome as the LUC requirements, this "comparable rate" requirement means that stations must treat candidate ads at least as well as they treat other comparable advertisers with respect to rates, discounts, etc. Stations also must keep in mind that rates and discounts must be made available to each qualified candidate for the same office on an equal basis both before and during the LUC window.

The job's not over until the paperwork . . .

Stations should also be preparing for the paperwork burden involved with political advertising. Stations must keep a political file (which is an essential component of the station's public inspection file) that includes records of ***all*** requests for political time made by or on behalf of any candidate. The political file records must include: the name of the candidate and office involved; whether or not the request was accepted; the schedule of time provided; the spot length; the classes of time purchased; the rates charged; the date and time the spots actually aired; the name, address and telephone number of a contact person for the candidate/committee, along with the name of the authorized committee treasurer; and the rebates paid to the candidate (if any).

As the station is obligated to keep these records and make them available for public inspection, it must be certain that all relevant staff members are aware of the obligation to collect and keep this information starting when an inquiry for political advertising time is made (although mere rate inquiries do not need to be recorded). Moreover, these records must be continually updated as relevant information develops (*e.g.,* when the spots are run, etc.).

In addition, broadcaster must now keep records of all paid political advertising that "communicates a message relat-

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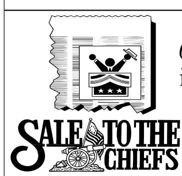
ing the renewal process. Although the FCC eventually accepted the application, it determined that the station's improper filing was a violation of FCC rules and also issued a $250 fine. (Note – Upon successful completion of the electronic filing process, the FCC's system provides a clear and unequivocal message confirming that the application has been received into the system. If you haven't received that message, you should not assume that that you have successfully filed whatever it is that you're trying to file.)

Those of you who may be puzzled by the seeming disparity between (a) the cute little $250 fine issued here and (b) the much beefier $10,000 fine dished out to the station described in the immediately preceding story need not fret. The difference in fines reflects substantial differences in the underlying misconduct. In the case of the $250 fine, the licensee had teed up its renewal application before the deadline for renewal applications – *i.e.*, more than four months before its license actually expired. Thinking that it had filed the application, the licensee was concerned when it saw no indication from the Commission of successful filing and, a month or two after the renewal was due – but still *before* its license expired – the licensee contacted the FCC, was advised that the application had not been filed properly, and was able to correct that mistake *before* the license expired. By contrast, in the $10,000 fine case, by the time the licensee got around to filing for renewal, its license had been dead and gone for approximately four years already, meaning not only that the renewal application was way late, but also that the station had been engaging in unauthorized operation for a period of years.

Station sold, fine stays with previous owner – During November, 2006, Clear Channel applied to the FCC to sell off a North Dakota radio station. The next month, Clear Channel staff reportedly aired a recorded telephone call without letting the person on the other end know that it would be broadcast. In January, 2007, the station was sold. Ten months after the sale, the FCC wrote a letter to Clear Channel asking about the broadcast of the recorded call, which had occurred just days before the sale. Clear Channel responded that it had sold the station and had no information in its possession to disprove the claims. The FCC determined that Clear Channel could not prove it did not air the call and issued a $12,000 fine. The FCC also reminded Clear Channel that the FCC has a history of not letting broadcasters off the hook just because they are no longer the licensee, if the violation occurred while the entity was still the licensee. Sellers should bear the "long arm" of the FCC's enforcement in mind when they sell a station, although the intricacies of the statute of limitations provisions of the Communications Act arguably reduce the length of the FCC's arms under some circumstances.



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ing to any political matter of national importance." This requirement applies to ***all*** political advertising, not just candidate advertising. Thus, even though non-candidate advertisements are not subject to reasonable access, equal opportunities or LUC rate requirements, they ***are*** subject to this recordkeeping requirement. The records of such ads must include: a record of each request to purchase time; whether or not the request was accepted; the rate charged; the date and time the ads aired; the class of time purchased; the issue covered by the ad; the name of the candidate and office to which the ad refers (if applicable); and the name of the purchaser, the name, address and telephone number of a contact person and a list of chief executive officers/board of directors. Again, relevant station personnel must be made aware of their responsibility to collect the relevant information when requests for air time are made.

Finally, thanks to relatively recent changes in federal election law, candidates for ***federal*** office must provide to the station a particular written certification ***at the time the advertising time is purchased.*** In this "stand by your ad" certification, the federal candidate must certify whether or not the advertising will refer to another candidate for the same office. If the ad will refer to an opposing candidate, the certification must also state that at the end of the ad a statement will be included in which the candidate identifies himself or herself as well as the office being sought and affirmatively states that the candidate has approved the broadcast. Television ads also must include an image of the candidate and a printed statement that the candidate or the candidate's committee paid for the broadcast, the name of candidate, and that the candidate approved the broadcast. The FCC has advised the stations may (but are not required to) deny LUC rates to federal candidates that do not meet the "stand by your ad" certification requirements.

There's more where that came from . . .

As mentioned above, the political advertising rules are notoriously complex and a station's compliance with the rules typically depends on the specific facts at hand. Many of the areas discussed above give rise to their own subsets of particular questions which can generally be answered only with specific reference to specific factual settings. This summary of the station's requirements is, necessarily, brief and superficial. As you prepare your station's political advertising policies, disclosure statements, LUC rates, and political files, you should consult early and often with local election officials, your state broadcasters association, the NAB and, of course, your friendly neighborhood communications lawyers.

Mark your calendars!!!

Satellite Carriage Elections Due October 1 . . . or so

Impending DTV transition adds wrinkle to timing of carriage notifications

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In April we alerted you that the FCC had issued an order requiring satellite carriers (DirecTV and Dish) to carry digital-only TV stations in markets where the satellite carriers provide “local-into-local” service. That order also required the satellite carriers to carry all high definition (HD) signals in a market in which any station’s HD signal is carried, though that HD carry-all obligation is to be phased into different markets over a four-year period.

The new obligation of satellite operators to carry DTV-only signals applies *both* to stations that are turning off their analog signal *and* to stations that are signing on as digital-only. In either case, stations will have to make an election as to whether they seek (a) must-carry on a satellite carrier’s system or (b) a negotiated retransmission consent agreement. ***In addition to sending election notices, stations that are turning off their analog signals after January 1 but prior to February 17, 2009, must also send an ADDITIONAL notification of the anticipated turn-off date to satellite operators***.

The form, substance and timing of satellite carriage elections and notices are all crucial – carriage election notices must have very specific information.

The timing for the elections and notices that the FCC enacted in its April Order is as follows:

- *Must-carry/retransmission consent election for stations turning off analog on 2/17/2009:* Election notices must be sent by October 1, 2008. No additional notice required.

- *Must-carry/retransmission consent election for stations turning off analog prior to 2/17/2009, but after 1/1/2009:* Election notices must be sent by October 1. ***In addition***, the station must send a notice by October 1, advising of the date on which they anticipate turning off their analog signal.

- *Must-carry/retransmission consent election for stations turning off analog prior to 1/1/2009:* Election notices must be sent any time between (a) 60 days prior to turning off the analog signal and (b) 30 days after signal turn off. No additional notice is required.

Notification/Election Rules Temporarily on Hold: While the FCC enacted these new DTV satellite carriage requirements and notification/election procedures in April, the effective date of the election and notification procedures was put on hold until those procedures were approved by the federal Office of Management and Budget (OMB). Unfortunately, OMB has not yet approved the procedures, and may not get around to doing so until September. While approval in September should not cause a problem for most stations, it could cause a problem for stations that are planning to turn off their analog signal prior to January 1.

In any case, stations should contact FCC counsel to discuss the form, substance and timing of satellite carriage elections and notices. Carriage election notices must have very specific information, as set forth in Section 76.66 of the FCC’s rules. Further, all elections and other notices should be sent by certified mail, return receipt requested.

Once the election/notification procedures have been approved by OMB and finally implemented by the FCC, the transition by satellite carriers from analog to digital broadcast signals is supposed to proceed as follows. If a station elects must-carry in a timely manner, then beginning January 1, 2009, satellite carriers must continue carrying the station’s analog signal until the actual termination of analog service by the broadcaster. Once the station terminates analog transmission, the satellite carrier must immediately begin carrying the digital signal of the station, *with no a gap in carriage*. However, if the transition for a station occurs after January 1 but prior to February 17, the satellite carrier is required to switch to the station’s digital signal immediately *only* if the station notified the satellite carrier by October 1 of the anticipated date of analog turn-off. Stations that turn off their analog signal prior to January 1 are entitled to must-carry of their digital signal no more than 90 days after the date they notify the satellite carrier of their must-carry election. For stations that elect and negotiate a retransmission consent agreement with a satellite operator, these transition dates may be subject

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Cable groups looking for leverage

Retrans Revamps Requested

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Several cable operators have been stepping up attacks on the retransmission consent rules that they say unfairly favor broadcasters. In particular, the American Cable Association (ACA), which represents smaller cable operators, has been pressing the case before Congress and the FCC that broadcasters have too much leverage in the negotiation for retransmission consent. The ACA is (a) urging Congress to investigate the retransmission consent regime while (b) asking Congress and the FCC to rewrite rules to allow cable operators to carry out-of-market stations. One group of cable operators is even pushing the broadcast DTV transition as a reason for limiting broadcasters' retransmission consent rights.

Television broadcasters that are counting on retransmission consent revenues would be well-advised to keep up with the latest developments.

The central issue, of course, is the ongoing struggle over how much compensation cable operators should pay to broadcasters for retransmitting their over-the-air signals. The cable operators, of course, would prefer to pay nothing for those signals. That desire, however, is typically blocked by the fact that broadcasters that elect retransmission consent status usually have the exclusive right to broadcast a particular network's programming within a given market. Thus, if a cable operator in a given market wants to continue to retransmit *American Idol* to its subscribers, it will need to reach a deal with the Fox affiliate in that market.

None of this is new, of course, but as the next round of retransmission consent negotiations comes around – the deadline for the next election is October 1, 2008 – many cable operators are facing an increasing number of broadcasters determined to receive compensation for allowing their signals to be carried on cable. These cable operators claim that broadcasters' exclusive rights to popular broadcast content gives the broadcasters an unfair ability to demand unreasonable sums for the right to retransmit that content. Broadcasters counter that they only want whatever their signals are worth. If the price is too high, the cable operators are free to pass. Indeed, given that much lower-rated cable networks command fees between $1 and $3 dollars per subscriber, broadcasters argue that the much lower fees demanded by broadcasters cannot be considered unreasonable.

Thus, the ACA and some cable operators are turning to that time-honored Washington, DC, approach to regulatory difficulties – trying to get the rules changed in their own favor. In connection with the FCC's localism rulemaking, for instance, the ACA filed comments urging the FCC to allow cable systems to carry TV stations from adjacent, in-state markets. Pointing out that DMA lines occasionally do not coincide with state lines, the ACA argued that current arrangements block cable subscribers from receiving the signals of stations that are in the same state but different markets – thus denying such subscribers access to in-state news, sports, and weather programming.

The ACA is also supporting a House bill introduced by Congressman Mike Ross (D-AR), which would permit cable operators to offer TV signals from adjacent markets in circumstances in which a cable system is physically in one state but is part of the DMA of a bordering state, allowing cable subscribers access to in-state-but-out-of-market broadcast stations. The current version of the bill would not merely allow such carriage but would eliminate retransmission consent, network nonduplication, syndicated exclusivity, and sports blackout rules with respect to such in-state/out-of-market stations. ACA, obviously, supports this approach, arguing that consumers should be entitled to access stations licensed to their own state. Of course, giving cable operators the ability to pick up such out-of-market stations (without the consent of the stations involved) would just happen to eliminate the exclusivity – and the bargaining power – of the in-market stations.

In a separate move, a group of cable operators is seeking to eliminate the threat of broadcasters' withholding retransmission consent, at least for the months surrounding the DTV transition date. Claiming that a "quiet period" is needed to avoid disruptions of the DTV transition, the cable operators asked the FCC to prohibit TV stations from pulling their signals during the months surrounding the February 17, 2009, transition date. Coincidentally, the proposed quiet period would cover one of the critical ratings "sweeps" periods – when some of the most in-demand broadcast programming is aired. Thus, regardless of whether such a quiet period would help the DTV transition, it certainly would help cable operators by ensuring that no broadcaster could refuse retransmission consent during the February, 2009 sweeps.

While it is unclear that any of these cable-sponsored efforts will gain any traction in Congress or before the FCC, television broadcasters that are counting on retransmission consent

(Continued on page 17)

Copps Carps Concerning Contour Calculations

By: *Ron Whitworth*
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Over the years the localism battlefield has been marked by various stories of supposed public interest failures by broadcasters, supposed failures which supposedly lead ineluctably to the conclusion that the public is not being properly served. Such stories tend to be short on verifiable and/or verified detail and long on rhetorical flourishes – but they invariably cast the broadcast industry (or consolidation, or maybe just "big broadcasters") as the Bad Guy.

Recently, however, in assigning blame for what he termed the "erosion of localism", Commissioner Copps pointed his finger considerably closer to home. According to Copps, some of the fault should be laid at the feet of the Commission itself (well, maybe not the *whole* Commission – just those members who don't see things as clearly as Copps does).

As Copps sees it, the staff is "pull[ing] a quick one" and is thereby contributing to the "erosion of localism".

In a decision released on July 2, the Commission affirmed the staff's approval of the modification of a Garden City, Missouri, FM station's facilities. The licensee had proposed to move the station's transmitter site some 40-50 miles away from Garden City. With conventional contour prediction methods, the proposed facilities would not have satisfied city-grade coverage requirements. But using an alternate methodology, the licensee was able to demonstrate compliance.

Such supplemental showings are permitted under Section 73.313(e) of the rules, which provides that alternative contour prediction methodology may be used "where the terrain in one or more directions from the antenna site departs widely from the average elevation". While a couple of objectors claimed that no such "wide departure" in terrain was present between Garden City and the proposed transmitter site, the staff concluded – and the full Commission concurred – that that claim was wrong, and an alternate analysis was appropriate. The Commission also confirmed that the alternate analysis did establish compliance with the city-grade coverage requirement.

What got Commissioner Copps's knickers in a twist, though, was the fact that, in a complete unrelated case which is still pending before the Commission, the staff had declined to consider an alternate methodology analysis tendered by a party objecting to a new FM translator proposal in Berlin, New Hampshire. The objector claimed that, because of intervening mountains (we are, after all, talking about New Hampshire), the proposed translator would not be able to pick up the signal of its proposed primary station. In the objector's view, Longley-Rice showed that the primary station's signal would not go as far as might otherwise have been predicted. According to Copps, the staff refused to consider the objector's showing – and therein lies the rub, at least for Commissioner Copps.

As Copps sees it, the staff is "pull[ing] a quick one" by (1) allowing the use of alternate contour prediction methodologies to allow the Garden City station to show that its signal goes much farther than might have been thought – thus permitting it to move its transmitter farther away from its community, but then (2) refusing (in the New Hampshire translator case) to consider such methodologies which supposedly show that a station's signal really doesn't get as far as might have been predicted – thus permitting a translator authorization that might not otherwise have been granted. Copps sees this as a means by which the Commission "enable[s] broadcasters to move farther from their local communities, but bars them where they could keep broadcasters closer to home."

It is of course true that even though you're paranoid, they might still be following you. But it is difficult to confirm here that anyone at the Commission – staff or Commissioners – has in fact been undertaking an anti-localism campaign by selectively allowing or disallowing Longley-Rice or similar alternate contour showings. Such a notion would seem unlikely in any event, even more so in light of the difficulties which the Commission has historically had in dealing with contour prediction methods.

Reliance on standardized signal prediction methodology is essential to the efficient processing of applications. But the assumptions necessary for a standardized approach mean that that approach will not necessarily be

(Continued on page 15)

When is a monopoly not a monopoly?

XM/Sirius: And Then There Was One

By: *Harry F. Cole*
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The FCC has approved the merger of the only two satellite-delivered audio services (SDARS), XM Radio and Sirius Radio, after 18 months of high- and low-profile discussions, debates, public displays, private conversations and other high drama. Oh yes, and also after XM and Sirius agreed to pony up about $20 million to resolve the pesky fact that they both had apparently operated numerous terrestrial facilities without the necessary licenses. And also after they both made "voluntary commitments" relative to a wide range of matters, including programming, hardware, intellectual property and pricing.

While the full text of the Commission's decision had not been issued as of this writing, the press release describing the action, along with the dissenting statements of Commissioners Copps and Adelstein, provide at least a glimpse of the contortions that everyone involved had to perform to achieve this controversial result.

In 1997, the FCC had specifically ruled that no SDARS monopoly would be permitted, so the XM/Sirius proposal seemed a long shot, at best. But you never know about this kind of thing is Washington.

First, a background note. Back in 1997, when the SDARS service was just being created, the Commission specifically and expressly ruled that no single entity would be permitted to hold monopoly control over all SDARS licenses. So XM would be XM, Sirius would be Sirius, and never the twain would meet. So when the two approached the FCC in January, 2007, with their proposal to merge forces, it looked like a long shot at best. But you never know about this kind of thing in Washington.

Initially, many observers assumed that XM/Sirius would argue that the audio media delivery market had expanded since 1997, with the addition of iPods, Internet radio and the like, and that satellite-delivered radio constitutes such a small percentage of that varied market that a SDARS monopoly would cause no harm. But as it turns out, XM/Sirius didn't need to make that argument, because the Commission majority reached its decision under the "worst case" assumption that the relevant market is limited to SDARS.

It should not come as a great surprise that, under those "worst case" assumptions, even the majority concluded that the merger would "result in potential harms". After all, if the market would be reduced from two competing companies to one monopoly, most market theoreticians would ordinarily conclude that the public could be at risk.

But even the most bitter pill can be sugar-coated, and that's just what happened.

XM/Sirius sweetened their proposal by making "voluntary commitments" to:

- Cap prices for three years following consummation, "subject to certain cost pass-throughs" after one year. (The Commission also retained the ability to review the cap six months prior to the end of the three-year period and, possibly, extend or modify it, if necessary.)
- Offer consumers "new programming packages", including the ability to select programming à la carte.
- Make available to a "Qualified Entity or Entities", pursuant to long-term leases or other agreements, rights to four percent of the full-time audio channels on both Sirius and XM platforms (at present, that would be a total of 12 channels). And while they're at it, XM and Sirius also committed to setting aside an equal number of channels for noncommercial educational programming.
- Offer interoperable receivers to be available at retail outlets within nine months of consummation.
- Refrain from granting any exclusive right to any manufacturer to make, market or sell SDARS receivers. XM and Sirius also agreed to make their intellectual property available "on commercially reasonable terms" to permit any device manufacturer to develop equipment to receive the XM/Sirius service.
- File the applications necessary to provide Sirius service to Puerto Rico via terrestrial repeaters within three months of consummation.

There were other more or less incidental aspects to the deal (f'rinstance, XM/Sirius is barred from entering any deals that would bar any terrestrial radio station from broadcasting "live local sporting events"), but you get the idea.

The one other major factor underlying the Commission's decision appears to have been XM/Sirius's willingness to make a "voluntary contribution" of approximately $20 mil-

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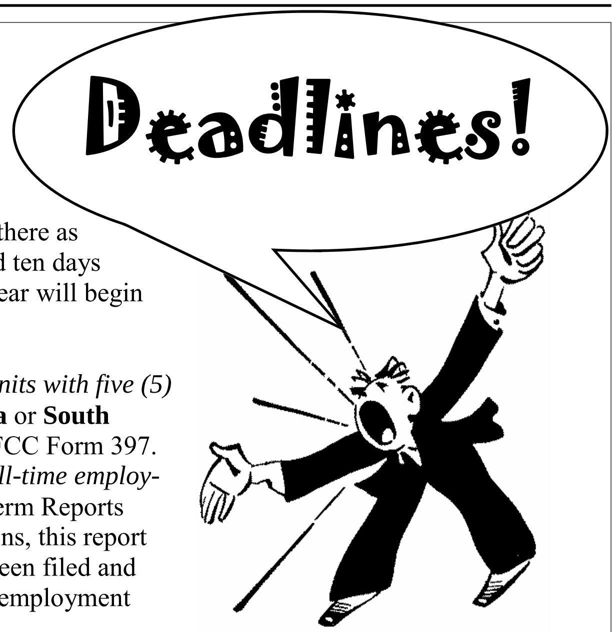
August 1, 2008



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

August 14, 2008

LPTV/Class A/TV Translator Settlements – Settlement agreements resolving mutual exclusivities among LPTV/Class A/TV translator applications filled in 2006 must be filed in order to avoid auction proceedings. (*See* related article on Page 15.)

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).

October 1, 2008

EEO Public File Reports – All *radio* and *television* stations *with five (5) or more full-time employees* located in **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Iowa**, **Mariana Islands**, **Missouri**, **Oregon**, **Puerto Rico**, the **Virgin Islands**, and **Washington** 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 **Florida**, **Puerto Rico**, or the **Virgin Islands** 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 **Iowa** or **Missouri** 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 **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, **Puerto Rico**, the **Virgin Islands**, or **Washington** must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All reports must be filed

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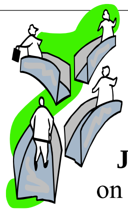


FHH - On the Job, On the Go

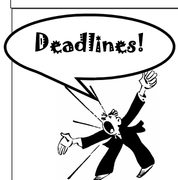
Howard Weiss will be attending the Annual Convention of the Texas Association of Broadcasters in Austin from August 6-8. He'll be appearing on a regulatory panel with FCC's **Roy Stewart** on August 7.

Jeff Gee will be participating in a legal workshop at the Nebraska Broadcasters Association convention in Lincoln on August 7.

In his role as counsel for the Association, **Scott Johnson** will be attending the annual Summer Convention of the South Carolina Broadcasters Association in Hilton Head Island from August 7-10. And while we're talking about **Scott**, let's give him a hearty *Memo to Clients* round of applause for his recent induction into the Alabama Broadcasters Association newly-established Hall of Fame. Members of the inaugural class in the Hall include all former ABA Broadcasters of the Year. **Scott** was given that honor in 1999 in recognition of his contributions to the Association over decades of service.

On August 19 **Joe Di Scipio** will give the alumni welcoming address to incoming Syracuse University College of Law students. **Joe** is a Practitioner-in-Residence at the 'Cuse.

Media Darling of the Month? This month you can't swing a dead cat without hitting one. **Harry Cole** was quoted (again) in the *Washington Times,* this time commenting on the Third Circuit's decision in the CBS/Janet Jackson indecency appeal. But that was small potatoes compared with the two-page spread (including a very flattering photo) given to **Bob Gurss's** 2008 Regulatory Update in *Public Safety Communications* (the official magazine of APCO International). And for the second year in a row, both the **Franks** (**Jazzo** and **Montero**) were recognized as Washington DC Super Lawyers in the Communications Law category. Their selection comes after a rigorous multi-phase process which includes a state-wide survey of lawyers, peer review by other attorneys in the practice area, and additional independent evaluation by the staff of *Law and Politics*, a division of Key Professional Media, Inc. But taking the cake was **Frank Montero**'s appearance on *Destination: Casa Blanca*, a one-hour program featuring a discussion of Hispanics and telecommunications. The program, hosted by PBS's Ray Suarez, was telecast on the Hispanic Information and Telecommunications Network.



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electronically.

Radio Ownership Reports – All *radio* stations located in **Iowa** or **Missouri** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323 or 323-E.

October 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 third such report. The period to be included is July 1 through September 30, 2008. As with the second report (filed in July), this quarter's report will be filed through the Conssolidated Data Base System (CDBS), the normal electronic filing system for applications and reports.

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.

Late withdrawal, expensive consequences

Stand By Your Bid

FCC imposes millions in penalties for bids withdrawn in FM auction

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A staff decision issued in July makes clear that the Commission is serious when it advises potential auction participants that those who bid in an FCC auction do so at their own risk. Underscoring the draconian nature of its position, the FCC punctuated its decision by declaring that it does not consider the $1.3 million penalty which it levied against one of the bidders in question to be excessive. All of the penalties stem from an FM auction conducted in 2004.

In the early days of broadcast auctions, bidders could bid up the price of a license and withdraw their high bid at the last minute. As a penalty for using a bid withdrawal, the withdrawing bidder was required was to reimburse the FCC the difference between the withdrawn high bid and the eventual winning bid when the license finally sold. For example, assume that Bidder A had been the winning bidder for some spectrum with a bid of $100,000, but Bidder A (perhaps suffering from buyer's remorse) chose to withdraw its bid. Assume also that the spectrum was later bid upon and won by another bidder for $95,000. The withdrawal penalty for Bidder A would be $5,000 – the difference between the high-but-withdrawn bid and what the FCC eventually sold the channel for.

In the 2004 auction, six different bidders employed bid withdrawals. However, unlike the above example, the penalties were much greater than $5,000. In one case, Cumulus withdrew a $1.5 million bid for a North Dakota license. When the license was later re-auctioned it fetched only $125,000, thus triggering a penalty of more than $1.3 million. Yowch!! Five other withdrawing bidders got similarly unpleasant news, with penalties ranging from a paltry $112,250 (for Nankuli, HI) up to a more robust $794,000 (for Windsor, NY). All six sought reconsideration. Cumulus, along with five other broadcasters, asked the FCC to reconsider its penalty rules.

In their plea to the FCC, the bidders decried the penalties as "unconscionably excessive". The bidders pointed out that the huge penalties were higher than any other fine in the standard list of rule violation fines included in the Commission's rules. Several of the bidders noted that the penalties were hundreds of times larger than the eventual wining bid. For obvious reasons, the bidders seemed to advance every conceivable argument for why they should not have to pay $3.8 million in penalties.

There was doubtless not a dry eye at the FCC when the Commission's staff dismissed all of the arguments. In a 20-page order, the staff explained that the penalty-for-withdrawal rules were announced before the auction, bidders who participated did so subject to those rules, and there was no reason to waive the penalties. The FCC noted that it has since eliminated the use of withdrawals in broadcast auctions, so bidders in future auctions won't be tempted to try the same ploy that got these six bidders into trouble.

Readers are reminded that, while broadcast auctions may still be in the relatively early stages of development, the rules governing those actions derive from auction rules for other services which have been subject to auctions for more than a decade. Although it is unlikely that broadcast auctions will feature withdrawals again, there may still be many other pitfalls in the somewhat arcane auction process to which bidders should be alert. At a minimum, before embracing a bidding strategy which is based on the assumption that a completed bid might in some instances be withdrawn without significant penalty, bidders should consult counsel.

Update from Planet Kidvid

(Continued from page 2)

times the base amount specified in the rules, but the decision does not provide any explanation of how the staff chose to assess the various factors that it was required to consider to justify the upward bump.

Since this decision appears to be at odds with the FCC's own rules in several respects, it will be interesting to watch both the progress of this case and any other decisions that may be issued in similar circumstances. In the meantime, this case underscores how important it is for TV and Class A TV stations to continue to air at least three hours per week of core programming. As this case illustrates, even though the rules themselves do not establish three hours as a mandatory minimum, the staff seems to see things differently – so to avoid problems, an ounce of prevention may be worth a pound of cure (assuming that the going rate of cure is about $20,000 per pound).

Should you have any questions concerning this matter, please communicate with either the attorney at the firm with whom you normally deal or Anne Goodwin Crump at 703-812-0400, e-mail crump@fhhlaw.com.

Settle . . . or reach for your wallet

On the Auction Block: Digital TV Channels For The Little Guys

By: *R. J. Quianzon*
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Two years ago the FCC opened a filing window and invited LPTV and TV translator licensees to apply for digital companion channels on which they would operate in the post-transition digital world. (As we all know, despite the Commission's elaborate plans designed to insure that all full-service TV licensees will be fully digital by February, 2009, the FCC has not made such plans – or, it seems, *any* plans, elaborate or otherwise – for the transition of LPTV/ Class A TV/TV translator stations . . . but that's another story.) Nearly 2,000 applications were filed in 2006 in response to the invitation.

Since then, the FCC sorted out the applications, first identifying those which caused no interference problems to other stations – those "singleton" applicants were granted permits right away. The remaining applications consisted of approximately 200 separate groups of mutually exclusive applications. The FCC then gave all groups an opportunity to work out mutually agreeable solutions among themselves; applicants in approximately 130 of the groups did just that and entered into settlements.

But 64 groups of MX applications remain unresolved. In early July, the FCC gave those applicants one more chance to settle their differences. They now have until 6:00 p.m. (eastern time) on ***August 14*** to submit their settlement agreements to the Commission. (Note that the August 14 reflects a two-week extension of the July 31 deadline originally announced by the Commission.) Applicants in any group that do not reach a settlement by that time will be placed into auction against one another in November. The auction is set to begin on November 5, 2008.

The only parties who will be able to participate in the auction are those who submitted applications two years ago. Those applicants will face nominal opening bids ranging from $500 to $1,000. The FCC has also noted that it will not be giving much leeway during the auction. The FCC has proposed requiring 100% bidding eligibility and no withdrawals for the auction. In other words, look for a reasonably fast-paced auction resolution to these long-pending MX situations.

(***Copps Carps*** *- Continued from page 10)*
accurate for a wide range of situations which do not conform to the approach's assumptions. The Commission attempted to deal with this more than three decades ago, when it adopted the terrain roughness factor (known to the cognoscenti as "delta-h", or Δh) as a means of assuring both ease of processing and reasonable accuracy in predictions even when the terrain in the relevant area "depart[ed] widely" from standard assumptions. But the routine use of the terrain roughness factor was suspended almost immediately after it was adopted. Applications were thereafter processed on a case-by-case basis.

In 2002, in an unpublished letter decision, the staff quietly announced, in a footnote, that alternate contour prediction methodologies would be permitted only when certain conditions pertained. In particular, terrain would be said to "depart widely" only where the terrain roughness factor had a value of "20 meters or less, or 100 meters or more", or where the predicted contour along radials toward the community of license varied by more than 30% from the prediction obtained using the standard method. This formulation, although never codified, has been the rule of thumb since.

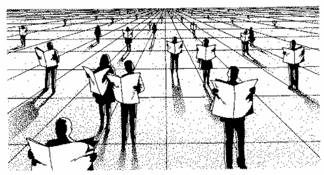
According to the Commission's decision in the Garden City case, the alternate showing satisfied those standards, and thus could properly be invoked. Since the Commission has yet to act in the New Hampshire translator case – and since the staff does not appear to have formally published its decision which is now on appeal before the Commission – we can't be sure whether the staff's action there was consistent with applicable precedent. But it does seem a stretch to believe that the staff's refusal to consider an alternate contour showing in a translator case reflects a fundamental anti-localism bias. (Indeed, in view of the labor-intensive process necessary to evaluate alternate contour showings, the staff might be entirely justified in declining to accept *any* such showings in the context of secondary services, such as FM translators.)

Copps urges that the Commission should "revisit our technical and allotment rules as they relate to localism" and that "[l]ocalism must infuse everything we do". It will be interesting to see whether Copps's statement will lead to any changes in the way that the staff addresses alternate contour prediction showings.

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

Updates on the News

The appeal of indecency – FCC now 0-2 – In a long-awaited decision, the U.S. Court of Appeals for the Third Circuit reversed the FCC's order holding that CBS and its affiliates had broadcast indecency in the notorious 2004 Super Bowl half-time show featuring Janet Jackson and Justin Timberlake. The Court found that the FCC had had a long-standing policy ***not*** to penalize the occasional fleeting instance of possible indecency and that the Commission had not adequately explained why it chose to depart from that policy when it whacked the CBS folks for the half-second exposure of La Jackson's right breast. The Court's decision was consistent with the Second Circuit's decision in the Fox case, although unlike the Second Circuit, the Third Circuit did not suggest that the Commission's indecency policy is unconstitutional.



It's not clear where this case will go from here. The Court remanded the matter back to the FCC for further consideration – so if the FCC wants to try to take another crack at explaining its abandonment of the fleeting expletive policy, it could conceivably do so. But that policy is already before the U.S. Supreme Court in the Fox case, so it's unlikely that the Commission will bother to try to tweak its policy before Chief Justice Roberts and his pals get their crack at it. It would seem more likely that the Commission might try to bring the CBS case up to the Supremes, to be heard at the same time as the Second Circuit/Fox case which is already there. There is, of course, no guarantee that the Supremes would take the CBS case, but the FCC might think that the image of Ms. Jackson's anatomy broadcast out to gazillions of football fans presents a stronger case for heavy-handed enforcement than does the situation in Fox (which, you will recall, involves ad lib remarks by Cher and Nicole Richie). Another theory is that the FCC will just sit tight and do nothing with the CBS/Jackson case until the Supremes have issued their decision in Fox, which will probably occur sometime in the first half of 2009.

Whatever happens, the Third Circuit's decision provides further confirmation that the Commission's indecency policy in the wake of the 2004 Super Bowl has been a dramatic, and unjustified, over-reaction.

Stayin' Alive I – Channel 5/6 FM proposal? – You may recall that, late last year, consulting engineer Jack Mullaney proposed (in the context of the FCC's DTV allotment process) that the Commission reallot TV channels 5 and 6 for use by FM radio broadcasters (including commercial operators, NCE folks, LPFM, etc., etc.). You may also recall (as recounted in the March, 2008 *Memo to Clients*) that Jack's proposal seemed to get some traction when it was addressed in the Commission's "diversity" proceeding, but then got flat-out trashed by the Commission the very next day in the DTV proceeding. While the outlook is decidedly not brilliant for the proposal following that trashing, hope springs eternal. In the "diversity" proceeding the Commission did ask for comments on the matter (even if that request was then effectively undermined in the DTV proceeding) and, in response to that request, the "Broadcast Maximization Committee" (BMC) filed an extensive showing in support of Jack's concept. Jack has asked us to alert anybody interested in this that comments in response to and/or in support of the BMC comments may be filed with the Commission by August 29, 2008.

Stayin' Alive II – White Space proposal? – Meanwhile, the long-running white space proceeding is still, well, running. You may recall that this involves a quasi-futuristic proposal for allowing unlicensed, wi-fi-like communications in the TV band. While that might seem to be a recipe for disaster, the proponents of the technology believe they can jigger their hardware to (a) automatically recognize the presence of TV stations operating in the vicinity and (b) turn itself off so as to prevent any interference. The problem has been that, at least according to some press reports (the FCC has been tight-lipped about what's been going on), the test units which have been provided to the FCC for evaluation have apparently not worked all that well. Displaying an admirable never-say-die attitude, though, the proponents are back at the Commission with more gear, and the FCC is taking to the streets to test the equipment in the real world. Don't look for any knock-out punches here – rather, we can probably expect to hear about inconclusive results that will lead to more testing, which will lead to more inconclusive results, and so on, and so on.

Even Stevens? – U.S. Senator Ted Stevens, a fixture in the Upper House for decades and a guy who has been particularly influential in FCC policy matters, has been indicted by federal prosecutors in Washington on a variety of corruption charges. While Stevens enjoys (as we all do) a presumption of innocence, Senate rules are less forgiving: because of his indictment, he has had to step down from his committee positions, which included serving as the ranking Republican on the Commerce, Science and Transportation Committee which, coincidentally, has first crack at communications-related legislation. (Stevens' position on that Committee had historically enabled him to include a number of Alaska-friendly provisions in the Communications Act and elsewhere.) In his absence – which may or may not be temporary – Texas Senator Kay Bailey Hutchison has stepped in. Bear this in mind if you're scheduling a lobbying trip to DC in the near future.

(XM/Sirius - Continued from page 11)

lion to the U.S. Treasury to resolve compliance issues. You may recall that the issues included rampant use of terrestrial repeaters without proper authorization and marketing of in-car receiving devices that caused significant interference problems in the NCE-FM band. XM/Sirius have also committed to take "additional remedial measures".

So the Commission has formally rescinded the notion that a monopoly in SDARS is unacceptable. And while the monopoly that the Commission has now embraced is, admittedly, subject to some limitations, those "limitations" are really not much to write home about. After all, they were "voluntary commitments", which at least suggests that they are not formal regulatory obligations. Plus, the price caps go away in three years, and it's not clear how long the remaining "commitments" will have to remain in place. And sure, the Commission reserved the right to re-visit the price caps question – and presumably the others as well – but whether or not that will ever happen is anybody's guess. Plus, since these terms have not been formally codified as regulatory requirements, it would seem that XM/Sirius would be able to pull the plug on some or all of them largely at its convenience (after waiting a decent interval for the sake of appearances). Perhaps the Commission might try to retaliate, but that would most likely end up in litigation – and depending on how the Commission's final decision here is ultimately worded, the FCC might not have the strongest case.

And anyway, look how XM/Sirius have already responded to very clear regulatory requirements: they appear largely to have thumbed their corporate noses, flagrantly, at prohibitions about use of terrestrial repeaters and consumer device limitations for years, and they still ended up getting what they asked for. Does the Commission believe that "voluntary commitments" will be more binding?

Interestingly, at least one "public-interest law firm" – Mountain States Legal Foundation (MSLF) – has already raised questions about the constitutionality of the programming set-asides to which XM/Sirius were forced to "voluntarily commit". According to MSLF, the set-asides violate the equal protection clause of the Fifth Amendment because they are, in effect, racial preferences or quotas. It is unclear whether MSLF will attempt to litigate this question, and if it does, whether it will be able to demonstrate that it has standing to do so. But its argument is not frivolous, and MSLF has a history of litigation activity in precisely that constitutional area. We shall see.

*(**Satellite Carriage Elections** - Continued from page 8)*

to negotiation.

We will let you know when the new DTV election/notification procedures are in effect. In the meantime, because these procedures are a bit complicated, we urge stations to contact us long before the October 1 deadline in order to identify and address any problems that might arise.

*(**Retrans Revamps** - Continued from page 9)*

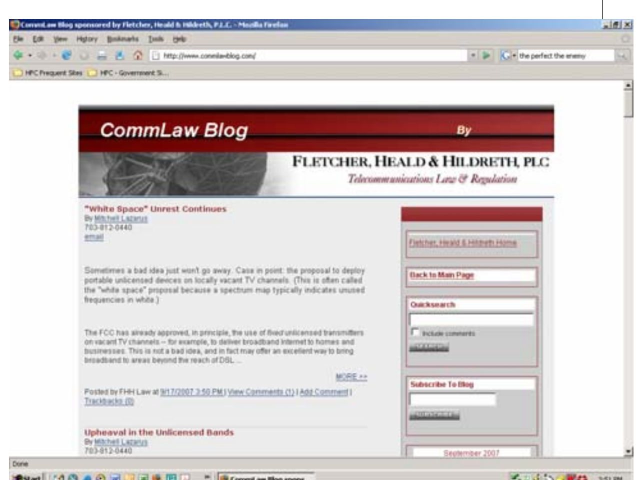
revenues would be well-advised to keep up with the latest developments. With the October 1, 2008 election date (which will affect carriage arrangements for the 2009-2011 cycle) fast approaching, stations should already have their own strategies at least roughed out – but stations should also be prepared to shift gears if necessary in light of the on-going cable efforts to change the rules.

Late Breaking News???

If you're looking for information and insight about late-breaking developments (like, for example, the Third Circuit's decision in the Janet Jackson case, or the latest in the FCC's "embedded advertising" inquiry), 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 nearly 120,000 visits to our site to date! Click on over and see why.



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Reg Fee Update

The Commission has reportedly adopted the regulatory fee schedule which it had proposed last May. A copy of the broadcast-related fees as they were proposed in May can be found in the May *Memo to Clients*. Once the Commission has formally announced the adoption of the new fee schedule, we will post the fees on our blog at ***www.commlawblog.com***, so check there for further updates – including the deadline for filing this year's reg fees, which has not been announced as of this writing.