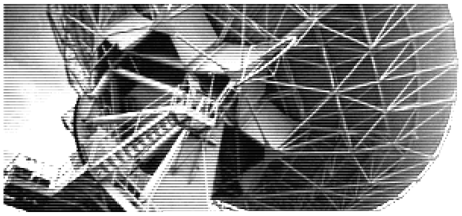

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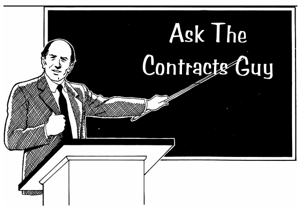
Communications Law & Regulation

MEMORANDUM TO CLIENTS

News and Analysis of Recent Events in the Field of Communications



Crafting the nondiscrimination fine print

New Renewal Certification Requirement Means New Language in Advertising Contracts

By Steve Lovelady
lovelady@fhhlaw.com
703-812-0517

In the March and June, 2008, *Memos to Clients*, we described the FCC's recent "diversity" initiative order, and the wide ranging nature of the new rules and policies adopted by the FCC in the name of expanding opportunities for minority- and women-owned broadcasting outlets.

> *The good news is that compliance appears to be fairly simple. The bad news is that nothing is quite as easy as it may seem at first.*

In this issue, we want to highlight a new policy, adopted as part of the order, that requires broadcasters to add nondiscrimination clauses to their advertising contracts. Not complying with this new requirement could result in delays and, possibly, fines when your next license renewal application is processed.

The policy in question requires each broadcaster to certify in its next license renewal application that: (a) the broadcaster's advertising contracts do not discriminate on the basis of race or gender; and (b) such contracts contain nondiscrimination clauses. Its purpose is to combat long-rumored practices in the advertising business regarding "no urban/no Spanish" provisions which specify that commercials will not be run on stations which feature such formats. While the existence of such practices has not been conclusively established, anecdotal evidence has for decades fueled concern about the adverse effects that such practices could have – and, according to some, have actually had – on minority broadcasters.

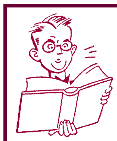
The good news is that compliance with this new policy appears to be fairly simple. All that is required is "yes/no" certification at renewal time that the licensee/renewal applicant is in compliance. Simple, no?

Unfortunately, as with most other ostensibly simple "yes/no" certifications, the bad news is that nothing is quite as easy as it may seem at first.

For example, the Commission declined to provide, for purposes of illustration, the text of an approved nondiscrimination clause. So we don't know for sure exactly what the FCC has in mind when it refers to nondiscrimination clauses. Of course, the clause should clearly articulate that the licensee has a policy of nondiscrimination, but what kind of additional detail (if any) might the Commission be looking for?

At least one minority-oriented public interest organization has informally circulated a model clause that, in the organization's view, satisfies the new FCC policy. The suggested language provides that, in the placement and scheduling of, and compensation for, advertisements, there shall not be discrimination on the basis of race, color, religion, sex, national origin, or language spoken by the broadcaster's audience; it also includes a separate clause, designed to implement the nondiscrimination policy. That separate clause would require periodic reports, notices to employees, training in nondiscriminatory policy compliance, etc.

(Continued on page 14)



August, 2008 **No. 08-08**

Inside this issue . . .

Night of the living debts . . .

The Long Arm of the Red Light Rule

Reaching back into the past to undo things long done?

By Patrick Murck
703-812-0476
murck@fhhlaw.com

Sometimes "final" doesn't mean final, at least when the FCC's Red Light procedures are involved. As we commented way back in the December, 2002, *Memo to Clients*, when the Commission's Red Light Rule was first proposed, the rule "could give a whole new meaning to the concept of 'finality' – or, more likely, it could deprive the notion of 'finality' of any meaning." And sure enough, fast forward six years and we find that our fears were far from unfounded: the Commission has recently demonstrated its own view that it can reach back and undo actions that the affected private parties reasonably assumed were done deals long before.

The case involved the transfer of PCS licenses from Northstar Technology to Banana Communications. In 2001 Banana filed an application to assign the licenses to Northstar on the condition that Northstar make certain post-closing payments. When Northstar failed to make these payments, the parties filed an application with the Commission to assign the licenses back to Banana pursuant to the original agreement. The FCC staff processed and granted the assignment and the parties consummated the deal in December, 2004.

So far, so good.

But as it turned out, according to the FCC's records, Northstar owed the Commission nearly $1 million as of November, 2004. The Commission sent Northstar a notice of its delinquency, but it appears that Northstar ignored that notice. Much to the Commission's embarrassment, so too did the FCC's staff, which (as noted above) granted the 2004 assignment application (from Northstar to Banana) notwithstanding Northstar's delinquency. The Commission's Red Light policy, of course, ordinarily provides that applications filed by deadbeats (*i.e.*, folks who are delinquent on debts to the FCC) will not be acted on; in fact, if the delinquency isn't cleared up promptly, such applications are subject to dismissal.

In PCS-land at the Commission, once an assignment has been consummated, the parties are required to file a consummation notice, which the FCC then ordinarily implements by modifying its ownership records to reflect the new owner and issuing that new owner its own licenses. In the Northstar/Banana case, because of the delinquency (which the staff apparently noticed shortly after the assignment was granted), the staff declined to implement the consummation notice. As a result, the licenses in question continued to be held by Northstar, at least as far as the FCC was concerned.

Even more troubling, though, was the fact that, in July, 2005, the Commission dismissed the underlying 2004 assignment application (which, it may be recalled, sought approval of a deal which the FCC had approved and which the parties had closed eight months earlier). The basis for the dismissal: Northstar's unpaid debt.

That could have been the end of the story, but we are, after all, dealing with the Commission here, next to whom the Keystone Kops occasionally seem as coordinated and disciplined as a Busby Berkeley production number. When it dismissed the application (in 2005), the FCC staff neglected to issue a public notice of the dismissal, so the dismissal technically didn't become effective. When this lacuna came to the staff's attention a year later, it reinstated the application. But by that time the Northstar debt to the FCC was well in excess of $1 million, and Northstar wasn't returning the FCC's calls.

(Continued on page 6)

FLETCHER, HEALD & HILDRETH P.L.C.

1300 N. 17th Street - 11th Floor
Arlington, Virginia 22209
***Tel*:** (703) 812-0400
Fax: (703) 812-0486
***E-Mail*:** Office@fhhlaw.com
Web Site: fhhlaw.com
Blog site: www.commlawblog.com

Supervisory Member
Vincent J. Curtis, Jr.

Co-Editors
Howard M. Weiss
Harry F. Cole

Contributing Writers
Denise Branson,
Anne Goodwin Crump,
Steve Lovelady, Francisco Montero,
Patrick Murck, R.J. Quianzon,
Lee G. Petro, Michael Richards,
Davina Sashkin and Ron Whitworth

Focus on FCC Fines

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

FCC targets car TVs for DTV enforcement – Since March 1, 2007, 100% of all television receivers imported or shipped in the U.S. have been required to include DTV tuners. In a recent $328,000 fine, the FCC made clear that 100% means every single one of them. Unlike previous enforcement actions leveled against major electronics retailers, here the FCC spanked a parts supplier who had no direct relations with retail consumers.

Six months ago, an FCC agent wandering about on the internet happened to find a company in Florida that supplies automobile dealerships with monitors for rear seat entertainment systems. The company does not sell this equipment to the retail public. Instead, the company ships the monitors to automobile dealers who install them in vehicles. The Florida company has a significant business: during the first four months of 2008, it shipped 4,000 units.

The FCC looked into the type of monitors that the company was selling and determined that the monitors had TV tuners built into their electronics. Remember, after March 1, 2007, the presence of TV tuner in a monitor triggers a requirement for a DTV tuner. The FCC determined that the monitors did not have a digital TV tuner. The FCC fined the company about $100 a piece for each one of the "illegal" monitors.

Not surprisingly, the FCC was not pleased with the company when it found out that the company initially provided false information to the inquiring Feds. Turns out that although nearly 4,000 units were shipped, the company first told the FCC that only a dozen were shipped. Who knew? The company's eventual admission that the number was really closer to 4,000 resulted in a fine from the FCC.

The FCC is sending a clear and consistent message to ***all*** equipment manufacturers – including those with who make equipment that you might not routinely think to be subject to all the DTV Transition hoop-de-doo – that they are taking the DTV transition very seriously. Broadcasters may take some solace in the fact that the FCC is working diligently to ensure that all new televisions can receive the new DTV signals that are mandated.

FCC must approve the sale of your company or license – A case this month involving a Tennessee AM station reminds all licensees that they are mere stewards of the taxpayer's radio waves and that the FCC must give its consent before control of a license is transferred.

The owner of the station in question hadn't bothered to ask for the Commission's blessing before it sold control of the licensee to another party. This was, apparently, an innocent mistake, since the transaction was reported to the Commission in the regular course of things and, once the parties realized that they had failed to jump through the necessary hoops, they un-did the deal. But the damage had already been done, and the FCC initiated an inquiry.

The licensee ran up the white flag and suggested that the matter could be resolved through a consent decree, and the Commission agreed. With the payment of a $5,000 "voluntary contribution" and commitment to a "compliance plan" that requires, among other things, the submission of annual "compliance reports" to the Commission for the next three years, the licensee was back on track.

FHH - On the Job, On the Go

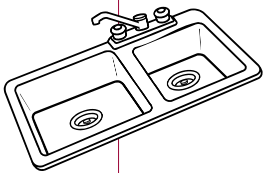
With September just around the corner, you're probably making your plans for the NAB Radio Show in Austin — and so are we. Heading down to the Lone Star State will be **Joe Di Scipio**, the **Two Franks** (**Jazzo** and **Montero**), **Scott Johnson**, **Matt McCormick**, **Michelle McClure**, **Lee Petro**, **Jim Riley, Peter Tannenwald** and **Howard Weiss**. **Frank M** will be attending the Spanish Broadcasters Association's reception on September 17 in the Hilton Austin. (He serves on the SBA Board of Directors.)

In October **Peter** will be attending the Community Broadcasters Association annual convention in Las Vegas.

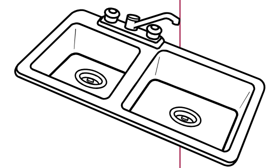
Frank J has been re-appointed as Co-Chair of the Federal Communications Bar Association's Professional Responsibility Committee.

Media Darlings of the Month – **Peter Tannenwald** was quoted in a front page article in *Legal Times* concerning litigation relating to cable programming regulation. And, for the third month in a row, **Harry Cole** is a *Media Darling*, this time for getting a commentary — with a charming photograph of himself, to boot — spread across the pages of both *Radio Business Report* and *TV Business Report*. His piece, on the passing of George Carlin, was taken from the FHH blog (www.CommLawBlog.com).

Diversity 2008 – Everything but the kitchen sink III



Increased Efforts To Increase Diversity



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

The juggernaut which led to the Commission's spate of diversity initiatives (*see* the March, 2008, *Memo to Clients* and the related article on page 1 of this issue) continues unabated, and may even be expanding. Recent developments reflect a continuing focus on issues relating to the socio-ethno-economic profile of the "media".

For example, instead of its usual monthly meeting at its DC headquarters, in July the Commission headed up 95 to the Big Apple, where it convened a confab of industry and government representatives to address the issue of access by women and minorities to the purchase of communications entities. The goal was to "enhance the [FCC's] knowledge", explore the topic and, possibly, identify ways to facilitate access of women/minorities to communications properties in the age of consolidation.

S Classers could devote no more than 50% of their broadcast day to "commercial matter", which would appear to lessen the desirability of the S Class – essentially relegating it to a kind of second class status.

The emphasis on women and minorities was particularly interesting because, in the diversification initiative order adopted last November, the Commission had taken pains to speak in terms of "eligible entities", a gender- and race-neutral concept which avoids the constitutional problems which arise when the government engages in gender- or race-based decisionmaking. But since the New York session was mainly a forum for the gathering and dispensing of information, the temporary abandonment of the constitutionally convenient cant was probably not problematic.

Elsewhere on the diversification front, Media Access Project (MAP) has proposed that the Commission introduce a new class of television license that would apply not to a primary, stand-alone, station, but rather to the separate, individual digital multicast streams which will be possible through DTV operation. From press reports describing the proposal, it appears that MAP would have the Commission issue separate licenses for each digital stream that a TV licensee would be willing to make available. The separate channels so licensed would be deemed "S Class" licenses. They would be made available, through an auction mechanism, to minorities, women and "others underrepresented in media ownership". The primary TV licensee would be compensated for use of its facilities, since the S Class licensee would obviously be using the primary station's transmission facilities.

The upside of this proposal, from the "diversity" perspective, is that it would make available over-the-air video channels to new entrants to the television business. Since (according to the proposal) S Class stations would be entitled to must carry rights, S Class licensees would enjoy the ability to reach the same audience – over-the-air and through MVPD delivery systems – as conventional full-service licensees.

But S Classers would be subject to public interest obligations, and could devote no more than 50% of their broadcast day to "commercial matter". That latter limitation would appear to lessen the desirability of the proposed S Class – essentially relegating S Class licensees to a kind of second class status. (That is ironic, since the S Class proposal was apparently intended as a counter to a proposal by Chairman Martin which would have permitted leasing of digital streams to "small and distressed businesses". According to critics, Martin's proposal amounted to a form of "media sharecropping".)

On yet another front, as we have reported here previously, the Commission is requiring, as part of its diversification initiative, that each broadcaster certify in its next license renewal application that: (a) the broadcaster's advertising contracts do not discriminate on the basis of race or gender; and (b) such contracts contain nondiscrimination clauses. Now another public interest group has suggested that the Commission designate, from the Commission's staff, an "advertising nondiscrimination compliance officer" (ANCO). According to the suggestion, the ANCO would be responsible for alerting broadcasters to their obligation to place nondiscrimination clauses in their advertising sales contracts, and their duty to observe and insist on performance of these clauses just as they would with any other material term of an advertising contract.

Since all broadcasters will be reminded of these obligations come renewal time, it is difficult to see why the Commission should allocate any of its personnel resources to this particular task. But, given the extent to which the Commission has thus far seemed eager to embrace virtually any diversity-related brainstorm, we should not be surprised if this one gains traction, too.

Nit-picking, FCC-style

Digging Into The Details

Beyond the big picture, practical problems present themselves

By Davina Sashkin
703-812-0458
sashkin@fhhlaw.com

When the Commission acts, most people tend to focus on the broad outlines and the prominent highlights of the action. But in most instances, changes in the Big Picture invariably entail changes in the details, the minutiae, and it is those fine points which, in the end, often demand attention. Herewith several examples:

MX'd DTV Maximization Applications – When the Commission announced, back in May, that it was lifting the freeze on DTV facility maximization applications, it acknowledged that some applications might end up being mutually exclusive (MX) with one another. No worry – the Commission gave MX'd applicants 30 days in which to resolve their differences by agreement. If no agreement could be reached, the Commission warned, then the MX applications would all be dismissed and the applicants would have to re-file.

While that's all well and good, and certainly the prospect of getting dismissed and having to re-file might induce some folks to get more reasonable about settlement, the problem is that it's not clear that the Commission thought it through thoroughly enough. After all, if some mutually agreeable resolution between two MX applicants can't be reached, and if they get dismissed, won't they likely just re-file at the earliest possible time? And if they both re-file on the same date, won't they find themselves in a time warp, like Bill Murray in *Groundhog Day* – starting the settlement process all over again, presumably with the same likelihood of success?

Of course, if one applicant were to re-file one day before the other, the earlier filer would enjoy cut-off protection, and the later filer would be dismissed. That risk may encourage MX applicants to resolve their differences at the first opportunity. And re-filing will require an additional $800 filing fee (plus any related engineering and legal fees), so it's certainly not free. Bottom line: the incentives to resolve the MX by settlement or engineering amendment at the first chance are not negligible. But the fact remains that, in some case, settlement or amendment may simply not be viable options. But the Commission does not appear to be ready to address such situations.

Commission staff appears to be scrambling to set up internal procedures for handling the CP extension requests which the Commission promised to consider.

Eligible Entity CP Extensions – In the June *Memo to Clients* we reported on a change in the rules that allows certain purchasers of expiring construction permits to be granted extensions of up to 18 months for the build-out of the CP. (This change was adopted in connection with the Commission's diversity initiatives.) But again, while the Commission's action painted the Big Picture, it failed to fill in the details: as a result, the Commission staff appears to be scrambling to set up internal procedures for handling the extension requests which the Commission promised to consider.

The latest word from Commission staff relative to how to ask for the CP extension is somewhat Byzantine, dependent on a number of variable considerations. For example, if the CP assignment application has been granted, the request for CP extension must be made by letter (from the buyer), like a tolling request. If the assignment application hasn't been granted yet, then the pending application must be amended to include the request. And assignment applications not yet filed should include the request within the assignment application. Of course, there is no blank in the application form that calls for such a showing, so you have to improvise somewhat to get it into the form. Oh yeah, it's also not 100% clear exactly what the staff wants to see in the request, although presumably a simple statement setting out the basis for the applicant's claim to eligibility would be among the components in any event.

Curiously, the staff has also advised that the extension request is not reviewed until after the assignment is granted. Far be it from us to question the Commission, but it appears that the post-grant review of the extension request would be irrelevant, since by then the application – which includes the extension request – would already have been, er, granted. But we digress . . . We will continue to provide updates as we get more glimpses behind the wizard's curtain.

"AM or FM?" is the question in changes of heart on community of license changes – Sometimes you just don't want to move. So what do you do if

(Continued on page 9)

2008 Reg Fees Adopted

Payments due by September 25

The FCC has adopted the schedule for 2008 regulatory fees. The deadline for payment is technically not until September 25, but fees ***can*** be paid ***now***, so you can get the item crossed off your to-do list right away, if you want.

While the schedule as originally proposed last Spring included a number of increases over the 2007 fees (*see* the article in the May, 2008 *Memo to Clients)*, the schedule as adopted ups the ante still more in a number of instances. VHF TV licenses in the Top 10 markets went from $69,400 to $71,050, and in Markets 11-20 they went from $50,850 to $53,525; on the other hand, the fee in Markets 26-50 dropped modestly, from a proposed $34,900 to $33,525. On the UHF side, the prices tended to drop, if only slightly: Markets 1-10 fell from $21,450 to $21,225; Markets 11-25 went from $20,475 to $19,475, and Markets 51-100 dropped from $6,850 to $6,800. Bucking the trend, UHF TVs in Markets 26-50 went up, from $11,575 to $11,900. (UHF CP's also dipped from the proposed $1,875 to $1,800.)

Late-filed fees still trigger a 25% late fee, so it would be prudent to get this taken care of sooner rather than later.

In adopting this year's reg fees, the FCC also issued a Notice of Proposed Rulemaking in which it proposes to tweak a number of aspects of the process by which it calculates reg fees for all services (*i.e.*, not just broadcast-related fees). In the NPRM, the Commission observed that, even though, as part of the DTV transition, a number of full-service TV stations are operating digital stations, their reg fees are based *only* on their analog facilities. According to the Commission, the only reg fee obligation stems from analog operation, so that a licensee that has "fully transitioned to digital broadcasting and has surrendered its analog spectrum currently has no regulatory fee obligation."

Don't worry – that loophole is probably not long for this world. In the NPRM, the Commission specifically seeks comment on whether it should clarify that reg fees are required for both analog and digital licenses. While it appears that the FCC intends to collect reg fees from digital-only operations in the post-Transition universe, the Commission makes clear that it does *not* intend to double-dip by charging such fees for both analog *and* digital licenses when a licensee is in the process of transitioning.

Late-filed fees still trigger a 25% late fee, so it would be prudent to get this taken care of sooner rather than later. (The FCC's on-line Fee Filer system – at http://www.fcc.gov/fees/feefiler.html – provides a convenient way to pay. If you would like any help in navigating the Fee Filer system, let us know.)

One final observation – as reported in the article on Page 2 of this issue, the FCC's Red Light rule is still alive and kicking, and can wreak havoc on non-payers. That's just one more good reason to make sure that you get your reg fees paid on time.

(Continued from page 2)

Banana, on the other hand, asked the FCC to waive its Red Light rule to let the deal go forward. But then another federal agency (the Rural Utilities Service, an office of the U.S. Department of Agriculture (USDA)) showed up, asking the Commission to deny the assignment application because, as it turned out, Northstar apparently owed USDA nearly $8 million.

Things simmered away until April, 2007, when the PCS licenses at issue were scheduled to expire. Northstar resurfaced with renewal applications. The FCC promptly notified Northstar that, because of its outstanding debt to the FCC, the renewals would not be granted and, if full payment weren't received within 30 days, the renewal applications would be dismissed.

That warning seems to have had the desired effect. Northstar negotiated a settlement arrangement with the U.S. government which addresses all of its nearly $10 million in debts, including the FCC-related obligation. Largely because of that settlement, the Commission has now agreed to a "limited waiver" of the Red Light rule which will permit the assignment of the licenses to Banana (as had been contemplated four years ago) and the renewal of those licenses.

The waiver should not be interpreted as a signal that the Commission plans to soften up on its Red Light policy. To the contrary, the Commission stressed repeatedly that this waiver was based on the "unique circumstances" of this case and was "limited" in its scope. Essentially, the FCC made clear that, in its view, the case was a "purple cow" with little precedential effect. In other words, the Red Light Rule remains in place.

So while Northstar and Banana dodged this particular bullet, the fact remains that, at least in the Commission's view, no FCC grant of an application is necessarily ever final if it turns out that one of the parties to the application was subject to the Red Light Rule when the application was acted on. Caveat emptor.

2008 Annual Regulatory Fees As Adopted by the Commission

FEE CATEGORY	FY 2008 Annual Regulatory Fee (USD)
TV VHF Commercial Stations	
Markets 1-10	71,050
Markets 11-25	53,525
Markets 26-50	33,525
Markets 51-100	21,025
Remaining Markets	5,600
Construction Permits	5,600
TV UHF Commercial Stations	
Markets 1-10	21,225
Markets 11-25	19,475
Markets 26-50	11,900
Markets 51-100	6,800
Remaining Markets	1,800
Construction Permits	1,800
Low Power TV, TV/FM Translators/ Boosters	365
Other	
Broadcast Auxiliary	10
Earth Stations	195

Satellite Television Stations	
All Markets	1,175
Construction Permits	595

Commercial Radio Stations

Population Served	AM Class A	AM Class B	AM Class C	AM Class D	FM Classes A, B1 & C3	FM Classes B, C, C0, C1 & C2
<=25,000	650	500	450	525	600	775
25,001 -75,000	1,325	1,025	650	775	1,225	1,375
75,001 -150,000	1,975	1,275	875	1,300	1,675	2,550
150,001- 500,000	2,975	2,175	1,325	1,550	2,600	3,325
500,001 -1,200,000	4,300	3,325	2,200	2,575	4,125	4,900
1,200,001- 3,000,000	6,600	5,100	3,300	4,125	6,700	7,850
>3,000,000	7,925	6,125	4,175	5,150	8,550	10,200
AM Radio Construction Permits	415					
FM Radio Construction Permits	600					

A definitional problem

Is Spanish Radio a Separate Market?

By Francisco Montero
703-812-0480
montero@fhhlaw.com

When the merger of two radio companies results in the combined company controlling a significant share of a radio market, the merger may undergo review by both the Commission and the U.S. Department of Justice (DOJ) to determine if the merger is in the public interest. In undertaking that inquiry, the government considers whether the combined company will exceed the FCC's multiple ownership caps and/or wield an anticompetitive (and hence impermissible) level of market control. If the merged company would exceed those caps or otherwise be anticompetitive in one or more markets, it may be forced to sell off stations.

Regulators have formulas to determine what an impermissible level of ownership or control is in a given market . . . but what exactly is *the market?*

This question is, obviously, key to the ultimate resolution of the regulatory analysis: the broader the definition of the relevant market, the more competition the merged company will face, and the more competition that exists in a market, the less likely that the merged company will be deemed to exercise an impermissible level of control over that market.

We've seen this market-definition debate being waged in connection with the recently-granted XM-Sirius satellite radio merger. XM and Sirius argued that satellite radio is not a separate market from traditional "terrestrial" radio and other forms of electronic media, and therefore would not constitute a monopoly in the market. The National Association of Broadcasters (NAB) and other traditional radio broadcasters countered that satellite radio was a separate market and that therefore the merger should not be allowed (since merging the only two participants in the satellite radio market would create a monopoly in that market – and monopolies are generally understood to be anticompetitive situations).

But while the satellite radio merger has garnered quite a bit of media attention, another market definition debate has been quietly waging in the halls of government, namely, whether Spanish radio should be considered a separate market?

In the past 20 years, Spanish radio in the U.S. has transformed from a sleepy sideshow of broadcasting into a major multimillion dollar industry with several publicly-traded corporations possessing major market stations that compete with their English-language counterparts for audience ratings. Moreover, as the U.S. Latino population has migrated from traditional urban concentrations in markets like Miami, New York and L.A., Spanish radio has flourished in newly-emerging Latino markets in the Southeast, Midwest and Northwest. Charlotte, Seattle, Milwaukee and Detroit are only some of the fastest growing Spanish radio markets.

This question of market definition looms large not only for each transaction that must be analyzed, but also for the Spanish radio industry as a whole.

This question of market definition looms large not only for each transaction, but also for the Spanish radio industry as a whole.

The issue first surfaced in the mid-1990s. My client, Heftel Broadcasting (a predecessor of HBC and Univision Radio), owned two popular Spanish radio stations in the Miami market. It wanted to pick up two more Spanish stations there. The proposed acquisition would give Heftel less than control of the overall Miami market (by the FCC standards of the day); ***but*** it would result in Heftel having a market share exceeding 50% of the Spanish radio market there – an impermissible level ***if*** Spanish radio were to be treated as a separate and distinct market unto itself.

In a pleading battle in which I served as communications counsel to Heftel, the FCC allowed the proposed acquisition. The FCC reasoned that treating Spanish radio as a separate market could impede the expansion of Spanish radio, especially into small markets. The FCC also feared that identifying Spanish radio as a separate market could create a loophole allowing English language groups to exceed the FCC's multiple ownership caps by merely flipping their stations to a Spanish format and therefore removing them from the market. (One Heftel official at the time observed that to rule any other way would have effectively prevented Spanish broadcasters from being first to venture into emerging Latino markets because the new entrant would almost always have a monopoly in the market.)

(Continued on page 9)

(Continued from page 8)

In 2003, the FCC upheld this position in granting the Univision-HBC merger (which created Univision Radio), although the dissenting commissioners believed otherwise. However, in that instance, DOJ broke ranks and declared that Spanish radio ***would*** be considered a separate market for purposes of antitrust analysis. More recently, during the review of the 2008 buyout of Clear Channel, the FCC again (over the objection of the dissenting commissioners) refused to declare Spanish radio to be a separate market while the Justice Department again carved out Spanish radio as a separate market. This didn't come as a complete surprise. The Justice Department has long been concerned about the ability of radio broadcasters to exceed market concentration caps by playing with station formats.

Just what is a Spanish language format nowadays? How would the government classify cross-over formats like Reggaeton and Hurban that program in both English and Spanish (or Spanglish)?

That concern is not entirely without basis. In at least one instance several years ago, the DOJ was requiring a large broadcaster to dump a group of its English language stations in connection with a merger. The broadcaster initially agreed to sell the stations to another of my clients, a Spanish broadcaster. But when the seller learned that the buyer would continue broadcasting the stations in English – and not switch them all over to a Spanish format – the seller abruptly called off the deal and sold the stations to another Spanish broadcaster. This is precisely the type of scenario that worries the Justice Department – namely, the potential for a deliberate sale of spin-off stations to Spanish broadcasters in an effort to effectively remove them from competition with the English-language stations that the merged company is retaining.

However, although the DOJ's concern has merit, the treatment of Spanish radio as a separate market presents its own serious problems.

In another instance, when Clear Channel was required to spin off stations in connection with its acquisition of AM/FM, the DOJ staff was skeptical about Spanish language broadcasters seeking the spin-offs. The DOJ feared that they would change the stations to Spanish programming and effectively remove them from competition with Clear Channel. This put Spanish language broadcasters at a disadvantage by forcing them to incur delays and additional costs in dealing with the DOJ, which in turn put their financing and the transactions at risk.

Then there's the question of enforcement. If the Justice Department allows a broadcaster to buy a merger spin-off station on the condition that an English-language format will be retained on the station, how can the Justice Department enforce that promise if the new owner later decides to change the station to Spanish? And just what is a Spanish language format nowadays? For instance, how would the government classify newly-emerging cross-over formats like *Reggaeton* and *Hurban* that frequently program in both English and Spanish (or *Spanglish*)?

And there's a broader question: should the DOJ – or any part of the government – be dictating formats to radio broadcasters? After all, the FCC, with the blessing of the Supreme Court, has for more than a quarter century declined to get involved in regulation of formats. The FCC's restraint in that regard has been based, among other things, on practical difficulties – but there's also a serious First Amendment issue that would have to be considered before the government could start to regulate programming content. The complex legal issues presented by this clash of First Amendment, antitrust, administrative law and public policy considerations is already attracting attention – for example, it was recently addressed in a thoughtful article by my friend Professor Catherine Sandoval in the Federal Communications Law Journal. It will certainly continue to be the focus of discussion in academia, the courts, governmental agencies and corporate boardrooms.

As the Spanish broadcasting and advertising market continues to track the growth of the U.S. Latino population, we can expect this issue to reemerge and continue to be debated well into the future.

(Continued from page 5)

you file for and obtain a construction permit to move your station to a new community of license, but then change your mind and decide you want to stay put? The answer, as it turns out, depends on whether the station is AM or FM. An AM station has no problem; it can simply notify the FCC of its intent to remain in City A and turn in the construction permit for new facilities in City B. Its city of license automatically remains City A.

The same is not true on the FM side, though, because a change in city of license for an FM station requires a revision to the table of allotments. Thus, when the CP to move to City B is granted, the table of allotments is revised to delete the allotment for City A. So if the FM guy decides that he really doesn't want to go to City B, he can't just turn the City B CP in and stay put in City A. Rather, he must file a minor modification application of the construction permit to change the allotment back to city A.

Petitioners target wireless mikes

LoPo Licenses Likely To Be Lopped

700 MHz auxiliaries to terminate on DTV Transition deadline

By Harry F. Cole
703-812-0483
cole@fhhlaw.com

As part of its effort to completely clear all broadcast operations out of the 700 MHz band following the February 17, 2009, DTV transition, the Commission has imposed a freeze on any new authorizations for low power auxiliary equipment in that band. (Actually, the precise frequency block at issue runs from 698-806 MHz, but that chunk of spectrum is commonly referred to as the 700 MHz band.) Perhaps more importantly, the Commission has also proposed to modify all outstanding licenses which provide for such operation – the proposed modification being that authority to operate in the 700 MHz band will terminate as of February 17, 2009.

If the FCC thinks that it can wave its magic rulemaking wand and make all low power 700 MHz operation vanish in the blink of an eye, it probably has at least one more think coming.

Generally, the equipment affected by this sweeping order and related proposal serves auxiliary functions, such as cue and control communications, TV camera synchronization and the like – but it appears that the most prevalent, or at least most controversial, low power 700 MHz equipment consists of wireless microphones.

While the Commission has made crystal clear for years that full-service broadcast service would be removed from the 700 MHz band as of the DTV Transition date, the Commission has not previously been as clear about low power auxiliary operations that have also been permitted in that band. The FCC now says that everyone engaging in such operations should have (and may have) figured out their days were numbered, but it does not appear that the FCC has previously taken a position, directly or otherwise, on the subject.

Whether or not the FCC's silence to date has been the result of conscious planning or inadvertent oversight, the agency has now snapped into action with a vengeance. As a result, effective August 21, the Commission will not accept or grant applications for further licenses for low power services in the 700 MHz band, nor will it process any requests for equipment authorization which would involve such services.

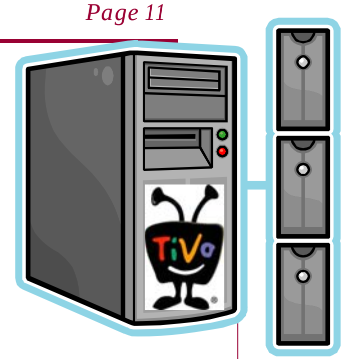
Looking ahead, the Commission has proposed to modify all outstanding low power 700 MHz licenses to specify that, to the extent that those licenses permit operation in the 700 MHz band, they will expire as of February 17, 2009. According to the Commission, a wide range of alternate frequencies are available for use for such services, so roping off that particular band should have only "minimal impact" on such operations.

The Commission has also proposed a blanket prohibition against the marketing of any devices that operate as low power auxiliary stations in the 700 MHz band. That would include the manufacture, import, sale, offer for sale or shipment of such devices. The prohibition would take effect as soon as the proposal is adopted. Since this proceeding appears to be on a fast track, it's possible that the prohibition could be in effect before the end of the year.

Besides the upcoming DTV Transition deadline, a major impetus for the FCC's sudden concern about low power 700 MHz operation was pressure from the "Public Interest Spectrum Coalition" (PISC), which filed a complaint against a number of wireless microphone manufacturers and a petition proposing, among other things, the creation of a "General Wireless Microphone Service" to utilize, on a secondary basis, vacant UHF channels below Channel 52. The Commission has requested comments on all of the PISC proposals. The context of the FCC's request, however, suggests that it is largely *pro forma* in nature, and that the Commission's real interest lies with the proposals, described above, which the agency specifically addresses elsewhere in its order.

The FCC's decision does not address precisely how the agency would enforce a blanket prohibition against everyone who currently owns and operates a 700 MHz wireless mike. Many such mikes are used by organizations – churches, theaters, corporate event venues, among many others – who presumably are not especially *au courant* about the technical details of their gear, much less the FCC's pronouncements. If the FCC thinks that it can wave its magic rulemaking wand and make all low power 700 MHz operation vanish in the blink of an eye, it probably has at least one more think coming.

The deadline for comments on the FCC's (and PISC's) proposals has not yet been established. Check the FCC blog (www.CommLawBlog.com) for updates.



Son of Betamax

Court Upholds Cable Network DVR Systems Against Copyright Claims

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

Score one for the cable guys . . . a big one. A federal appeals court in New York has ruled that a cable company violates no copyrights when it provides virtual digital video recorder services, commonly known as "network DVRs".

Network DVRs provide TiVo-like services without the inconvenience of having to provide each subscriber with his/her own separate recording device sitting next to, and wired into, the TV set. Rather, network DVRs store programming on the cable company's computers. All related functions – storing, playback, rewinding and fast-forwarding – are performed through remote connections to the cable system's server.

The decision, from the U.S. Court of Appeals for the Second Circuit, potentially expands customer options, making any digital cable box or two-way TV into a DVR gateway. For cable providers, it means the cost of providing DVR services will likely decline, potentially cutting the monthly fee needed for a solid return on investment. If prices go down, subscriber numbers could go up, with a consequent increase in overall bottom-line for the cable guys.

The Second Circuit's decision favors Cablevision, the appellant. It reverses a lower court ruling that the network DVR system constitutes unauthorized – and, therefore, infringing – copying of the various works (*e.g.*, movies, TV shows and the like) requested by cable subscribers availing themselves of the network DVR services. The potential liability for such infringement would be enormous – and the only way that Cablevision, or any other network DVR operator, could avoid it would be to negotiate new copyright licenses with the copyright holders, which would also likely be an extraordinarily pricey proposition. The losers in the appeal – *i.e.*, the copyright holders who claimed infringement – included Turner Broadcasting, Fox, NBC, Disney and CBS. They all asserted that network DVRs would have adverse effects on their distribution of content on the retail level.

For cable and satellite providers, network DVRs make a lot of business sense. Now, with a traditional DVR-sitting-on-the-customer's-TV approach, inventory, delivery, installation and setup of individual DVR boxes is costly – some estimates run as high $500 per DVR installation. By contrast, network DVR services, once available, can be remotely installed without a home visit, and without the need for keeping stacks of DVRs on the shelves.

But for program providers – whether cable channels or over-the-air broadcasters – more DVR use could well mean more commercials getting zapped. DVR services make it incredibly easy to fast-forward through unwanted commercials in seconds or even split-seconds. The more commercials go unwatched through DVR use, the more downward economic pressure is applied to the traditional sponsorship model for broadcasters and many conventional cablecasters.

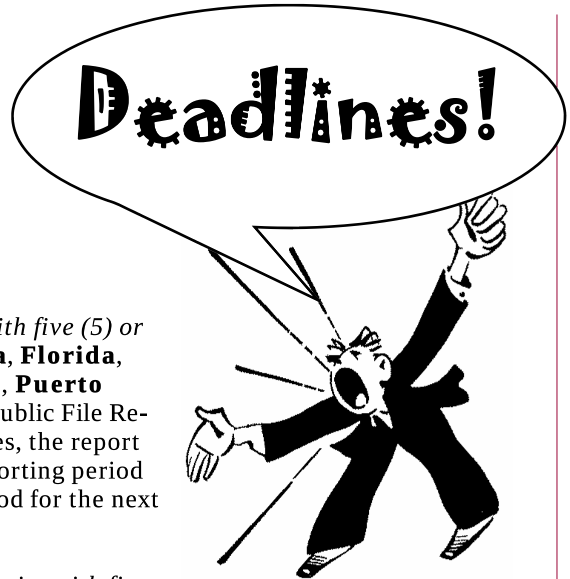
The Second Circuit found no distinction between network DVRs and video cassette recording; it held, essentially, that time-shifting is time-shifting is time-shifting.

The legal principle at issue here first arose in a Supreme Court ruling from the early days of consumer video cassettes. That decades-old decision held that TV viewers were engaged in legitimate "time shifting" when they used VCRs to tape programs. "Time shifting" was a "fair use" of copyrighted materials – so it could be done without any additional permission from or payment to copyright owners. In that case, *Sony Corporation of America v. Universal City Studios, Inc.* (often referred to by the *cognoscenti* as "the Betamax case"), a major production house went after Sony, which was not yet a studio owner, but was the manufacturer of then state-of-the-art Betamax VCR systems.

The Second Circuit found no distinction between network DVRs and video cassette recording; it held, essentially, that time-shifting is time-shifting is time-shifting. Of course, fast-forwarding an analog video tape takes more time than skipping ahead once a film has been translated into computer digits. That is, it is possible that the program distributors might be able to distinguish network DVRs from Betamax, and thus undermine the Second Circuit's rationale. But to do that, they would have to convince a higher court – either the Second Circuit sitting *en banc* or the U.S. Supreme Court – of a legally meaningful distinction between: (a) speedy digital time-shifting by DVR and (b) more cumbersome mechanical time-shifting via video tape.

Broadcasters and cablecasters are now confronted

(Continued on page 17)



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 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 Consolidated Data Base System (CDBS), the normal filing system for applications and reports.

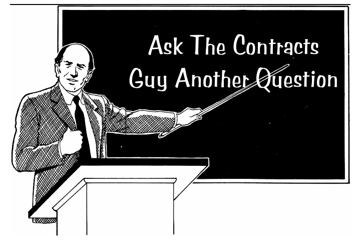
Children's Television Programming Reports - Analog and Digital - For all *commercial television* and *Class A television* stations, the second quarter reports on revised FCC Form 398 must be filed electronically with the Commission, and a copy must be placed in each station's local public inspection 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.

You'll never work in this town again
. . . unless this town is in New York



New York Nixes Non-Competes

Impact on in-place pacts unclear

By Steve Lovelady
703-812-0517
lovelady@fhhlaw.com

In early August, New York enacted a state-wide ban on non-competition provisions in broadcast employment contracts. By doing so it joined a handful of other jurisdictions (Arizona, Connecticut, Illinois, Maine, Massachusetts, the District of Columbia) that target the broadcast industry with statutes to either limit enforcement of or completely ban contract clauses in employment agreements between broadcasters and their employees that would otherwise prevent the employees from subsequently working for competitors. California generally bans enforcement of all non-competition agreements against employees in all industries.

The New York statute was successfully passed this year after at least two prior attempts failed in 2004 and 2006. It was heavily promoted by labor unions, particularly local chapters of the AFTRA and NABET-CWA with support from the New York State AFL-CIO. Although New York City has one of the largest concentrations of media industry employers and employees, most of the pro-employee support for this legislation appears to have originated upstate, with the Rochester and Buffalo local chapters getting particular credit in union press releases. Apparently, television and radio station employees in those smaller markets were the ones who felt that overly-restrictive non-compete agreements were being forced upon them by local broadcasters. AFTRA is aggressively pursuing passage of similar legislation in other states.

Perhaps the biggest question is whether the statute makes non-compete clauses in existing contracts void and/or unenforceable. It might be a little premature for anyone subject to a pre-existing non-compete to celebrate any new-found freedom.

Interestingly, the New York law applies not only to traditional radio and television stations, but more broadly to any "broadcast employer", a term which includes networks (cable and broadcast), internet or satellite-based services similar to a broadcast stations, and any other entity that provides broadcasting services such as news, weather, traffic, etc. On the other side of the equation, the term "broadcast employee" includes on-air *and* off-air employees, but *not* management employees. The law leaves vague exactly who might be deemed a "manager", so we can expect litigation to bring that question into focus. In a similar vein, it's not clear whether the law applies to independent contractors or freelancers.

Perhaps the biggest question, at least initially, is whether the statute makes non-compete clauses in existing contracts void and/or unenforceable. The New York statute merely states that after the date of the its enactment, a broadcast industry employer may not require, as a condition of employment, that a broadcast employee agree to refrain after the employment period has ended from obtaining other employment within a specified geographic area, for a specific period of time, or with a particular other employer or in any particular industry. In simple terms, this seems to be a ban upon entering into new non-compete agreements.

But what if an employee had agreed to (and had presumably been compensated for) such a provision in a contract signed before the law's enactment? Arguably, that prior contract provision might still be enforceable. Indeed, a new law which renders illegal contractual provisions which were legal when entered into might raise significant constitutional questions. So it might be a little premature for anyone subject to a pre-existing non-compete to celebrate any new-found freedom.

One aspect of the new law in New York that should grab the attention of broadcasters is that any person violating the new law is civilly liable to its employee for damages, attorney fees and costs. Plaintiffs' lawyers in New York representing employees have doubtless made note of that provision. There is nothing in the new law that defines how such damages are calculated, so we can expect enterprising attorneys to come up with all sorts of creative ways to show how their clients are entitled to multi-million dollar awards under the new law.

The new ban on new non-competes in New York – and similar efforts in other jurisdictions – highlights the need to have a local lawyer familiar with relevant state employment statutes review and approve any new or renewed agreements between broadcasters and their employees. Ultimately these agreements are subject to resolution under state laws, and media-industry employers could find themselves hit with substantial lawsuits and countersuits for damages for merely including impermissible non-compete clauses in their employment agreements. It is no longer safe to just re-use the old form of employment contract that you have stored in your computer or file cabinet.

Meet the new edition, same as the old edition (almost)

"The Public and Broadcasting" Revised, Again

With no notice, FCC posts slightly-revised version

By Denise Branson, Legal Assistant
branson@fhhlaw.com
703-812-0425

The FCC has updated the April, 2008 version of *The Public and Broadcasting* a mere three months after its release. The relatively minor changes amount to snipping a sentence here, adding a paragraph there, and updating a couple of addresses. Don't bother to scour the document looking for the changes. They are:

- The DTV Transition section now advises that, if a consumer receives local stations through cable or satellite service already, then his/her TV sets are prepared for the transition.
- The listing of materials required to be placed in the public inspection file has been expanded to include the recently-created Form 388 (DTV Transition Consumer Education Reports).
- Indecency complaints now have a new gathering place at the Consumer & Governmental Affairs Bureau, Consumer Inquiries and Complaints Division.

It would probably be prudent for everyone with a public file to assure that that file contains a copy of the new edition. While the new changes are minimal, it's possible that the FCC could assert that having any version but the latest and greatest available is a violation. (Note that the FCC has *not* yet said that, but you never know.) And since the FCC also requires broadcasters to make copies available to people who walk in off the street and ask for one (like that might ever happen), you might want to run off a couple of extra copies to have on hand.

The July 2008 edition is available for download at: http://www.fcc.gov/mb/audio/decdoc/public_and_broadcasting.html. If you run into any problems getting it there, let us know and we'll get you a copy.

The most recent revision prior to April, 2008, occurred nine years ago, back in 1999. When the April, 2008, version was released, the Commission announced it with a public notice. No such fanfare – in fact, no fanfare at all – attended the July, 2008, revision. It appears that the FCC is taking the position that broadcasters should constantly check the release date of *The Public and Broadcasting* on the FCC's website. While that seems a bit odd – particularly if the Commission is going to be issuing frequent revisions involving largely non-substantive changes – it will probably be good to get into the habit of checking the FCC's site periodically, so that you always have the most recent edition in your public file.

(Continued from page 1)

In our view, provisions of this type are unnecessarily broad in scope and could potentially open the door to claims against broadcasters who contractually agree to these standards but who subsequently fail to follow-through in practice with the requirements. We also think that overly-complicated and detailed nondiscrimination clauses and overly-burdensome compliance requirements could scare away potential advertising clients at a time when the radio business in particular is facing declining revenue.

As an alternative, we suggest a somewhat more pragmatic approach to compliance, keeping it simple by sticking with the wording of the Commission's diversity order and not overly elaborating upon it with any unnecessary requirements. For example, the following clause would appear to comply with FCC's policy:

> *NONDISCRIMINATION POLICY: [Insert name of broadcaster] and its station[s] do not discriminate in advertising contracts on the basis of race or gender. Any provision in any order or agreement for advertising that purports to discriminate on the basis of race or gender, even if handwritten, typed, or otherwise made a part of a particular contract, is hereby rejected.*

The FCC's diversity order implementing the new policy went into effect on July 15. However, the revised license renewal application on Form 303-S has not yet gone through the (somewhat Orwellian-named) Paperwork Reduction Act process. So it is unclear exactly when the requirement for adding these nondiscrimination clauses to your advertising contracts begins.

It is also unclear how this new policy will apply to existing advertising contracts. As mentioned earlier, the policy is to be implemented through certifications in routine license renewal applications: when your next renewal application comes due in a couple of years, you will be required to certify that your advertising contracts contain nondiscrimination clauses. But let's say you have a standing order with a client for weekly spots that began on January 1, 2008, and runs through the end of the year, with the only paperwork being an contract/order form that was signed in January before the new policy took effect – will that agreement be covered by the certification you will be required to make in 2012 (or whenever your next renewal application happens to be due)?

To be abundantly clear that you are in compliance, in ad-

(Continued on page 15)

FM ALLOTMENTS ADOPTED – 6/20/08-8/19/08

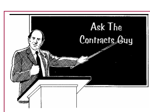
State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
TX	Dilley	72 miles SW of San Antonio, TX	291A	07-183	TBA
OR	Boardman	52 miles SW of Kennewick, WA	231C3	06-72	TBA
NV	Owyhee	138 miles S of Boise, ID	247C3	06-72	TBA

FM ALLOTMENTS PROPOSED – 6/20/08-8/19/08

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (*i.e.*, Drop-in, Section 1.420, Counterproposal)
MI	Custer	103 miles NW of Grand Rapids, MI	227A	08-86	Cmnt: 9/15/08 Reply: 9/30/08	Accommodation Substitution
IA	Asbury	6 miles W of Dubuque, IA	*254A	08-150	Cmnt: 9/22/08 Reply: 10/7/08	Accommodation Substitution
WI	Mineral Point	53 miles SW of Madison, WI	238A	08-150	Cmnt: 9/22/08 Reply: 10/7/08	Drop-in
KY	Irvington	51 miles SW of Louisville, KY	261A	07-296	Cmnt: 9/22/08 Reply: 10/7/08	Accommodation Substitution
CA	Blythe	151 miles W of Phoenix, AZ	247B	08-151	Cmnt: 9/22/08 Reply: 10/7/08	Accommodation Substitution

Notice Concerning Listings of FM Allotments

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



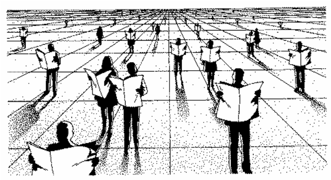
(Continued from page 14)
dition to starting to add a nondiscrimination clause to all new contracts, you should consider sending out a mailing to all existing advertisers (including your national rep firm, if you have one) amending your current contracts to include this new clause. Perhaps when we see the revised renewal application Form 303-S and the instructions regarding this issue, it will be clearer exactly what the compliance certification will require regarding existing agreements.

Finally, we are constrained to observe that there is a bit of irony in the approach the FCC has taken with this new policy. Presumably, when station license renewal time rolls around, if a licensee is unable to certify in its renewal application that its advertising contracts contain the required nondiscrimination clause, the FCC will delay approval of the application and either admonish the licensee or possibly seek to impose a monetary fine for failure to comply with this policy. That has been the FCC's course of action when dealing with certifications regarding public file rule requirements, for example, in the last round of license renewals. But what if the licensee's station is broadcasting an urban or a Spanish-language format – the precise type of format this policy is designed to protect and encourage? Will the FCC still punish such licensees for failing to have nondiscrimination clauses in their advertising agreements? We shall see.

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

Updates on the News

The Commissioners are coming! The Commissioners are coming! – Vacuum the red carpet, gas up the welcome wagon, get a couple of keys to the city copied up and notify the media. The FCC has announced that, between now and February 17, 2009, the Commissioners themselves are hitting the road, "fan[ning] out" across the country to "raise awareness and educate consumers" about the coming DTV transition. Each stop will feature a "public event", such as a town hall meeting, workshop or roundtable with a Commissioner, who will (the FCC assures us) also "be available to local press". No word yet on whether there will also be a moon bounce or maybe pony rides.



A phalanx of FCC staffers will precede by a couple of days the arrival of a Commissioner in each town. The staffers will provide technical and outreach assistance to broadcasters, local officials and others interested in a smooth transition.

Targeted markets include all markets in which more than 100,000 households or at least 15% of the households rely solely on over-the-air signals. The Commission has released a list of 81 markets that will be visited between now and February. Dates for 23 of the visits have been released. Perhaps not surprisingly, the trip to Phoenix is scheduled for the end of December. Details of the visits will be released by the FCC later, although we already know that Commissioner McDowell will be in Anchorage on August 27 and Fairbanks the next day.

Meanwhile, the Commission has announced that the Wilmington, NC DTV test will commence on September 8 at noon, at which point the local commercial network affiliates and the local Trinity Broadcasting low-power station will broadcast their standard programming on digital channels only. BUT the Commission has carved out an exception that will permit the participating stations to broadcast emergency information in analog should the need arise – for example, if a hurricane should threaten the area. (Note that, when the transition does finally arrive in February, 2009, stations will not be permitted to broadcast anything – emergency or not – on their analog channels.) In addition, during the Wilmington test period the participating stations will be broadcasting, in analog, a message advising viewers of the test and alerting them that, if they are seeing the message, they need to upgrade to digital.

And one more thing – the Commission has established a Speakers Bureau which will arrange DTV-related presentations, free of charge, to any group anywhere in the country requesting one. Just go to www.fcc.gov and click on the "Request A Speaker" button. If you're looking for speakers, the folks at the NAB can also set you up.

More bad stuff is coming! – In case you may have momentarily lost sight of the dire straits in which we all might find ourselves in the blink of an eye, the FCC is reminding us of just that. It is hosting a "Summit on Pandemic Preparedness: *Enhancing Communications Response for Health Care and First Responders*". They'll be looking at such cheery subjects as "telehealth services" and "social distancing/quarantine", all with an eye to insure that, when the fan gets hit, the necessary communications facilities will be ready to handle the job. The get-together is currently scheduled for September 18 in the Commission's office in Washington. The original date was announced as September 16 – we're guessing that the FCC decided that it wouldn't be ready by then . . .

Togging up for those roadside remotes – We were surprised to learn recently of the "Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)" (no kidding – that's the name that a majority of your elected Federal representatives signed off on), which was enacted three years ago. Pursuant to SAFETEA-LU, in 2006 the Federal Highway Administration adopted rules which are set to take effect this November (November 24, 2008, to be precise). The rules require that any worker who happens to be working in the public right-of-way of a Federal-aid highway ***must*** wear "high visibility clothing". This includes newspeople. We'll be looking into the nitty-gritty of this requirement for next month's issue, but you might want to focus on this sooner rather than later, in case you're about to go shopping to freshen up your outerwear wardrobe for the Fall.

The *Memo to Clients* is available

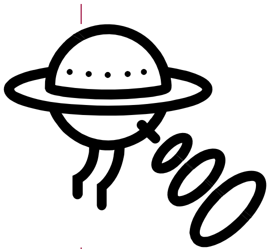
electronically!!

Do you prefer this . . .

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

Same content – less paper.

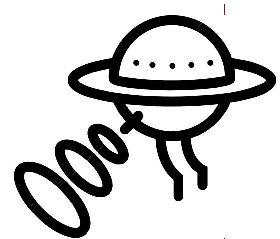
. . . or this?



They will come from outer space . . .

FCC Proposes Satellite Operation On 2 GHz By January, 2009

Status of rebanding process apparently not a concern



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

Broadcasters use the spectrum at 1990-2110 MHz for auxiliary operations involving vans, helicopters, remotes, STLs and intercity relays. That particular neck of the spectrum woods is in the process of reorganization, or "rebanding", designed to free up a chunk of space that will be used for mobile services by Sprint Nextel. The rebanding will require many broadcasters to obtain and install new gear – at the expense of Sprint Nextel, thank you very much. Most broadcasters have been contacted by Sprint Nextel in the past year to coordinate the purchase of new equipment, which uses digital emissions and, thus, chews up less spectrum. As a result of the rebanding, when broadcasters move to digital operations, 35 MHz of spectrum will be vacated.

When the 2 GHz spectrum is clear, Sprint Nextel will be licensed to use 5 MHz for its mobile operations. Another 20 MHz of the vacated spectrum will be used by satellite companies. So far, the process has been slow, with disappointing progress. The overall task is, of course, daunting in and of itself – not to mention the fact that it's going to be staggeringly expensive for Sprint Nextel. That could account for some of the slowness.

But the satellite companies who have been waiting in the wings to get at their 20 MHz are starting to get restless. They have pressed the Commission for permission to start using the new spectrum and, lo and behold, the Commission has agreed to consider letting them do so, even before broadcasters have shifted to their new digital operations. Thus far in the rebanding process, the FCC has refused to allow satellite companies to use the spectrum until broadcasters have moved to new operations in the top 30 television markets. However, the FCC has now concluded that it may not really need to wait for the broadcasters to move before it allows the satellite companies to operate on the same frequencies. Accordingly, in a notice of proposed rulemaking the FCC has proposed that, as of January 1, 2009, satellite companies will be able to transmit in the 2000-2020 MHz bands as long as such operation is secondary to broadcast operations.

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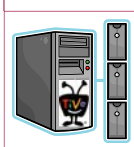
Predictably, both broadcasters and Sprint Nextel have objected to the FCC's proposal. Broadcasters, through the NAB and MSTV, have strongly opposed the change, pointing out that they will encounter major league interference if satellite operators beam down signals from space while terrestrial broadcasters are still operating on the same frequencies. Sprint Nextel has likewise noted the potential for interference and the practical problems that it would face in having to relocate broadcasters under these circumstances.

Not surprisingly, the satellite companies have confidently assured the FCC that everything will be just fine. In fact, one of the companies disclosed that it launched a satellite a few weeks after the FCC proposed changing its rule. Needless to say, broadcasters and Sprint Nextel were less than complimentary of the satellite claims.

The FCC's tentative conclusion that it will allow both broadcasters and satellite companies to operate simultaneously at 2000-2020 MHz is not promising for broadcasters. Broadcasters who are facing deadlines for relocating to digital equipment may soon be bothered by interference from outer space. While the Commission's tentative conclusion for the time being is still just that – tentative – it is not unreasonable to assume that it may be embraced permanently in the not-too-distant future, most likely by January 1 of next year. Stay tuned for future developments.



(Continued from page 11)

with essentially two choices: find ways to maintain revenue streams despite increased commercial-zapping, or mount a persuasive, last-ditch attack in the courts showing that, for copyright law purposes, time-shifting on a DVR is not a "fair use". If solid distinctions between digital and old-fashioned cassette recording technologies can't be established, the appellants would likely have to get the Supreme Court to overrule the old VCR precedent overruled – which is never an easy task.

We have heard no word yet on whether the broadcasters and cablecasters involved plan to seek further review of the Second Circuit's decision. Of course, another way to sort out the rights and responsibilities of all concerned would be through amendment of the Copyright Act, updating the statute so that it specifically articulates how traditional copyright interests are to be interpreted and applied in the context of 21st Century technology. Don't hold your breath . . . .

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