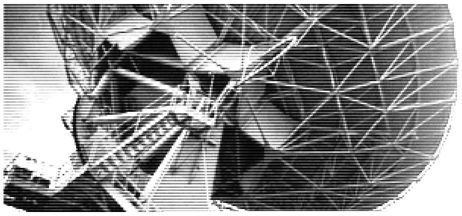

FLETCHER, HEALD & HILDRETH

Communications Law & Regulation

MEMORANDUM TO CLIENTS

News and Analysis of Recent Events in the Field of Communications

Scenes from the front

DTV Update:
T-Day Minus Four Months and Counting

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

We're rounding the final turn and heading into the homestretch of the DTV derby. At this point the momentum has for the most part shifted so that the FCC and the TV industry as a whole are gliding . . . or perhaps careening . . . or perhaps stumbling toward the digital finish line. Here we chronicle various scenes from the evolving apocalyptic panorama.

Jumping the gun?

While the firm, fixed and final Transition Date has long been set at February 17, 2009 (unless, of course, a bill thrown into the Congressional hopper in mid-September gets any traction, in which case a couple more weeks – and who knows, maybe even more than that – might get added), a number of licensees are champing at the bit to terminate their analog operations before then. Early analog withdrawal is not necessarily a bad idea. After all, at a minimum the licensee eliminates power bills for a redundant operation. And if the licensee is reasonably confident that the significant majority of its audience already receives the digital signal – either through cable, or satellite, or maybe real DTV receivers – then the risk of ratings collapse is minimized.

The Commission has established a largely trouble-free drill for those who want to pull the analog plug before February.

The Commission has established a drill for those who want to pull the analog plug before February, and for those who are willing to hold off until November 17 to do so, the drill is largely trouble-free.

The FCC has adopted a streamlined approach for transitioning stations, an approach which kicks in November 17, 90 days prior to the Real Transition Date (*i.e.*, next February 17). Most stations will be able to permanently terminate their analogy operations as of November 17 ***without prior Commission approval AS LONG AS*** they have provided at least 30 days' worth of over-the-air notices, on their analogs, alerting the audience to the anticipated termination date and "inform[ing] them about how they can continue to receive the station". (*See* the sidebar on page 11 for details on just what information those announcements should include.) Stations choosing this option will have to notify the Commission of their plans at least 30 days in advance. While that notification is supposed to contain a showing that "the service reduction or termination is necessary for purposes of the transition", it's not clear what the purpose of that showing is, since the Commission has unequivocally stated that prior agency approval will not be required.

The bottom line for most full-service TV stations, then, is that if you want to turn off your analog operation as early as possible without first having to get FCC approval, you should plan to do so on November 17, which will require notice to the FCC (through CDBS) no later than October 18, and over-the-air notices of the planned termination also starting no later than October 18.

The one subset of licensees who will have to jump through additional hoops are those who have flash-cut construction

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September, 2008 **No. 08-09**

Inside this issue . . .

Election 2008: Vaticinations and haruspications

Political Prognostications: Who's the Broadcaster's Candidate?

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

As the 2008 Presidential race (not to mention the 2008 political advertising season) kicks into high gear, broadcasters may wonder how the candidates stand on issues relating to the broadcasting industry. Conventional wisdom is that Republicans favor deregulation and Democrats favor regulation. As a heavily-regulated industry, then, one would expect that broadcasters would have an easier time of things under a Republican administration than a Democratic one. That simple narrative, however, does not seem to be holding true anymore.

Over the past few years, the FCC pushed more regulatory burdens on broadcasters – a peristaltic wave that culminated in, among other things, "localism" proposals that threaten to re-regulate broadcasters at a level not seen in several decades. And all that occurred under a supposedly "deregulatory" Republican administration. Moreover, as the former Chairman of the Senate Commerce Committee, Republican Presidential candidate John McCain has been sharply critical of the broadcasting industry in the past. Thus, broad party labels may not provide a useful, or accurate, basis for predicting future regulatory policies.

Democratic Presidential candidate Barack Obama has made technology policy a substantial part of his platform and has directly addressed the regulation of broadcasters on a number of occasions. In particular, Obama has come out strongly for curbing increased media consolidation and for expanding opportunities for minority and small business ownership of media outlets. Obama also has spoken directly on the subject of broadcast licensing, favoring shorter license renewal periods with greater public input.

McCain has not been as outspoken on media consolidation. As Chairman of the Commerce Committee, McCain supported many, although not necessarily all, of the media and telecommunications mergers of the late 1990s and early 2000s notwithstanding his opposition to the largely deregulatory Telecommunications Act of 1996. More recently, through various aides and advisors, McCain has expressed support for basing broadcast ownership analysis on all available media sources, including the Internet – a shift that could potentially loosen local ownership restrictions. (That approach could also undermine, if not eviscerate, the "scarcity" rationale which for decades has provided a justification for any content-based regulation of broadcasting.) On the subject of diversity in the media, McCain has favored the return of the diversity sale tax credit rather than more direct means of increasing minority media ownership.

Media consolidation, then, is probably where the candidates have the greatest differences. On other issues involving broadcasters, however, the two adversaries have taken somewhat similar positions. On the subject of localism regulation, Obama has gone on record as supporting "new rules promoting greater coverage of local issues and greater responsiveness of broadcasters to the communities they operate in." McCain's campaign also has stated that greater "clarity" is needed on the subject of broadcast localism, suggesting that the FCC's localism push will not end regardless of who is elected. Both candidates have been supportive of expanding LPFM service. The Obama platform favors free political air time on radio and television, which McCain also favors. Both Senators voted to increase the maximum fines on indecent broadcasts and have called for rigorous enforcement of indecency rules. (Then again, we have yet to find a pro-indecency candidate.)

The more interesting point for broadcasters, and the media industry in general, is

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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

Focus on FCC Fines

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

Cable company fined for changing channel line-up – Television broadcasters are usually quite aware of many of the FCC regulations that control how cable companies operate their businesses. One regulation requires cable companies to notify subscribers and the local franchise authority before making a rate or service change. The Time-Warner subsidiary on Hawaii was issued a $7,500 fine for failing to follow this rule. Obviously, familiarity with all of the ins and outs of carriage requirements is important for cable operators ***and*** broadcasters alike, as both groups are directly affected by those requirements.

In this case, the Time-Warner affiliate shuffled the stations on its channel lineup. Prior to the shuffling, cable customers could watch dozens of channels directly through their television sets without a converter. After the shuffle, more than forty channels moved to a tier that required a converter box. The cable company defended its actions claiming that it offered to give cable converter boxes to customers without extra charge. However, the FCC said that the requirement to add a converter box was a change in service.

As broadcasters prepare for the transition to digital-only operations, they should be mindful of how cable operators are supposed to alert subscribers to any changes in service – including changes which may occur in connection with the upcoming DTV transition. In particular, cable companies are required to provide their subscribers and authorities with written notices about transitions to all-digital systems, listing any actions or information required to continue receiving service.

San Diego TV station claims it is a filter for emergencies – In March, 2005, the FCC proposed fining three San Diego television stations for failing to provide emergency information (about nearby wildfires) accessible to hearing-impaired viewers through, *e.g.*, closed-captioning or visual-text displays. The FCC has now rejected a request for further consideration posed by one of the target stations; as a result, that station is now on the hook for $25,000.

The FCC's rules mandate that video program distributors provide persons with hearing disabilities access to the same emergency information as is available in the audio portion of the programming.

The FCC reviewed hours of tape from the television station and found at least 22 instances where emergency information about the wildfires was reported in the audio without corresponding reporting accessible to the hard of hearing. The station responded that its journalists and producers should be allowed to act as filters as to what constitutes an emergency for purposes of requiring visual information. The FCC acknowledged that programmers should be able to exercise good faith judgment in determining what is an emergency; yet in all 22 cases, the FCC determined that the station failed in exercising such judgment. (One example: viewers were given oral instruction on what to do if flames were spotted near their house, but that instruction was not provided visually.) The FCC seems unwavering that flames lapping near your home is an emergency.

After three years of reviewing the file, the FCC has finally flamed the station with a $25,000 fine. Readers are reminded that the FCC requires that visual information be provided along with aural information in cases of emergencies. While some discretion is provided to stations as to what constitutes an emergency, it may be best to err on the side of caution, particularly if the station has visual aids at the ready.

FCC taking aim at pirates – During the first three weeks of September, the FCC issued orders and notices regarding nearly a dozen pirate radio stations identified by FCC agents. Most of the stations were using the FM band in locations that varied among Florida, Cleveland, Oregon and New York. Standard fines of $10,000 were issued to those pirates. Yet one pirate forked over no booty.

While most of the pirates chose to operate in the standard FM broadcast band, one case involved unauthorized transmissions at 156.80 MHz, a frequency in the marine band channel used by ships, boats and for other operations at sea. Over a period of weeks, the Coast Guard responded to several false distress calls, and scrambled ships and aircraft to phantom emergencies. After multiple false alarms, the Coast Guard contacted the FCC to help determine the source of the false distress and mayday calls.

The FCC tracked the signal to a Largo, Florida, trailer park but, wouldn't you know it, just as they were moving in to make the bust, they got word that the local police had beat them to the punch, arresting a 16-year-old boy from the trailer park. According to the police, in the lad's room they found multiple radios, a marine battery and a whip antenna – an uncommon collection for a high school student. The kid 'fessed up to making the fake distress calls. Within six months he was doing time in the local juvie facilities for non-FCC problems. So it should not be a surprise that he failed to respond to the Commission's initial order whacking him with an $18,000 fine for his unauthorized radio broadcast. However, upon reconsideration, the FCC recognized that the kid was locked up and had no means to pay the fine. The FCC fine was cancelled.

Beancounters on the march

Re-setting The Reg Fee Meter?

FCC considers re-allocating costs of regulation

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

Sometime this month, you likely sent off a sizable check to the FCC to pay the regulatory fees which the FCC annually extorts – er, perhaps that's too harsh – exacts (yes, that's acceptably circumspect) from its regulatees. Perhaps you would like to know where the money goes. For those who are curious – or those who want to mount an effort to convince the FCC that the fees are too high – the FCC has provided analyses of its annual budget. In particular, the FCC has listed how much money it takes in from the broadcast industry and how much money it spends regulating the industry.

The FCC's disclosures are intended to help the agency review its formula for assessing fees among the various industries that it regulates. Congress long ago ordered the FCC to collect reg fees as a means of funding the FCC's operations. To a significant degree, those fees are intended to cover the cost of the Commission's regulatory activities. The fees assessed against each regulated industry – *e.g.*, broadcast, cable, wireless, satellite, etc. – are supposedly based on the costs which the FCC incurs in regulating each of those industries. Because it has been some time since the Commission took a close look at its costs of regulation vis-à-vis the reg fees it has been charging, this year the Commission has invited comment on whether (and if so, how) its fee schedules might be adjusted to more accurately reflect its costs.

Whether the Commission's review of its per-industry cost allocations will result in higher annual reg fees for broadcasters is far from clear – but that is certainly a possibility.

It's been almost 15 years since the FCC last looked into its reg fee methodology. That methodology is based in large measure on the number of FCC FTEs (full-time employees) devoted to each regulatory category. Because of the difficulty of tying that number down with precision, the Commission estimated it in 1994 and has used that estimate since then. With remarkable understatement, the Commission acknowledges that "the communications industry has changed considerably since we adopted our regulatory fee schedule in 1994", and opines that review of its vintage 1994 estimates of FTE allotments is in order.

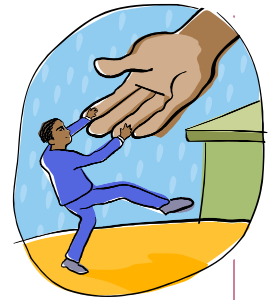
This is *not* a penny-ante undertaking. While the check that you wrote this month may have seemed quite large, the FCC was dipping even more deeply into the pockets of other companies that it regulates. For example, satellite operators had to fork over more than $125,000 per space station system as their annual fee. Mobile phone companies had to pay 17 cents for each cell phone unit owned by their subscribers. Telecommunications providers, such as your local phone company and VoIP companies, had to shell out a percentage of their revenues as their fee. In other words, there's a lot of money in play here, and both the FCC and the various affected industries have an interest in getting things right.

In a Further Notice of Proposed Rulemaking (*FNPRM*), the FCC has now provided data about the amounts of money that (a) it spends on each industry and (b) it currently receives from each industry. According to the Commission, it spends nearly one hundred million dollars ($100,000,000.00) each year to regulate the media industry. Its Media Bureau directly employs 231 FTEs full time employees who split $26 million in personnel expenses. The FCC then tacks on $2 million in non-personnel expenses and a whopping $65 million in overhead/support expenses. According to FCC calculations, the Media Bureau comprises an impressive 30% of the FCC's $313 million annual budget. The FCC's Wireless Bureau – the folks who regulate cell phones, pagers, microwaves, and other wireless licenses – comes in second at 27% of the budget expense. (These and other facts and figures are set out in extensive detail, complete with a plethora of pie-charts, in the *FNPRM*.)

According to the FCC's projections, regulatory fees assessed against broadcast and cable services this year will total $94 million – with broadcast services kicking in $42 million and cable making up the remaining $52 million. This total is almost double what it was in 1995. For comparison purposes, the FCC provided 1995 data which indicated that broadcasters kicked in $21 million and cable $30 million.

Whether the Commission's review of its per-industry cost allocations will result in higher annual reg fees for broadcasters is far from clear – but that is certainly a possibility. Those who would like to comment on the FCC's regulatory fee system and the methods used to assess fees may file reply comments by October 27.

Viewability load lightened



Small Cable Guys Get Break On Digital Carriage

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

In November, 2007, the FCC imposed requirements on the way that cable systems transmit digital and analog "must-carry" broadcast TV signals. The goal was to ensure that those signals be viewable to all subscribers. Among other things, the FCC required cable operators to carry the HDTV version of certain broadcast signals, even if cable operators were carrying the analog version of that signal. Recently, the FCC provided some relief to small cable operators regarding this HDTV carriage requirement.

Background

Material Degradation

The FCC first addressed cable carriage of DTV signals in 2001. At that time it established two principles derived from statutory provisions (the 2001 standards) requiring that cable operators carry local TV broadcast signals "without material degradation":

- "a cable operator may not provide a digital broadcast signal in a lesser format or lower resolution than that afforded to any other signal on the system"; and

- "a cable operator must carry broadcast stations such that, when compared to the broadcast signal, the difference is not really perceptible to the viewer."

The FCC ruled in 2001 that because the material degradation was to be measured by the eye, it did not necessarily require carriage of all of the content bits of a station's digital signal.

Thus, a digital broadcast signal delivered in HDTV (as opposed to "standard definition" digital or "SD") had to be carried on the cable system in HDTV. This is an issue for some cable operators, as HDTV takes up more bandwidth on the cable system than SD. Nevertheless, the FCC ruled in 2001 that because the material degradation was to be measured by the eye, it did not necessarily require carriage of *all* of the content bits of a station's digital signal.

Viewability

In the 2007 Order, the FCC retained the requirement that HDTV signals be carried in HDTV, as well as the comparative approach to determining whether material degradation has occurred. In addition, however, in light of the statutory mandate that all TV signals carried pursuant to "must-carry" must be viewable by subscribers on all TV receivers connected to the cable system, the FCC adopted rules (the 2007 standards) specifying that:

- cable systems that are *not* "all-digital" must provide must-carry signals in analog (as well as in digital), though "all-digital" systems *may* provide them in digital form only;

- the cost of any down-conversion of digital TV signals to analog for this purpose must be borne by cable operators; and

- down-converted signals may count toward the one-third channel capacity/ bandwidth capacity cap on commercial TV must-carry obligations.

In explaining the first of these new 2007 standards, the FCC stated that cable operators must either: (a) carry the signals of commercial and non-commercial must-carry stations in analog format to all analog cable subscribers, or (b) for all-digital systems, carry those signals only in digital format, provided that all subscribers with analog television sets have the necessary equipment to view the broadcast content. The FCC also clarified in the 2007 Order that that it is *not* material degradation to down-convert that signal to comply with these "viewability" requirements.

It is important to remember that these requirements apply ***only*** to *local TV stations carried pursuant to "must-carry."* Stations carried pursuant to retransmission consent are subject to whatever terms the cable operator and the TV station negotiated in their consent agreement.

Lastly, in the 2007 Order, the FCC recognized that the "viewability" requirements would place significant financial and bandwidth burdens on small cable systems, so it: (a) invited waiver requests from cable operators with less than 552 MHz of activated channel capacity; and (b) issued a notice of proposed rulemaking seeking comments on other ways of relieving the

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Lots of bark, but how much bite?

Groups Seek To Sic FCC On Arbitron

Accuracy of People Meter questioned, effect on minority audience count bemoaned

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

In this age of increasingly atomized audiences, the ability accurately to identify and target a particular audience component – by age, gender, ethnicity, etc., etc. – is of paramount importance. Advertisers aboard the promotional carousel must be able to reach just the right audience if they want to snag the gold ring. Obviously, an advertising medium is most valuable when it allows advertisers to more precisely reach a particular audience

In the radio business, a station's likely ability to deliver a particular audience to a prospective advertiser is generally based on one factor above any other: Arbitron ratings.

Historically, those ratings have been compiled through an archaic "diary" system, in which a relatively small universe of listeners complete, by hand, diaries reflecting the stations they listened to. Arbitron then extracts the data from those diaries, slices and dices the data exhaustively, and sells the results for use in the purchase and sale of advertising time.

That's the PPM theory: greater accuracy whenever, wherever, and however – actively or passively – a surveyed listener encounters a radio station.

One problem with Arbitron's historic approach has been the potential for inaccuracy inherent in the diary system. Aside from prosaic problems such as deciphering handwriting and understanding exactly which station a listener's shorthand terminology might refer to, diaries suffer a more fundamental potential flaw: are reporting diarists accurately reporting what they in fact listened to? Since even the most diligent diarists are routinely subjected to frequent and varied distractions, it is at least possible, if not likely, that the data amassed from the diaries are not 100% accurate.

In an effort to improve the accuracy of its reports, Arbitron developed a new approach. Instead of relying on the diligence of reporting individuals, Arbitron sought to remove (or at least minimize) the potential for human error (whether or not that error was intentional) by automating the data collection process with new digital "Portable People Meters" – or "PPMs". With this new system, the reporting listeners need do nothing more than carry around a cellphone-sized PPM device all day long. The PPM detects and records ID codes embedded in the audio signals of radio stations. The data so accumulated are then electronically transmitted back to Arbitron daily.

In theory, at least, the PPM is able to record every exposure to any radio stream – including those often forgotten or subconsciously blocked as mere background din by manual diary-keepers: station choices imposed by cashiers, taxi drivers and boom box picnickers in the park will all be included in the overall compilation of stations generated by the always-on and always-vigilant PPMs.

That's the theory: greater accuracy whenever, wherever, and however – actively or passively – a surveyed listener encounters a radio station. And for purposes of the advertising industry, Arbitron's goal can't be faulted. Arbitron is simply trying to assure that the data which Arbitron is peddling are as accurate as possible.

But Arbitron's claims of greater accuracy are under fire. Critics point to statistical and anecdotal evidence which suggests that PPMs may introduce inaccuracies by undercounting ethnic, racial and linguistic minorities. At least one independent industry group – the Media Ratings Council – reportedly denied accreditation to the PPM methodology in New York and Philadelphia.

While there do appear to have been significant, post-PPM drops in audience reporting among a number of stations offering ethnic formats, the reason for those drops is not clear. According to Arbitron critics, a wide range of flaws plague the PPM methodology. For example: the overall PPM sample size – which is reportedly 66% smaller than the diary sample – is said to be too small; young (18-34) people, African-Americans and Hispanics are not adequately represented in the sample; and cell-phone-only households, which reportedly skew higher for African-Americans and Hispanics, are not adequately represented.

While these may be valid criticisms, other claims advanced by the anti-PPM coalition seem more problematic. It is said, for example, that PPMs are less likely to be carried by 18-34 year old minority individuals because the PPM device resembles a pager – as a result of which the person carrying the PPM "might be marked as either a police informant or as a drug dealer." Critics also claim that response rates among Hispanic participants, in particular, are alarmingly, and unacceptably, low.

On a more methodological – but no less questionable – point, critics assert that the PPM approach fails adequately to acknowledge the supposed fact that "minorities are by far the most brand-loyal of all consumers." A listener's brand loyalty to a radio station, it is said, is reflected by misreporting in the diary system: "some diary participants may recall listening longer than they actually listened." This odd criticism seems to be based on the notion that acknowledged inaccuracy is not only accept-

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able but desirable. Since the PPM system is not based on the potentially subjective, and inaccurate, recall of the diarist, the PPM system does not on its face permit "brand loyalty" factors to influence the results. And this – that is, the fact that the PPM system precludes the injection, intentional or otherwise, of subjective inaccuracy into the results – is supposedly a flaw.

Whatever the reason, though, it appears that when Arbitron relies on PPMs, many stations enjoying predominantly minority audiences suffer precipitous ratings slides when compared to manually-entered diary ratings of recent vintage.

And that has led a group of minority-oriented broadcasters and organizations to file an emergency petition asking the FCC to investigate Arbitron's methodology. The petitioners include a number of organizations and broadcasting companies including the National Association of Black Owned Broadcasters (NABOB), the Minority Media and Telecommunications Council (MMTC) and Univision. They say the viability of minority-oriented media is at stake because the alleged under-reporting of minority listenership cuts ad revenues and makes financing harder to find.

If the situation is as dire as the petitioners describe it, an FCC investigation probably won't help much.

While the interplay of ratings and economic consequences is pretty much undeniable, the ability of the FCC to do anything about it is far from clear. The petitioners want the FCC to use its investigative powers in this dispute. But Arbitron and its ratings methodology are not regulated by the FCC, as the company holds no broadcast licenses, runs no cable systems and provides no satellite transmission services. The FCC is, after all, the Federal *Communications* Commission, *not* the Federal Audience Ratings Commission.

The petitioners thus face a daunting threshold jurisdictional issue: Can the FCC regulate Arbitron?

The FCC, of course, is a creature of Congress – as an agency created by legislation, it can do only what that legislation says it can do. The question, then, is whether the Commission has any statutory authority to start to fish around in the inner workings of a company which has thus far not been subject to the FCC's routine regulatory control. On the face of the Communications Act (the first place to look for the FCC's job description), you'd be hard-pressed to find anything that would appear to green light the requested inquiry (although at least two Senators have taken up the cudgel against Arbitron — far short of a Congressional majority, but every little bit helps).

But this is Washington, where – apart from some buildings and monuments – little is set in stone. The petitioners, doubtless recognizing that their request lacks any solid and specific imprimatur from Congress, have crafted a somewhat seductive back-door argument, which goes something like this: The FCC regulates broadcasting; the FCC (with the blessing of the Courts and Congress) has identified diversity in broadcast content as a desirable goal subject to some level of Commission regulation; minority-programmed stations will suffer severe competitive disadvantage from inaccurate audience reporting, to the point that their continued existence might be threatened; if minority-programmed stations cease to exist, so too will diversity of programming; therefore, the Commission can act to prevent inaccurate audience reporting because such action is necessary to protect diversity in programming.

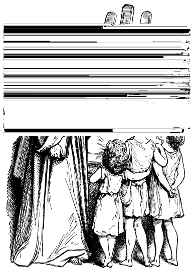
If a court were to assess that argument, it is far from clear that the argument would get very far. But at this point the argument is addressed to the Commission, and this particular Commission has already demonstrated (perhaps most obviously in its Diversification Initiatives proceeding, *see, e.g.*, the March, 2008, and June, 2008 *Memos to Clients*) an overriding interest in matters supposedly affecting "diversity". So it's possible that all the Commission will need will be some, any, colorable argument to justify opening the door. If a court might decide some years down the line that the door should not have been opened, well, the Commission can cross that bridge when it gets there.

And getting the door open may really be all that the petitioners are looking to do. After all, if the situation is as dire as the petitioners describe it – and "dire" is probably an understatement when the petitioners hyperventilate that, for example, implementation of PPM "would drop a financial nuclear bomb on America's minority radio stations" – an FCC investigation probably won't help much. Such an investigation would likely drag on for several years, providing little help in the meantime.

But an investigation would very possibly cause a host of political problems for Arbitron, which presumably would prefer to avoid the harsh glare of publicity, particularly if subpoenas might be involved. So if the concept of an investigation starts to get traction, we might see some conciliatory gestures by Arbitron in an effort to head things off before it's too late.

Perhaps in the same spirit, PPM opponents have also been busy elsewhere, seeking to open additional fronts. They have succeeded in both New York and New Jersey, where those states' respective attorneys general have opened official inquiries. The New York City Council has even held hearings on the matter. None of these developments is in and of itself a knock-out punch – but all of them add incrementally to the pressure building against the PPM methodology.

While the situation remains, as of this writing, fluid, the FCC has invited comments on the petition. The first round of comments were due on September 24, 2008; replies are due by October 6, 2008.



A word to the wise from Joe Di Scipio

Affiliate Autonomy Affirmed

FCC clarifies permissible scope of "right to reject" provisions

A little over seven years ago, the Network Affiliated Stations Alliance (NASA) filed a petition seeking an inquiry into network practices. Specifically, NASA asked the FCC to investigate whether the affiliation agreement which the major commercial networks (ABC, CBS, NBC and Fox) routinely force their affiliates to sign complied with the FCC's rules. The FCC has now issued a Declaratory Ruling addressing issues raised in the NASA petition. The Commission's ruling clarifies what affiliation agreements may or may not say. It also sheds important light on affiliates' rights.

The FCC declaration addresses three areas of concern.

First, with regard to the ultimate control of the station, the FCC declared that: (1) licensee affiliates must retain ultimate control over station programming, operations and other critical decisions with respect to their stations; and (2) the network affiliation agreements must not undercut that control.

Second, with respect to the right-to-reject rule, the Commission affirmed that that rule is not limited solely to the right to substitute breaking news, local news or public affairs programming. This could be the most significant aspect of the declaratory ruling. The right-to-reject rule prohibits a TV station from entering into any contract with a network that prevents the station from either (i) rejecting or refusing network programming, or (ii) substituting a program which the station believes is of greater local or national importance. Some parties – primarily the networks – have viewed that rule as affording local affiliates a relatively narrow opportunity to override network programming decisions. The declaratory ruling, however, establishes that the right-to-reject is much more expansive, allowing an affiliate to substitute sports or entertainment or other programming as long as the licensee does so in the good faith belief that the replacement program is of greater local or national importance. In addition, the FCC found that networks cannot penalize affiliates for invoking the right-to-reject – meaning that the nets cannot impose financial or other penalties (including having the preemption count against a preemption basket) for rejections or substitutions even if the rejections/substitutions were not related to breaking news.

The nets cannot impose financial or other penalties for rejections or substitutions even if the rejections/ substitutions were not related to breaking news.

Third, the FCC ruled on the option-time rule which relates to the attempts by the networks to control an affiliate's analog or digital spectrum. The option-time rule prohibits any clause in an affiliation agreement that "prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time." The FCC determined that network affiliation agreements should not allow the networks to reserve an option to use an affiliate's broadcast time without committing to supply programming for the optioned time. In addition, the FCC stated that network affiliation agreements may not require affiliates to carry, at some unspecified future date, unspecified digital content that the network may or may not ever offer.

In sum, all of these aspects of the FCC's ruling are in the affiliate's favor. Each licensee affiliate should keep these considerations in mind when negotiating its network affiliation agreement.

(Continued from page 2)

that both candidates actually know what the letters "FCC" stand for and can probably name more than one FCC Commissioner. This is a distinct difference from Presidential campaigns of the past. While clearly very important to the media industry, communications regulation is often considered something of a backwater in the larger picture of Washington, DC – big issues like defense, health care, taxes, and free trade tend be the focus of the Washington Post and the Wall Street Journal.

By contrast, Obama has clearly focused on media and technology as part of his platform and has expressed very specific ideas about how the FCC should operate during an Obama administration. Meanwhile, McCain has spent years with direct oversight over FCC policy and is very familiar with the industry and its issues. No matter who gets elected, the FCC and the broadcast industry may be in for a more engaged and involved administration than we have seen in a very long time. Whether or not that will be a good thing for broadcasters remains to be seen.

A Memo to Clients Fashion Extra!!!

Surely you vest!

The Vest Is Yet To Come

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

You'll stop traffic, too, in a kickin' ANSI vest, shown here in yellow.

Attention all broadcasters! The fall fashion season has arrived! Don't be caught wearing last season's plain, boring, non-neon duds! It's not just fashion – it's the law!

Our friends at the Federal Highway Administration (FHWA) are ready to ensure you aren't caught looking (or becoming) lame on the side of the road. Beginning November 24, 2008, "all workers within the right-of-way of a Federal-aid highway" ***must*** wear "high-visibility safety apparel." In fashion terms, this means that every time you put a reporter, producer, camera operator or other station personnel on the road to cover an accident, traffic jam, parade, meteorological phenomenon, Bigfoot-sighting, etc., etc., you will need to be sure that those personnel are decked-out in the latest smokin'-hot fashion accessory: a neon orange, yellow or lime green vest with super-cute reflector strips.

As with most hot fashion trends, this one has been on the drawing boards for some time. Back in 2005, Congress – known to so many as *Project Runway* on the Potomac – passed a law directing the Secretary of Transportation to issue regs "to decrease the likelihood of worker injury and maintain the free flow of vehicular traffic by requiring workers whose duties place them on or in close proximity to a Federal-aid highway to wear high-visibility safety apparel." [Congress titled this legislative gem the "Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users" – seriously, that's what they called it.] Within a year the FHWA had adopted the visibility rules, but their effective date was put off until November, 2008.

So now the party's about to start, and it's time to tog up.

For those of you not well-versed in the ins-and-outs of federal highway couture, here's a breakdown of the new rule:

To vest or not to vest?

According to 23 C.F.R. Part 634, workers hanging out in the right-of-way on any federal-aid highway should be dressed to kill (and to not be killed), day or night. A "worker" is anyone in the right-of-way of a federal-aid highway performing a job function. Thus, if your camera crew is out on Highway 101 filming the latest five-car pile-up and their boots are on pavement, they need to be stylin' in neon.

Where to vest?

The term "federal-aid highway" includes all Interstate and National highways, *plus* "all other public roads not classified as local roads or rural... roads." ("National" highways are roads designated as "US" or "Route", as in "US-66" or "Route 66"; "Interstate" highways generally have an "I" prefix, as in "I-95".) In other words, pretty much every road except the streets in your residential neighborhood or the farm road leading from town to the water tower would likely be considered a "federal-aid highway" and, therefore, subject to vest-age. And why not? Reporters need to be fashionable wherever they go (except, apparently, for farm-to-market routes and your cousin's cul-de-sac).

You don't want your reporter being the only one kept away from the crime scene just because she hasn't accessorized comme il faut.

Failure to vest?

Didn't come dressed for the ball? As with many fashion faux pas, the primary enforcement mechanism here appears to be fear of embarrassment for being identified, and identifiable, as stylistically less than *au courant*. But note that local, state, and federal law enforcement and transportation authorities have authority to refuse to permit access to the highway site for failure to be fabulously (or at least by-the-book visibly) attired. This could be problematic for broadcasters trying to get the scoop – you don't want your reporter being the only one kept away from the crime scene just because she hasn't accessorized *comme il faut*.

How to vest?

The FHH product testing experts have not been able to thoroughly investigate the purveyors of fine neon safety vests, but a quick Google search for "high visibility vest" or "safety vest" reveals a number of retailers. The National Work Zone Safety Information web site also has links to approved retailers: go to http://www.workzonesafety.org/safety_products/ and select "High Visibility Clothing". Broadcasters without Internet access might consult with their local emergency personnel (or army surplus store) for suggestions on where to purchase these rockin' vests. These in-demand items range in price from $10 – $30 each, depending on how tricked-out your style is. Just be sure to **buy vests designated ANSI Class 2 or 3** – any other class is not in compliance with the new rule, and thus not classy at all.

DTV Update

(Continued from page 1)

permits which specify that operation on the DTV channel cannot commence until February 17, 2009. That condition was imposed on those permits out of concern about possible interference to pre-transition facilities – the theory is that such interference could occur up to the final Transition Date. However, licensees holding a DTV permit weighed down with such a condition can request an STA to get around it (assuming, of course, that their DTV operation will not cause interference).

All quiet on the Wilmington front?

The Commission is still presumably evaluating its experience in the Wilmington, North Carolina, market, which (with the FCC's blessing) went almost-all-digital as a test in September, five months before the Real Transition. But its preliminary assessment is upbeat: "the vast majority of the 400,000 television viewers impacted by the change . . . seemed to be prepared for it."

With italicized excitement, the FCC concludes that "less than one-half of one percent of area homes" called in for help.

But that's not really a valid measure.

That is good news, although the Commission's rah-rah reaction downplays (or disregards) aspects of the test that might otherwise give it pause.

For example, the fact that *anyone* in the Wilmington area might not have been aware of and prepared for the transition is hard to believe. After all, agency and industry officials (all continually beating loudly on the ominous The-Transition-Is-Coming drum) reportedly blanketed the place for weeks leading up to the test – so much so that you couldn't swing a dead cat without hitting a couple anywhere you went. If that kind of hyper-saturation exposure did not achieve universal familiarity with the transition, it's a pretty good bet that in other markets not blessed with this type of attention, the lack of familiarity with the transition is likely to be considerable higher.

And let's look at the numbers. According to the FCC, Wilmington features an estimated 180,000 households, of which 14,000 rely on over-the-air (*i.e.*, non-cable, non-satellite) signal delivery. On Day One of the Wilmington test, about 800 residents called into the FCC helpline looking for help. The Commission looks at those numbers and, with italicized excitement, concludes that "*less than one-half of one percent of area homes*" called in. And it's true that 800 is less than one-half of one percent of 180,000.

But that's not really a valid measure.

The primary transition fear, after all, is that folks who receive their TV signals over-the-air won't know what to make of it on February 18, when they wake up and all they are seeing on their sets is snow. Cable- and satellite-connected viewers should not have that problem, so they are not the people the test was focusing on. Rather, the test was (or at least should have been) intended to gauge the effect of the transition on the 14,000 households who use over-the-air receivers.

If we use 14,000 as the relevant denominator, we find that *almost six percent* (*i.e.*, 800 divided by 14,000) of the affected population had some kind of problem. That's a boatload worse than the less-than-one-half-of-one-percent touted by the Commission.

And again, let's stress that this occurred in a market which had been overwhelmingly blanketed with information.

So while the Wilmington experiment apparently went well, it may not have gone as well as the FCC would like us to believe and, more importantly, it may not be an accurate harbinger of what we might all expect next February.

"Hi, I'm [fill in the blank], from the FCC . . ."

Lest anyone claim that the FCC Commissioners themselves have somehow been looking the other way on this whole transition thing, check out http://www.dtv.gov/video_audio.html. There you will find 17 video PSAs and 15 audio PSAs, most of which star none other than Los Comisionados in person, each earnestly spreading the Transition word in English and Spanish. (Actually, it looks like only Comisionados Adelstein and McDowell chipped in Spanish versions, and Commissioner Tate appears only in the audio PSAs, not the videos.) You can download one, some or all of these bad boys in a variety of electronic formats. Be the first one on your block to collect 'em all – who knows what historical value they may have come next year?

Converter boxes redux

One of the aspects of the Transition that tends to go unmentioned is the issue of converter boxes. Those devices are set-top units which serve as digital tuners, converting an old-fashioned analog receiver into a new-fangled digital receiver with the mere connection of a couple of cables. The government has allocated millions of dollars to putting these boxes into consumers' hands through a coupon program which has already suffered considerable criticism. (The implementation of that program is the responsibility of the NTIA, so the FCC dodges that bullet.)

But others have criticized the fact that the converters that are generally available in the marketplace are lack-

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DTV Update

(Continued from page 10)

ing. Perhaps most importantly, the vast majority of the converters that can be purchased lack a "pass-through" capacity that will allow the old-fashioned receiver to continue to function as an old-fashioned receiver while the converter box is plugged in. This is a serious drawback when it comes to receiving low power and Class A TV stations, most of which are not scheduled to move to digital for the foreseeable future.

This problem has been brought to the FCC's attention time and again (including in a mandamus petition filed by FHH member Peter Tannenwald). The Commission's reaction has been less than encouraging.

Hold on, though. This month he wrote a letter to the Consumer Electronics Retailers Coalition (CERC), noting that "recently" a converter box featuring "the important analog pass-through feature" had been introduced to the market. But, according to Martin, the unit is available only "from a few very small retail outlets" and by means (*i.e.*, over the Internet or by phone) that add considerable shipping charges. Martin asked whether it might be possible for the CERC maybe to get some of its members – like Best Buy, Circuit City, Wal-Mart, etc. – to, like, you know, possibly stock these converters, along with the non-pass-through-friendly ones they have been selling for months.

This month the converter issue appears to have made it onto the radar screens of FCC Chairman Martin and NTIA Head Baker.

Keeping his Junior Consumer Advocate hat on, Martin wrote another letter, this one to the CERC and the Consumer Electronics Association, pointing out that there just don't seem to be many battery packs for converter boxes and battery-powered DTV receivers out there in the market. Martin the Governmental Official chided that the availability of such items "is vitally important as a matter of public safety". Martin the Entrepreneurial Consultant helpfully observed that "there appears to be a significant unmet market demand" for such items. Martin the Design Engineer noted that many converter boxes "operate from an external power supply and it appears they could operate with battery packs". As of this writing it is not clear whether either letter has drawn any response.

Not to be outdone, Meredith Attwell Baker, the acting head of the NTIA – the agency responsible for the converter box coupon program – suggested that, rather than let the government do all the heavy lifting here, broadcasters should consider (1) stocking up on converter boxes and then (b) handing them out free-of-charge to viewers. In an admirable demonstration of "spin", Baker pointed out that the boxes could be gussied up with station logos, "which would allow [the broadcasters] to build brand awareness while they were helping out."

Another Memo to Clients sidebar!

The Cost of Premature Analog Withdrawal

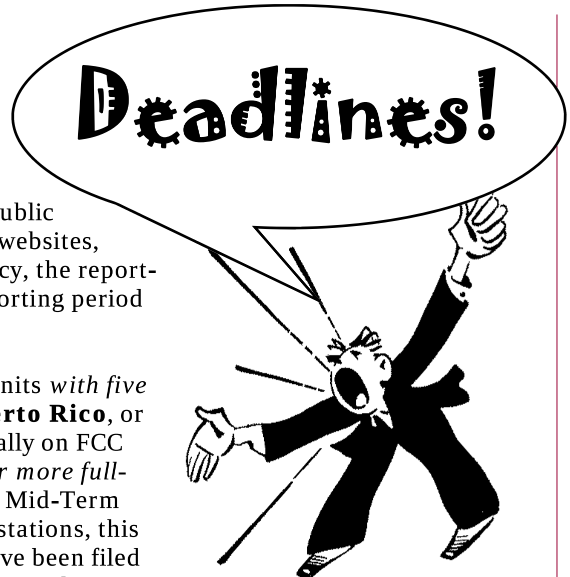
Getting the word out to the viewers

Licensees looking to pull the plug on their analog operations prior to February 17, 2009, are required to so notify the public in over-the air messages containing the following information:

- the station's call sign and community of license;
- the fact that the station is planning to reduce or terminate its analog operations before the transition date;
- the date of the planned reduction or termination;
- what viewers can do to continue to receive the station, *i.e.*, how and when the station's digital signal can be received. (Alternatively, the notification could describe how to get service from another station affiliated with the same network and serving the same loss area.);
- information about the availability of digital- to-analog converter boxes in their service area; and
- the street address, email address (if available), and phone number of the station where viewers may register comments or request information.

Stations turning off their analog on or after November 17 must air ***four*** such announcements ***daily*** (at least one in prime time) for the ***30 days prior to turn-off***. These are, by the way, separate and distinct from the DTV educational PSAs that stations are supposed to be running as part of the run-up to the Transition.

October 1, 2008



EEO Public File Reports - All *radio* and *television* station employment units *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 listing all station activity to educate consumers about the DTV transition. The period to be included is July 1 through September 30, 2008. The report will be filed through the Consolidated 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 third 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.

October 20, 2008

DTV Transition Status Report Updates - All *television* stations that have not both fully completed their post-transition DTV facilities and previously informed the Commission of the completion through filing an up-

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(Continued from page 12)

date to the DTV Transition Status Report must file an update on progress toward completion of construction. In addition, any television station that has changed its plans with regard to termination of analog operation, *e.g.*, stations that have elected to terminate analog operation early, must also file an update on Form 387.

December 1, 2008

DTV Ancillary Services Statements - All *DTV licensees* ***and*** *permittees* must file a report on FCC Form 317 stating whether they have offered any ancillary or supplementary services together with its broadcast service during the previous fiscal year. If a station has offered such services, and has charged a fee for them, then it must separately submit a payment equal to five percent of the gross revenues received and an FCC Remittance Advice (Form 159) to the Commission. The report on Form 317 specifically asks for a list of any ancillary services, whether a fee was charged, and the gross amount of revenue derived from those services. *This year marks the first time that* ***permittees*** *as well as licensees are required to file the report.*

EEO Public File Reports - All *radio* and *television* station employment units *with five (5) or more full-time employees* located in **Alabama**, **Colorado**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **Rhode Island**, **Minnesota**, **Montana**, **New Hampshire**, **North Dakota**, **South Dakota**, and **Vermont** 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 **Alabama** or **Georgia** 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 **Colorado**, **Minnesota**, **Montana**, **North Dakota**, or **South Dakota** 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 **Alabama**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island**, or **Vermont** 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 **Colorado**, **Minnesota**, **Montana**, **North Dakota**, or **South Dakota** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323 or 323-E.

(Continued from page 5)

burdens on small cable systems.

As initially adopted, these "viewability" rules will be effective for at least three years from the beginning of the digital transition, *i.e.*, through at least February 17, 2012. The FCC will review them in 2011.

September 2008 Viewability Order

In its most recent Order, the FCC did two things:

First, it exempted for three years "small" cable systems from the requirement that TV signals broadcast in HDTV must be carried in HDTV format. "Small" cable systems are defined for this purpose as systems that either: (a) have 2,500 or fewer subscribers and are not affiliated with a large cable operator serving 10% or more of the nation's subscribers; or (b) have an activated channel capacity of 552 MHz or less. It did *not* provide an exemption from the three viewability requirements adopted in the 2007 standards.

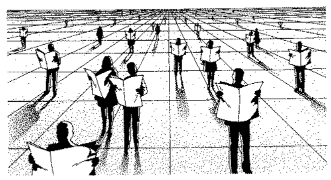
Second, it clarified that where a must-carry station is broadcasting in SD, and the cable system down-converts that signal to analog for subscribers who cannot view digital signals, the rules do *not* require cable operators to also carry an SD digital version of a broadcast station's signal, in addition to the analog version, to satisfy the material degradation requirement that has been in place since 2001. This is because both an SD digital version and an analog version of the digital broadcast signal received at the headend should have the same resolution – 480i – and thus there should be no perceptible difference between the two versions of the signal. However, if the cable operator also has subscribers who are incapable of viewing an analog signal, then the cable operator *would* have to carry the station's SD signal.

In spite of the fact that the FCC's recent Order is intended to "clarify" matters, there may be some uncertainty among cable operators in implementing these requirements. If you have any questions as to how your station's signal is being carried on cable systems, please call us.

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

Updates on the News

Automatic programmatic distribution — Anyone who has filed for a construction permit in the last several years has bumped up against (or at least should have bumped up against) FCC Form 620 and the related obligations to notify pretty much everybody on the face of the planet of the proposed construction. (We have described this clearance process in *e.g.*, the May, 2008, November, 2006, and February, 2005 *Memos to Clients*.) This requirement flows from the National Historic Preservation Act and the "Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission" (NPA). Essentially, CP applicants are required to analyze their proposals, prepare a report on that analysis, circulate the report to various offices and groups (including the relevant "State Historic Preservation Officer" and potentially-interested Native American tribes), and await their responses. In a worst-case scenario, applicants might find themselves having to prepare and submit a full-tilt Environmental Assessment. While exemptions to the rules may help avoid that fate, in many instances you still have to jump through a considerable number of hoops just to confirm that you're eligible for an exemption.



Against this background it may be good to know that the Commission has established a new electronic mechanism through which applicants may submit Form 620 for distribution to all appropriate recipients. According to the FCC, this will "automate, expedite and facilitate" the process mandated by the NPA. As with many things, this could be a two-edged sword. On the one hand, having the FCC distribute your Form 620 may relieve you of some hassles and, more importantly, should shield you from any claims that the distribution was somehow lacking. But on the other, bear in mind that Form 620 does not necessarily have to be submitted to the Commission at this point in many cases. That is, the Form 620 is prepared and circulated, and on the basis of that initial effort it is often determined that the proposal raises no environment/historical problems. At that point you can just check the "yes" box in the environmental certification question on Form 301 (or 340), and that's that. So the new automated system entails handing over to the FCC a bunch of information – that is, your Form 620 – that you otherwise might not have had to hand over.

The new system is not yet up and running. When it comes on line, we'll check it out and report back to you.

Getting Sirius – When the Commission granted the XM/Sirius merger a couple of months back, it committed to start a proceeding looking into whether it should require satellite radio receivers to be able to receive digital audio broadcasts (a/k/a/ "HD Radio") as well – and vice versa. True to its word, the Commission has kicked off that inquiry. If you want to participate, comments are due by November 10, reply comments by December 9.

Backfill clarification – We have previously had occasion to describe the Commission's "backfill" policy when it comes to moving FM channels around from city to city. In a nutshell, that policy prohibits the removal of an FM channel from the community to which it has been allotted if that removal would result in the loss of that community's only local aural service. (*See*, for example, the May, 2007, or February, 2005 *Memos to Clients*). In a recent decision the Commission clarified that that policy requires that an actual licensed and operating station remain available in the community in question. That is, an outstanding construction permit will ***not*** do the trick.

This arose out in beautiful downtown Dripping Springs, Texas, where the only station in town wanted to move over to Bee Cave – and who wouldn't? A CP for a new noncommercial FM in Dripping Springs had been issued but the station hadn't been built yet. The guy who wanted to move went ahead and applied to move to Bee Cave anyway, arguing that the noncom was "near completion" and that the spirit of the backfill policy was satisfied. Covering his bets, the guy also asked for a waiver just in case the application needed one.

Good thing that he asked for that waiver. An objector popped up, arguing that a nearly-built CP is not the same as a licensed and operating station, and that therefore the Dripping-Springs-to-Bee-Cave application violated the backfill policy and shouldn't even have made it through the front door at the Commission. And the Audio Division agreed – holding that reliance on the unbuilt CP "constituted an unacceptable backfill proposal". Oops. But since the applicant had a right to request a waiver, the staff determined that the application could be accepted for filing in order to permit consideration of the waiver request. And in the meantime, the NCE station had been constructed and had commenced operation, thus mooting out the waiver request.

The moral of this story is two-fold. First, don't count on unbuilt CP's to get you past a backfill problem. And second, when in doubt, ask for a waiver and hope like heck that things turn your way before the Commission gets around to answering your request.

Let's get right on that – And finally, we have the noteworthy Docket 91-259, an FM channel change matter commenced in 1991. The staff released its Report and Order (R&O) approving the various modifications proposed in that docket in 1995. Those modifications in-

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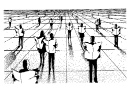
FHH's CommLawBlog has been re-designed!!!

As we announced in last month's *Memo to Clients*, we have re-designed our blog at

www.CommLawBlog.com.

If you had taken our advice and checked it out on September 1, you would have been among the first to learn of the phishing scam websites dressed up to look like the FCC's reg fee collection site – a scoop that the trade press (and eventually the FCC itself) picked up when everybody got back to work after Labor Day weekend. We update the blog as developments arise, so be sure to bookmark it and drop by every day or so, to see what's new. We have included a button that allows you to add the blog to your RSS feeds Or you can subscribe so that you'll be automatically alerted, by email, to new content when it gets added. (*If you were a subscriber to our old blog, please subscribe again — the upgrade didn't carry over our previous subscriber list.*) We have also added links to a wide range of sites that will be of interest and assistance to our readers.

We think you'll find a lot to like at CommLawBlog.com. Stop by, look around, and take the opportunity to add your own comments. We look forward to hearing from you.



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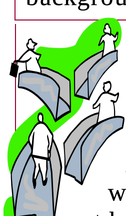
cluded a series of coordinated changes to a number of stations' facilities. Those changes required the filing of Forms 301 or 302, all of which were – by the terms of the R&O – to be filed within 90 days of the R&O, *i.e.*, by the Fall, 1995. We are pleased to report that one of the participating licensees finally managed to get its 301 filed in February, 2008 – that's right, more than 12 years after the deadline. In August, the Commission granted that application, but gave the licensee only six months (as opposed to the normal three years) in which to construct.

The proof is in the computing – Remember last year, when the FCC proposed to allow some AM stations to conduct their directional proofs using the "moment method"? (*See* the May, 2007, *Memo to Clients* for background.) Moment method computer programs (also referred to as NEC, or Numerical Electromagnetics Code, programs) permit the accurate calculation of actual performance based on certain internal antenna parameters, such as current and phase. In a relatively instantaneous 16 months, the Commission has adopted that proposal. Of course, the proposal to use computerized modeling techniques to replace the traditional hand-crank proof methods has been pending before the Commission for about 17 years, but really, who's counting? The FCC's decision to approve the moment method under some, but not necessarily all, conditions was released at press time, so we are not covering it in detail here. The new approach will not become effective until OMB approves the change, but it's at least possible that the staff might entertain waiver requests in the meantime. Check out our blog (at www.CommLawBlog.com) for more details.



FHH - On the Job, On the Go

Peter Tannenwald and **Paul Feldman** will be attending the "DTV National Convention 2008" of the Community Broadcasters Association at the Golden Nugget in Las Vegas from October 26-28.

New media darling of the month (and the "*new*" modifies "*media*", not "*darling*") — **Frank Montero**, who was profiled in a weekly "blog-within-a-blog" located deep within the Washington Post's website. Check it out at http://voices.washingtonpost.com/washbizblog/2008/09/la_plaza_1.html.

And let's have a hearty round of applause for **Michael Richards**, who inadvertently brushed up against a couple of phishing sites. The sites had been set up to resemble the FCC's regulatory fee filing system, presumably in the hope of scoring useful financial identification information from unwary fee filers. **Michael** blew the whistle on the apparent scam through a prompt posting on our blog (www.commlawblog.com). The posting was picked up by a number of trade publications, so word got out quickly and broadly. The discovery was first made on Saturday of Labor Day weekend, and by Tuesday afternoon — the first day back — the FCC issued a public notice warning of the problem. The Commission's public notice didn't expressly acknowledge **Michael**'s heads-up call, but that's not stopping us from doing so.

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

First Class