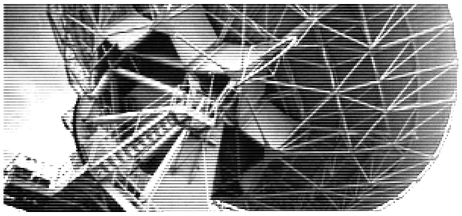


FLETCHER, HEALD & HILDRETH

Communications Law & Regulation

MEMORANDUM TO CLIENTS

News and Analysis of Recent Events in the Field of Communications

The Devil and the Details

FCC adopts elaborate white space rules

By Mitchell Lazarus
lazarus@fhhlaw.com
703-812-0449

Thudding a 1.3 pound order on the press table late on a Friday afternoon, the FCC not only ruined a lot of Washington weekends, but ended years of dispute by authorizing unlicensed devices on TV frequencies. A lot of the paper is taken up with the explanations and rationales needed to weatherproof against the inevitable court appeals. But the rules themselves still run to 15 single-spaced pages, making this by far the most complex regime for any unlicensed service.

We have long been doubtful that any workable set of rules could adequately protect TV stations and wireless microphones from interference. Poor device performance in recent engineering tests only deepened our skepticism.

It does not happen often, but we could have been wrong. The FCC may have pulled it off. Sure, there is always room to quibble over the numerical details – more channels for wireless microphones, lower detection thresholds, etc.

We were skeptical, but we could have been wrong— the basic regulatory structure seems workable.

But the basic regulatory structure for unlicensed white space usage seems workable on paper. In actual practice, whether the manufacture, marketing, and use of these devices can provide adequate protection for licensed operations remains the big question. We may have to wait a year or two for the answer.

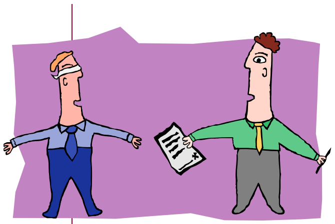
A rulemaking like this one – dropping new users into an occupied band – always involves a delicate trade-off between power and flexibility for the newcomer, on the one hand, *versus* protection for the incumbent, on the other. Here, having made the decision to allow the devices at all, the FCC seems to have resolved most doubts – and there are a lot of them – in favor of the incumbents – and there are a lot of them, too. The new rules protect:

- TV service (full-power digital, Class A and low power digital and analog, translators, boosters);
- Wireless microphones (and other low-power auxiliary devices);
- Two-way radio on channels 14-20 in thirteen major markets;
- TV translator receive sites;
- Cable headends;
- Broadcast Auxiliary Service fixed links;
- Offshore Radiotelephone Service;
- Canadian and Mexican border areas;
- Radio astronomy and medical telemetry (TV channel 37); and

(Continued on page 12)

November, 2008 **No. 08-11**

Inside this issue . . .



Paging Captain Yossarian

Catch 22

Comments invited on revised forms . . . But where are the revised forms to comment on?

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

In its ballyhooed *Diversity Order* last December the FCC adopted measures designed to promote more diverse participation in broadcast industry. In the past such efforts might have been expressly designed to favor minority- or women-owned entities, but intervening decisions of the Supreme Court have made such race/gender-based governmental favoritism difficult, if not impossible, for the FCC to embrace. Accordingly, the *Diversity Order* uses the broader substitute concept of "eligible entities" (EEs) – small businesses that meet certain criteria generally believed to be indicative of new and diverse entrants. (It is, of course, no accident that such entrants may be predominantly minorities and/or females.)

The *Diversity Order* was sprawling, spanning all sorts of areas within, and without, the FCC's conventional jurisdiction. While some of the rule and policy changes technically became effective months ago, others did not because they involve changes to FCC forms, changes which require the blessing of the Office of Management and Budget (OMB). (*See* , *e.g.*, the March and August, 2008 *Memos to Clients*.) The water was further muddied by the fact that the measures adopted did not automatically come with revised forms or instructions making clear how one is supposed to qualify as an EE and what information, exactly, the Commission expects an applicant to supply in support of a claim of EE-ship.

So we were all excited on November 6, when a notice in the Federal Register indicated that the FCC is gearing up to send its proposed forms over to OMB for review. In connection with that process, the Federal Register notice invited public comment about the FCC's proposed form changes. Hot-cha, we figured, at long last we might get a gander at something a bit more concrete.

Bad news. The FCC's notice consists only of terse, and not especially illuminating, summary descriptions of the proposed changes to the Commission's forms. While the Commission has set a January 5, 2009, deadline for public comments on the changes, the Federal Register notice has not clarified much. Instead, it merely notes that the FCC has proposed to modify a number of forms (and their respective instructions) to include: (a) a definition of "eligible entity" (as applied to the existing Equity Debt Plus standard for attributable interests); and (b) a question asking whether the applicant is claiming EE status. In addition, some of the forms will now include a question requiring certification of compliance with the new anti-discrimination rules (*see* the related article in the August, 2008 *Memo to Clients*), as well as a question regarding divestiture of "non-compliant, grandfathered cluster[s] of radio licenses" where a station is being assigned to an eligible entity.

The problem is: ***none of the proposed forms are provided in the notice***, and thus only abstract descriptions about what the forms will say are available for review and comment. In fact, according to FCC staff, they don't have to make the actual proposed forms public until ***after*** the deadline for public comment on the forms. So the FCC has solicited comments about form changes which it is not disclosing to the public and which it won't disclose to the public until after the deadline for comments has passed. Stop us when this starts making sense.

The forms which the FCC is proposing to change are: 301 (new broadcast construction permit), 303-S (broadcast renewal), 314 (consent to assignment of broadcast license), 315 (consent to transfer of control of broadcast licensee), 345 (consent to assignment/transfer of FM or TV translator or LPTV station).

If you are so daring as to want to enter the funhouse, we would be happy to assist you in submitting comments to FCC. Note that we expect that there will be a further opportunity to comment on all this once the FCC finally submits its proposals to OMB, since we understand that OMB itself will solicit comments. Ideally, that opportunity will be more meaningful than the one the FCC has put on the table.

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
Anne Goodwin Crump,
Mitchell Lazarus, Frank Montero,
Patrick Murck, Lee G. Petro,
R.J. Quianzon, Michael Richards,
Davina Sashkin and Ron P. Whitworth

Focus on FCC Fines

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

A.M. Anarchy? – Two AM stations are facing fines for operating outside of their technical parameters. One station failed to power down at night and the other was broadcasting a signal that interfered with neighbors all over the AM dial. In both cases, the FCC investigation into the improper technical operations triggered more extensive review of the stations and the G-Men uncovered problems with fines, public files and EAS compliance.

In Florida, the FCC investigated complaints about an AM station that was causing interference in the AM band. FCC agents used a calibrated spectrum analyzer and loop antenna to measure spurious emissions around the station's transmitter. In so doing, they determined that, at frequencies removed by 60 to 75 kHz from the station's carrier, emissions were reduced by only 33 dB in one instance. FCC rules require that such emissions be attenuated at least 65 dB below the unmodulated carrier level.

Presented with that determination, the station explained that it did not have the necessary equipment to monitor the emissions. Rather, it said, it relied upon annual measurements and inspections by consulting engineers to ensure compliance. Alas, the FCC reminded the station that it could and, indeed, should monitor the emissions. All that the station personnel had to do was go out into the parking lot, turn on their car radio and the spurious emissions were inescapable – given the level of the problem, the station could be heard up and down the AM dial. In fact, prior to using the monitoring equipment, the FCC agents simply turned on their car radio and could hear the signal stepping all over the AM band.

During the investigation of the AM interference, the FCC agents took the opportunity to read through the station's public file, inspect its EAS equipment and survey the tower and protective fences. All of these problems added up to an $18,400 fine for the station. The station promptly paid the fines for the EAS and public file deficiencies but contested the emissions and fence findings. The FCC stuck to its guns on all four fines, but did reduce the overall amount because the station was a first time offender.

A New York state AM station that was authorized for daytime-only operations chose to ignore the daytime-only restriction. After receiving a complaint about the station, an FCC agent stayed up late and woke up early to monitor the station's operations. As a daytime-only licensee, the station was required to shut down at sunset and not begin broadcasting until sunrise. The FCC agent monitored the station at both sunset and sunrise and found no change in the signal at any time.

The agent confronted the station manager with his observations and the manager readily admitted that the station had not been powered down at sunset for quite some time. Apparently in defense of this decision, the manager advised the agent that the station was operating at only one-third of its authorized power. Both of these admissions landed the station a $4,000 fine.

The fines did not end with the power problems. Since the FCC agent was already at the station, he looked into the station's EAS and public files. The agent discovered that the EAS equipment was not functioning and, upon interviewing an employee, determined that for the three years that the employee had been there, no EAS tests had been run and no logs had been kept. The review of the public files also revealed problems. The agent tacked on an $8,000 fine for the EAS problems and another $4,000 for public file deficiencies.

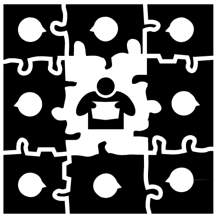
Many technical problems with a station's signal are easy to observe and are likely to invite an FCC inspection. Stations should also bear in mind that – as in these cases – an inspection of transmitter problems is often just the start of a licensee's problems, a lifting of the corner of the tent enough to let the camel's nose stick in. Once that happens, there's no telling what other problems – wholly unrelated to the reason the Feds show up in the first place – may be discovered when FCC agents are roaming around your main studio.

"Anything You Say, Can and Will be Used Against You" – The trio of cases reported below should be a stern warning to all readers to be careful about what you say to FCC agents. One case involves a tower owner sending off an e-mail to the FCC admitting his failures. The other two cases involve local police and the FCC working together to capture pirates using mobile radios to interfere with communications.

In the first case, the FCC received a complaint from a local official that a tower was not properly lighted. The FCC looked up the tower and contacted the owner. The owner sent someone out to the tower, observed the problem and took the proper precautions. The tower owner then engaged in a series of e-mail exchanges with the FCC that provided the foundations for the FCC's fine.

The tower owner wrote to the FCC agent that the tower's automated light monitoring equipment had been damaged for at least a year. The owner further advised the FCC agent that on three separate dates in the month preceding the outage an employee visually inspected the towers. The problem is that FCC rules require a tower owner to inspect

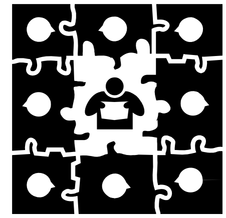
(Continued on page 14)



"Divide and conquer" approach to DTV coverage

Cell-A-Vision Adopted

By Lee G. Petro
petro@fhhlaw.com
703-812-0453



On November 7, 2008, the Commission adopted rules that may usher in a new age of television. While television broadcasting has historically relied on one antenna mounted on one big stick to get the signal to its viewers, the FCC has adopted new regulations that will allow TV broadcasters to use multiple sticks, with lower height and less power, to serve their current service area.

The technology — "distributed transmission system", or DTS — permits the television industry to follow the same path as the wireless telephone industry. Back in the 1980's, the initial cellular systems used one stick with a relatively high-powered signal, but the industry gradually broke the service areas into smaller cells (each served by lower-powered transmitters) which reused the spectrum in a more efficient manner. With the conversion to digital, the wireless mobile telephone industry is very efficient at slicing and dicing its spectrum to provide largely uniform service in urban areas.

The use of DTS technology will permit more uniform service in areas that suffer from various obstacles – both natural and man-made — that can wreak havoc on over-the-air reception.

You may have heard that the television industry is now transitioning to digital as well. And that transition will allow licensees to use similar cell-like technology. As a result, rather than constructing a 2,000-foot tower and blasting a megawatt or more of power, TV licensees will now be able to rely on multiple transmitter sites within their current service area, each operated at lower levels, in order to provide uniform service throughout their authorized service areas.

This technology will serve two major goals as we move to digital television. First, since over-the-air reception of DTV signals is a go/no-go proposition (depending on the ability of the would-be viewer's antenna to pick up a usable signal), the use of DTS technology is expected to provide better service at the fringes of a television's service area. Moreover, the use of DTS technology will permit more uniform service in areas that suffer from various obstacles – both natural (think mountains and valleys) and man-made (think skyscraper canyons, like NYC) – that ordinarily wreak havoc on over-the-air reception.

In adopting the rules, the Commission rejected proposals that would have permitted licensees to extend the service areas of their stations throughout their Designated Marketing Area. Instead, the Commission adopted a "Table of Distances", which defines the area in which DTS facilities can operate for a particular station. The distances are based on the reference point of the station, and range from 63 miles to 80 miles depending upon the channel on which the station operates.

The Commission also established a waiver policy for the expansion of a station's DTS service area if such expansion is necessary to assure continued service to existing analog viewers who would otherwise lose service because of the digital transition. ***Stations in this situation must file for authority to operate a DTS facility prior to August 18, 2009.*** In addition, stations may apply to expand their service areas to match the largest station in the market, and either operate the station with a single transmitter or as a DTS facility.

On the other hand, the Commission made sure that its rules will not permit DTS licensees to "cherry-pick" areas (*i.e.*, the most populated) while ignoring less populated, or less economically desirable, areas. Instead, the Commission will require that the current service area of the station be served by the DTS facility. Also, the Commission will apply the current 0.5% interference factor to DTS proposals and operations, so that new proposals will not cause interference to more than 0.5% of the population of another station, and other station proposals will not be permitted to cause more than 0.5% interference to the service area population of a DTS facility.

On the LPTV and Class A front, licensees of individual stations will be permitted to obtain experimental licenses to use DTS to service their respective coverage areas. In addition, licensees of multiple Class A or digital LPTV stations with contiguous noise-limited contours will be permitted to use a single channel within the group of channels to provide common locally-produced programming. To facilitate such conjoined operations, the Commission will permit, where possible, a Class A station to change its channel to establish a DTS network, with each separate component station being licensed separately.

The rules adopted in this proceeding were largely welcomed by those who filed comments, although some concern was expressed by parties who favor unlicensed devices in the television ""white spaces". With the white spaces rules now adopted (*see* related article on page 1), it is possible that television licensees could protect themselves from unlicensed devices if they utilize DTS technology to bolster their signal in all portions of their service area. Since unlicensed devices will be permitted to oper-

(Continued on page 12)

Say what?

A Deaf Ear No More
FCC Turns Up Volume On Closed Captioning Complaints

By Anne Goodwin Crump
crump@fhhlaw.com
703-812-0426

In the guise of looking at closed captioning requirements for digital television and easing the complaint filing process, the Commission has added new contact information posting and filing requirements for television stations and other video programming distributors. The Commission also has sought comment on how the revenue-based per channel exemption from closed captioning requirements should be applied to stations with multicast programming streams. The impressively-titled *Declaratory Ruling, Order, and Notice of Proposed Rulemaking* was the outgrowth of a petition filed by Telecommunications for the Deaf, Inc. and other advocacy groups for the deaf and hard of hearing back in 2004.

Of immediate import to most television stations are the changes that the Commission has made in the complaint process for viewers who encounter difficulties with closed captioning. The changes are designed primarily to help consumers make their problems known and obtain a prompt resolution.

Who's who? Contact information – file it, post it, keep it current. From an operational standpoint, the most significant change is the new requirement that video programming distributors (VPDs) – a group which, for these purposes, consists of over-the-air broadcasters and multichannel video programming distributors, such as cable operators and satellite TV operators – provide contact information so that viewers will know how best to direct their inquiries and complaints. Apparently, a major issue has been that viewers have been uncertain as to whom they should contact with questions and problems. In order to alleviate that perceived difficulty, the Commission will now require that two different types of contact information be made available. While these new information requirements should prove useful for would-be complainants, they also set up a trap for the unwary VPD.

First, VPDs must provide a telephone number, fax number, ***and*** e-mail address for purposes of receiving *and responding immediately* to any closed captioning concerns, such as technical problems which cause captions to vanish or become garbled. If a VPD has staff available either on-site or remotely for addressing technical issues, then consumers must be able to reach someone, either directly or indirectly, who can address the captioning problems. Further, for telephonic inquiries, the VPD must be able to accommodate incoming calls placed through a Telecommunications Relay Service (TRS) operator. For those inquiries made after-hours or when staff might otherwise be unavailable, a response should be provided within 24 hours.

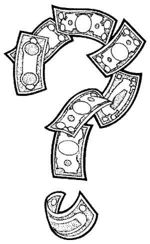
Second, VPDs must provide contact information for closed captioning complaints of a more general and less immediate nature. That information must include the name of a person with primary responsibility for captioning issues and rule compliance, the person's title or office, telephone number, fax number, mailing address, and e-mail address. All of this contact information must be included in telephone directories, posted on the VPD's website (if it has one), and included in billing statements for multichannel providers. The Commission also will compile a database of this information. *It is therefore requiring all VPDs to file their contact information with the Commission within 30 days of Office of Management and Budget approval.*

VPD contact information for closed captioning complaints must be filed with the FCC and kept updated (within ten days of any changes).

Of course, to remain useful, the information must be kept current. When any changes are made to the contact information, websites must be updated within ten days, any bills must be updated by the next billing cycle, and directories must be updated by the next publication. *Updates also must be filed with the FCC within ten business days of the change(s).* All of this means that, as employees responsible for closed captioning compliance come and go, and in the event of any change in mailing address, e-mail address, or telephone number, stations must remember to make the required updates.

Complaint process tweaked. In order to further ease the complaint process (at least as far as the complainant is concerned), the requirements for both the timing and the location of filing of complaints have changed. (The FCC has noted that complainants may also use Form 2000-C – the general Disability Access Complaint form – for filings regarding closed captioning.) The Commission has reduced the period in which a complaint may be filed to within 60 days of the captioning problem; it has also reduced, to 30 days after receipt of the complaint, the time in which a VPD must

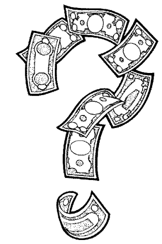
(Continued on page 15)



A Memo to Clients op-ed

Should the FCC Allow Mortgaging of FCC Licenses?

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



For decades the Commission has refused, as a matter of policy, to allow lenders and equity investors to take security interests in the FCC licenses that permit spectrum users – broadcasters, wireless operators, and all the rest – to use the spectrum. While this may not seem like a big deal to some, many lenders disagree: they claim that the FCC's policy significantly impedes the flow of communications-related investment funding. While debates over the wisdom of the FCC's policy have flared up periodically over the years, the FCC has not budged and its policy has remained unchanged.

But the current credit crunch has brought this issue into focus for renewed reevaluation. With the availability of capital drying up for small- and medium-size broadcasters and telecommunications companies, it is important to examine any kinks in the financial pipeline that might unnecessarily slow, or block, the flow of capital.

It is important to examine any kinks in the financial pipeline that might unnecessarily slow, or block, the flow of capital.

To understand how the "securability" of FCC licenses affects lending practices, it is helpful to understand how lenders evaluate whether to make broadcast loans. As a general rule, of course, lenders like to have some assurance that they will be able to get their money back. If a borrower's business is successful, repayments are made from cash flow. But if the business stumbles or fails, the lender may not be able to rely on cash flow. With that in mind, lenders normally require borrowers to provide, in addition to a promise to re-pay, a commitment of other assets as security for the loan. If the borrower's business fails, the lender gets its money back by laying claim to the secured assets.

In deciding whether to lend money (and if so, how much) to a prospective borrower, a lender generally reviews the borrower's assets to be sure that there will be enough to secure the loan. Some businesses are asset-intense. A car dealership, for example, or a jewelry store will have inventory the dollar value of which can be easily calculated. Determining how much an inventory-based business is good for can be reasonably simple.

The trouble with broadcasting is that it is ***not*** an inventory-based business. There is no warehouse full of appliances or parking lot full of automobiles that a lender can look to as collateral for a loan. In fact, there is rarely even any owned real estate. The broadcaster's only real assets (other than the microphones, antenna and transmitter) are its FCC license and the airtime that the broadcaster can program and sell as a result of that license.

Another measure of the credit-worthiness of a business is its cash flow. However, many new or growing broadcasters have little cash flow. This is especially true if the prospective borrower plans to change the programming on the radio or TV station being acquired. In that instance the borrower's business is more like a start-up with no cash flow at the outset. As a result, in many broadcast-related deals, cash flow valuation is not available as a practical matter. Instead, lenders are forced back to asset-based security. But again, with broadcasting, there is no inventory in which to take a security interest.

And therein lays the dilemma. Almost invariably, the broadcaster's most valuable asset is its FCC license. But that is precisely the one asset that the FCC will ***not*** permit lenders to take as collateral. So with no established and reliable cash flow and insufficient assets, many small- and medium-sized companies looking to enter the broadcasting business or expand their existing holdings are having trouble finding funding. That raises the obvious question: if an FCC license could be used for security, wouldn't that encourage lenders to provide funding which is not now available? If so, doesn't that mean that the FCC's "no securitization" policy is impeding the flow of capital into broadcast markets?

Because of the FCC's policy, lenders – many of whom are known for the "belts and suspenders" approach to doing any kind of business – are often hesitant to lend to broadcasters, particularly new entrants to the field. Consequently, the pool of senior lenders familiar with broadcast and telecom valuations is relatively small, and the pool of those willing to finance transactions below $10 million is even smaller. The source of senior debt financing for broadcasters is generally limited to a small group of national lending and financial institutions that possess more sophisticated media lending groups. These lenders frequently will attempt to mitigate their risk by requiring the borrower to set up separate "license subsidiaries," which are entities that are created for the sole purpose of holding the FCC license (all other assets of the company are held by an operating or tangible asset subsidiary). The lender can then take a security interest in the equity of the license subsidiary as a means of getting as close as possible to obtaining something akin to a lien on the FCC license. While such gambits may be attractive (or at least acceptable) to a relatively small universe of lenders, it is clear that the burdens these extra hurdles impose tend to shrink the pool of available capital sources and force the borrower to incur additional costs for the loan (by, *e.g.*,

(Continued on page 7)

(Continued from page 6)

forcing the creation of a multi-subsidiary structure).

As a result, many smaller local and regional banking institutions are reluctant to make broadcast loans. Such bankers are already constrained by leverage and loan-to-value ratio limitations. Add to that the fact that the balance sheet compositions and income statements of media companies tend to be (a) different from those of traditional companies and, therefore, (b) unfamiliar to local and regional banks. What the banks end up seeing is a heavily regulated business where the ability to secure the loan is limited. Moreover, they see an enterprise that is difficult to appraise on anything but an asset basis. For this reason, they usually will not loan beyond the value of any tangible collateral the broadcasters may have – such as real estate that may be owned at a tower or studio site – or beyond any SBA guaranty, where such a guaranty is available.

This is ironic because in most other businesses and industries, local and regional banking institutions are the greatest sources of small- and medium-sized business loans. It is especially ironic because regional banks frequently have a longstanding relationship with the community and the businesses that operate in their regions, just as local broadcasters do. However, broadcasters (and other FCC-regulated companies) are often unable to take advantage of these financing sources because those banks are unfamiliar with the methods of valuating broadcast properties and the loan structures and leverage granted in such loans. The unfortunate bottom line: local banks are not actively participating in a sector where they are needed the most.

In the eyes of many, the FCC's ban on license liens acts as a significant impediment to the flow of capital into the market.

Because local and regional financing options tend to be few and far between, broadcasters are forced to rely on an ever-dwindling group of large national media lenders – but those lenders are usually subject to floors that will not allow them to finance transactions below the $15-20 million level. Aggravating the increasing shortage of willing and knowledgeable lenders is the fact that significant consolidation in the banking industry has reduced both the number of players with media expertise and the number of players actively participating in syndicated financing. As a result, there are fewer players in general and specifically fewer players making loans below the $10 million-$15 million threshold.

This problem could possibly be addressed through a concerted effort to familiarize smaller regional banks with mechanisms to effectively secure of broadcast loans. For example, through a series of programs or seminars local banks could be introduced to industry valuation methods and exit multiples. A similar approach could be taken with state and Federal banking regulators, to demonstrate to them the sometimes subtle distinctions between, on the one hand, most broadcast and communications loans and, on the other, highly-leveraged transactions based solely on the asset value of the collateral. Confusion between those two types of transaction can lead to mischaracterization of broadcast loans as undesirable or worse. Such educational programs could be presented by, or in cooperation with, state and regional banking associations, as well as through national organizations.

The second, far more controversial, method of addressing the problem involves re-evaluating the FCC's ban on security interests in FCC licenses. The FCC's justification for the policy has been that FCC licenses are not property than can be pledged. Instead, a license is, in the FCC's view, merely a permissive entitlement that allows the broadcaster or wireless company to use the public's airwaves for limited periods, subject to renewal. Broadcasters themselves have often embraced this rule because it provides them with protection against unscrupulous predatory lenders looking to snatch away FCC licenses.

These are all valid points. However, they do not diminish the fact that, in the eyes of many, the FCC's ban on license liens acts as a significant impediment to the flow of capital into the market. Over and above the problems mentioned above, the security interest ban adds additional risk for foreign banks (a potentially significant source of capital for broadcasters) that are already disincentivized by strict, Federally-imposed limits on foreign ownership or control of FCC broadcast licenses. Moreover, the ban on security interests prevents lenders from being able to bundle broadcast or telecom loans for sale on the secondary market as is done with mortgage–backed securities in the housing market.

Many lenders legitimately note that no one would expect to obtain a home loan without first providing the protection of a mortgage to the lender. Moreover, the theoretical basis of the FCC's concerns runs counter to the practice of other regulatory agencies, which routinely permit liens on licenses (such as liquor and casino licenses). At the Federal level, the Federal Energy Regulatory Commission has permitted liens on certain types of authorizations for energy generation and distribution. The ability to create such liens facilitates the project financing of these business endeavors.

Notwithstanding the cloud that has recently been cast over the lending industry in the wake of the subprime mortgage melt-down, mortgage-backed securities, and the ability to sell them on the secondary market to institutional buyers such as Fannie Mae and Freddie Mac, have been a major engine behind the U.S. housing market and the ability of many to obtain loans to purchase homes. A change in the FCC's policy would free up not only capital at the national level but also, most importantly, capital from local and regional lending sources which are intimidated from making loans to broadcasters and other telecom companies.

(Continued on page 10)

*"U/D man!" "No, **U**/D man!"*

Translators Not Limited to Contour Overlap In "Lack of Actual Interference" Showing

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

The FCC has provided FM translator operators helpful guidance about how to determine lack of actual interference to full-service stations. In rejecting a Petition for Reconsideration filed by San Bernardino Community College District and National Public Radio, Inc., the Commission clarified that contour overlap is ***not*** the only way to demonstrate lack of interference under Section 74.1204 (d) of the Commission's rules.

The factual back-story leading up to this decision is a bit convoluted, so bear with us. Ten years ago, Living Way Ministries, Inc. (Living Way) filed an application for a new translator station. Translators, as secondary services, may ***not*** cause interference to any primary stations. The facilities proposed by Living Way would have resulted in impermissible overlap with full-service KUSC-FM, but Living Way argued that the overlap area was unpopulated. Section 74.1204(d) permits translator applications which would be "otherwise precluded" as long as the applicant demonstrates that "no actual interference will occur due to intervening terrain, lack of population", or other similar factors.

The central question, then, was how to define the area of likely "actual interference" and, secondarily, how to determine whether that area was not populated.

Under the U/D approach, some otherwise impermissible contour overlap may be ignored because it would be severely limited.

The Commission initially concluded that there appeared to be some population in the interference area as calculated by Living Way, so the Living Way application was rejected. On reconsideration, Living Way provided more detailed population information, but again was rebuffed by the Commission. Living Way tried again, tendering an even more refined definition of interference area (using protection standards that had been relaxed by the Commission during the pendency of the application), and sure enough, three was the charm. The FCC concluded that, while there remained an area of predicted interference (even under the relaxed standards and Living Way's more refined analysis), there was no population within that area. In 2002 Living Way's application was granted.

That decision brought out a considerable array of opponents, including NPR. They argued that, to determine the existence of a potential area of interference in situations like this, the Commission must rely on contour overlap analysis. Contour overlap analysis is simple: you draw the predicted contours of the proposed translator and any nearby co- or adjacent-channel stations which could be affected, and if an interfering contour (as defined in the rules) of the translator would overlap the protected contour of the primary station, then the translator application would be toast. In other words, in the view of these opponents, the ***only*** way to establish "lack of actual interference" is through contour overlap analysis.

Not so, argued Living Way – and, ultimately, the Commission. Reliance on the "undesired signal/desired signal" (U/D) approach was entirely appropriate. Under the U/D approach, some otherwise impermissible contour overlap may be ignored because it would be so severely limited, primarily because of the differences between the facilities of the translator and the primary service station. The U/D analysis looks narrowly at the relative signal strengths of the two facilities (translator and primary service station). If, at a given location, the primary station's signal – *i.e.*, the "desired" signal – is found to exceed the translator's signal – *i.e.*, the "undesired" signal – by a prescribed amount (in the Living Way case, the critical U/D differential was +40 dB for second adjacent protection), then there's actual interference. But in other areas, there would be no such interference.

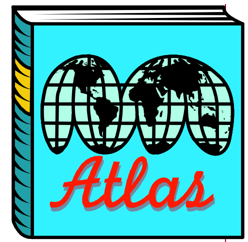
Translators, of course, operate with very low power. As a result, their signals are usually overwhelmed by any nearby full-service operations. So even if a translator were to be plunked down in a primary service station's protected contour (*i.e.*, the translator would be completely surrounded by the primary station's protected contour – a flat-out violation of the contour protection standard), a U/D analysis might establish that any "actual interference" area was extremely small and not populated. For example, the U/D analysis of Living Way's application established that "actual interference" would occur only within a 20-meter radius of Living Way's proposed transmitter. (A more extreme case, cited by the Commission, involved a translator which would have caused interference only within a 2.6 meter radius of the transmitter.)

This makes a certain amount of sense, and it does enhance the flexibility available to the Commission (and translator applicants) in assessing the impact of proposed translators.

But the full-service opponents of the U/D approach also have a point. Even if "actual interference" might really be limited to a 20-meter radius around the translator's antenna, the fact is that the translator's operation is likely to impair the primary station's service well beyond that limited area. And if reliance on U/D analysis might lead to multiple translators located throughout the primary ser-

(Continued on page 9)

The shape of things to come?



Copps/Adelstein Tut-tut *Tuck*

FM market move analysis criticized by FCC Dems

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

Radio folks who have a hankering to move stations around – usually in the direction of larger, more lucrative markets – were reminded recently that clouds are forming on the horizon.

Commissioners Copps and Adelstein issued joint dissents in two recent decisions involving FM channel moves. In their dissents, they were harshly critical of the manner in which the majority applied the *Tuck* analysis which has been utilized for the last couple of decades in the evaluation of proposed city-of-license changes. According to Copps/Adelstein, the *Tuck* analysis has degenerated into a "parlor game" for "Washington insiders", a game that (a) facilitates rather than discourages the flight of rural stations to urban areas and (b) leads to greater media ownership concentration. (For those readers who may just be waking from a several-year coma, the notion of greater media ownership concentration is not viewed as a good thing by Copps/Adelstein.)

> *The preference for strict enforcement of* Tuck *is part and parcel of the ongoing localism debate.*

The two cases at issue involved moving (a) a channel to Shalimar, Florida (pop. 718) from Evergreen, Alabama (pop. 3,630), and (b) a second channel to Sherman, Illinois (pop. 2,871) from Lincoln, Illinois (pop. 15,369). At first blush these proposed moves might seem reasonable. After all, in each case a smaller community is getting a first local FM service while the communities they are leaving would retain their own local radio service. What's not to like about that? Ah, but if you drill a little deeper, you find that the Shalimar allotment will mean that that station would be serving the considerably larger Ft. Walton market, and similarly, the Sherman allotment would be in the Springfield urban market. Copps/Adelstein presumably suspect that little old Shalimar and little old Sherman may just be allotment flags of convenience enabling those licensees to serve the larger markets rather than their small communities of license.

Since 1988 the Commission has invoked the *Tuck* analysis to try to sort out the public interests plusses and minuses of proposed city-of-license changes, particularly when the proposed move would take a station out of a rural area and dump it into an urbanized area. The *Tuck* analysis is intended to serve as a brake on such migratory patterns.

The Copps/Adelstein dissent was not intended to criticize *Tuck* or its underlying goals. Rather, they would prefer a more rigorous application of the showing required to gain a preference under the various factors considered in a *Tuck* analysis, and they accused the majority of eviscerating the principles underlying *Tuck*. According to their dissents, Copps/Adelstein yearn for those days of yesteryear when the FCC "took the *Tuck* standard seriously".

The preference for strict enforcement of the *Tuck* standard by Commissioners Copps and Adelstein is part and parcel of the ongoing localism debate. In their view, a rigorous application of the *Tuck* standard could and should serve as a check against homogenization of radio programming by ensuring that stations focus on the communities to which they are licensed, rather than on some distant, potentially more lucrative, market. This underlying assumption is highly questionable, of course. The Commission itself has recognized that radio stations tend to serve markets rather than specific communities. And in any event, the FCC's own authority to direct a licensee's programming in any substantive manner is severely limited by the Communications Act and (let's think about this for a minute – oh yes, now I remember) the First Amendment.

Nevertheless, the recent Presidential election puts the Democrats firmly in control of the country, and Copps and Adelstein both happen to be Democrats. As a result, we can expect that they may be hanging around for some time to come. In view of their clearly-stated and highly jaundiced view of city-of-license changes, applicants looking to go that route will likely face much tougher sledding. While it is possible that an appeals court may have the opportunity to set the Commission straight on some of these issues, there is no guarantee that that will happen in the near term, or even at all. Stay tuned.

(Continued from page 8)

vice station's otherwise protected contour, that contour could end up looking like the RF equivalent of Swiss cheese, with holes dotting it all over the place. While any one translator might arguably not be especially problematic, the incremental effect of a boatload of translators would be cause for legitimate concern.

The bottom line here is that the FCC has clearly sided with use of the U/D analysis for determining when there is a "lack of actual interference" for purposes of Section 74.1204(d). This is something of a victory for the translator universe, which has recently been on the short end of a number of rulings which seemed to favor the LPFM service over translators. What this all may portend for future confrontations among full service, translator and LPFM representatives remains to be seen.

Getting there from here

Moment Method Modeling Mystery

Rules in effect soon, but not the forms — What to do?

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

In the May, 2007, *Memo to Clients* we called attention to the Commission's proposal to allow some, but not necessarily all, AM licensees to use moment method computer modeling for their directional AM proofs. Use of such modeling was touted as hugely advantageous to many AM licensees because it would relieve them of an exceedingly time-consuming and expensive burden. In late September the Commission adopted its proposal (as we reported on www.commlawblog.com).

But just because the Commission approved moment method modeling did ***not*** mean that we could take advantage of it. The effective date of the new rules was not announced in September; rather, the FCC indicated that they would become effective once the Office of Management and Budget (OMB) had reviewed and approved the revised rules.

The staff deserves a round of applause for short-cutting the Rube Goldberg bureaucracy

So it was something of a surprise when we happened to be thumbing through the Federal Register on October 30 and came across a notice, from the Commission, advising that the changes would become effective ***December 1, 2008***, "except for the amendments to §§73.61, 73.68, 73.151, and 73.155." But, as it turns out, those sections are pretty much the only ones that were changed last September – which led to the next obvious question: what exactly goes into effect on December 1?

We asked around and it appears that, as a practical matter, very little goes into effect on December 1 . . . ***BUT*** there may be some method to the Commission's madness here.

At present, the smart money figures that OMB approval won't kick in until well into the first quarter of 2009. Meanwhile, though, it's possible that a significant number of AM licensees might be in a position to take advantage of moment modeling if they could. The staff's thinking appears to be that, if at least some aspects of the new rules are in effect, then affected licensees may feel it appropriate to prepare and submit applications based on moment modeling, even if the application forms have not technically been approved. While the staff won't be able to act on such applications until OMB has given its thumbs-up to the form, we understand that the staff ***is*** getting comfortable with the notion that it can grant program test authority based on the not-yet-OMB-blessed application forms.

So the drill goes like this. You prepare your 302-AM using moment modeling as outlined in the not-yet-effective rules and you file it now, asking for program test authority in the process. Don't ask for a waiver – just file the application and PTA request. We understand that the staff is willing to act on the PTA request and (presumably) grant such authority right away, which would enable the station-applicant to commence full operation of its modified facilities. While the license application would then hang around in pending status until OMB approves the forms (thus clearing the way for the Commission to act on the applications), that should not matter much to the station-applicant, since it would be operating merrily along with its PTA in the meantime.

If the staff takes this tack – and we have been led to believe that that's the plan – then they deserve a round of applause for coming up with a way to deliver benefits to the affected industry despite the strictures of a Rube Goldberg-like bureaucracy.

(Continued from page 7)

This is not a new debate. In the 1990's a consortium of lenders filed a petition with the FCC requesting a relaxation of the security interest policy in order to free up the credit crunch that preceded the 1996 Telecommunication Act. However, the petition lay largely ignored by the FCC. Thereafter, following a series of court cases addressing the issue, the FCC began to allow security interests in the "proceeds" of FCC licenses, but would not go farther than that. More recently, in 2004, the FCC's Federal Advisory Committee for Diversity in the Digital Age – formed by former FCC Chairman Powell to investigate ways to free up capital and create business opportunities for minority-owned media and telecom companies – made a number of formal recommendations. Specifically, the Committee urged: (i) a policy change to allow private lenders to take security interests in FCC licenses; and (ii) the creation of a Freddie Mac-like entity to purchase bundled broadcast and telecom loans on the secondary market.

Although such an FCC policy change (along with rule changes that would relax the foreign ownership limits by institutional lenders seeking to make domestic broadcast and wireless loans) could assist in freeing up the flow of capital, it would be a mistake to think that these FCC prohibitions are the sole cause of the mid-market gap referenced above or the credit crunch suffered by small- and medium-sized broadcast businesses. The rapidly changing media and telecom landscape is equally at fault, as are the ever-growing competition faced by traditional broadcasters from podcasts, satellite radio, internet video, and internet streaming, and generally falling valuations. Also, the credit problems have naturally been exacerbated by the country's current financial downturn

(Continued on page 11)

From the Memo to Clients voice of experience

Multiple Fees? Pay As You Go!

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

When you go to, say, a grocery store, and you buy a whole bunch of separately packaged items, and you take them to the check-out line, you don't pay for each one separately, do you? Of course not. You roll them all through the scanner, you get a grand total, you pay that grand total, and that's that. While the transaction could perhaps be seen as a series of separate and discrete purchases, in fact it's really just one overall transaction between you and the grocery store.

Why should it be different with the FCC? Beats us, but it does in fact seem to be different.

When an applicant files a number of separately feeable applications or reports, the FCC's system gives the applicant the option of either: (a) paying for each separate application separately, as it gets filed; or (b) paying one lump sum through the Commission's Fee Filer system. The latter is the equivalent of paying the grand total at the grocery check-out line; the former is what you expect the doofus in front of you at the grocery check-out line to do, just to slow things up and inconvenience you personally.

The FCC is not always Johnny-on-the-spot about associating lump sum payments with the applications to which they are supposed to be applied.

You'd imagine the FCC, as part of a federal government currently looking into the eyes of gaping and growing deficits, might want to make it easy for broadcasters to (a) pay their FCC filing fees, and (b) get fees properly credited so that applications get processed, as bureaucrats say, "in due course." You'd be imagining correctly as to (a), but (b) is another matter entirely.

The problem we have noted is that the FCC's system, and the Commission folks who have to deal with that system, are not always Johnny-on-the-spot about associating lump sum payments with the various applications to which they are supposed to be applied. In fact, in a number of instances it has taken considerable time and effort to get the staff to realize, and acknowledge, that the filing fees have in fact been paid.

Even though the online electronic payment system allows the manual entry of payments for multiple forms and stations, the Commission's system apparently does not always take notice. When that happens, the applications in question sit in some electronic filing limbo because the system, seemingly unaware of the fact that the filing fee has been paid, does not release the applications to the staff for processing.

The staff, of course, does not normally go rooting through the CDBS holding bin since the staff presumably (and reasonably) figures that the system will send along the pending filings once the fee has been paid. And the applicant, having paid the fee, would not ordinarily be expected to double- and triple-check that all its filings have moved along into the processing queue. The result: puzzling delay leading to lawyers' fees to investigate the delay leading to more lawyers' fees to get the FCC's left hand in touch with the FCC's right hand and thus get things moving.

Although it may be simpler for licensees to pay for a bunch of separate FCC filings with a single online payment, the best way to avoid delays and headaches is to PAY EACH ONE SEPARATELY at the time the forms themselves are filed. Both the CDBS broadcast form filing system and the ULS wireless system offer an opportunity to pay for each submission on-line, immediately at the time that submission is made. Our very strong suggestion: take that opportunity!

True, this approach may be cumbersome and counterintuitive – but it sure beats trying to figure out, weeks later, why an application has still not even been accepted for filing despite payment. In Congress, they call this "paygo" – short for pay as you go. Whatever your political bent, if you want to get your applications and forms moving forward as quickly as possible, paygo is the waygo these days!

(Continued from page 10)

and corresponding mortgage and credit crises that have infected most financial institutions. So serious has the situation become that in July, 2008, the FCC hosted an *En Banc* Hearing on Barriers to Communication Financing in New York to probe the causes and possible solutions to the credit crunch in the telecom and media markets. Again, it would be a mistake to think that a single silver bullet – be it educational programs for local or regional banks or a loosening of the FCC's regulatory choke chain – exists that will magically free up needed capital to the broadcasting or telecom sectors. However, in order to address the problem, the FCC must probe and understand the methods used by banks and lending institutions to evaluate prospective financings and work with those institutions to address the problems faced. While many possible solutions are beyond the control of the FCC, the limits on the ability of lenders to secure broadcast loans is one that should be studied and evaluated.

(This article first appeared in Radio World, and is reproduced here with permission.)

(Continued from page 1)

- Radio astronomy sites (all channels).

Riding herd on potential interference to that many services necessarily puts a lot of constraints on TV band devices (TVBDs), as unlicensed white space gizmos are now known. The constraints are mainly of three kinds:

- Operation is flatly prohibited on certain channels, and in certain areas, and on some channels in some areas.
- Every TVBD must know where it is, and have a current list of open channels for that location, or else it must operate under the direct control of a TVBD having that information. (Manufacturers can bypass this rule by undertaking extra procedures; *see* below).
- Every TVBD must sense the spectrum for incumbents on the channel it is using.

The details are stringent. Device locations, for example, must be determined to within 50 meters, a requirement that only GPS can fulfill today. The catalog of available channels must be updated at least daily. Sensing must achieve a detection level of -114 dBm, equivalent to 0.004 trillionths of a watt – yet even this sensitivity could miss TV signals that are viewable with a good outdoor antenna.

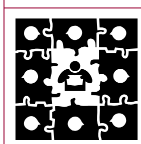
Looking ahead, TVBD manufacturers may want to avoid the self-location requirement, and instead seek to protect incumbent services solely through sensing. Those products might work better inside buildings, where GPS does not penetrate well, and in less populated areas, where control signals from companion GPS-based devices might be hard to find. Unfortunately, it those were just the types of sensing-only devices that fared the worst in testing. The FCC is willing to allow them, but not until it is satisfied they can meet requirements that have eluded them so far.

Ordinarily, FCC product certification is a private matter between the manufacturer and the FCC engineers. But this is not an ordinary rulemaking. Most FCC technical rules make it a straightforward matter to determine whether a candidate device complies. Here, though, being sensitive to the starkly differing interpretations that TVBD advocates and their opponents have put on past sensing-only test data, the FCC is adding extraordinary steps to the certification process. Rather than simply trust the applicant's own test results, the FCC will re-run the tests itself, not only in the laboratory, but also in the field. The testing will be open to the public. And the FCC will put the test results on public notice and invite comment. Any sensing-only devices that reach the market will have overcome unprecedented scrutiny.

Device locations must be determined to within 50 meters, a requirement that only GPS can fulfill today, and the catalog of available channels must be updated at least daily.

The last two proceedings for new, unlicensed services – ultra-wideband and broadband over power line – prevailed at the FCC despite vehement opposition. But both fell short of expectations in the marketplace. Because TVBDs are closer to existing successful products, such as Wi-Fi, they may have an easier route to breaking that pattern. On the other hand, the FCC has set up formidable engineering challenges that are sure to appear in the price tag.

The TVBD advocates have what they asked for. Let's see what they can do with it.



(Continued from page 4)

ate in areas where they cannot "sense" a television signal, a DTS network of transmitters may successfully keep these devices at bay.

Of course, a uniform digital signal throughout a large service area may give rise to new business opportunities for broadcasters as well. Mobile television has been on the horizon for a while, and the use of digital transmitters where the distance between wireless device and transmitter site is much shorter may just be the shot in the arm the nascent industry is looking for.

Since the new DTS rules have yet to be published in the Federal Register, and the accompanying forms have yet to be approved by the Office of Management and Budget, the Commission will permit the submission of requests based on the new rules in the form of requests for special temporary authority (as has been the case since DTS was first proposed almost five years ago). Any station which obtains such an STA will still have to refile for permanent authority once the forms have been approved. We will keep you informed of when the rules are adopted and when the race to the future will start.

FM ALLOTMENTS ADOPTED – 10/21/08-11/20/08

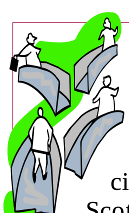
State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
TN	Linden	88 miles SW of Nashville, TN	267A	07-280	TBA
OR	Prairie City	165 miles E of Bend, OR	272C	08-67	TBA (substitution allotment)

FM ALLOTMENTS PROPOSED – 10/21/08-11/20/08

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (*i.e.*, Drop-in, Section 1.420, Counterproposal)
SC	Williston	68 miles SW of Columbia, SC	260A	08-201	Cmnts-12/15/08 Reply-12/30/08	Drop-in
TX	Marquez	128 miles NE of Austin, TX	296A	08-196	Cmnts-12/15/08 Reply-12/30/08	Drop-in
NV	Silverpeak	214 miles SE of Carson City, NV	291C	08-197	Cmnts-12/15/08 Reply-12/30/08	Drop-in
HI	Kihei	West Coast of the Island of Maui	264C2	08-217	Cmnts-12/22/08 Reply-1/6/09	Drop-in

Notice Concerning Listings of FM Allotments

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



FHH - On the Job, On the Go

Scott Johnson was recently honored by the University of Alabama for obtaining, after years of effort, FCC approval to relocate the University's television station antenna, a move which increased the station's over-the-air coverage more than ten-fold. Scott (who is already in the Alabama Broadcasters Association Hall of Fame as the 1999 Broadcaster of the Year) was awarded an Alabama football signed "To Scott" by 'Tide Coach Nick Saban. (As we go to press, UA is Numero Uno in the BCS college football rankings.) Like any good coach, Scott gave much of the credit to his team, including **Joe Di Scipio** and **Anne Crump** and Scott's assistant **Michelle Brown Johnson**, but the credit only went so far – Scott is keeping the ball. (Go to www.commlawblog.com to see a picture of Scott being presented with the ball by UA officials – at the blog, enter "Scott Johnson football" in the search box.)

And our *Media Darling of the Month* is (the envelope, please) . . . **Mitch Lazarus**, who was quoted in *Communications Daily* in connection with the FCC's grant of a waiver (championed by Mitch) for an ultra-wideband security system application.

(Continued from page 3)

a tower's lights at least once every 24 hours. The inspection can be either visual or by observing automated monitoring equipment. With only a few keystrokes, the tower owner's e-mail admitted that he had violated the lighting rule. The FCC fined him $1,600.

In two cases involving mobile radios, FCC agents and local police worked to find men who were intentionally interfering with two-way communications. The Boston Police Department raided the home of a 17-year-old boy who had reprogrammed a radio to work on police department channels. The teenager was arrested at home with the radios in his hands and admitted that he had been disrupting communications. Although the FCC initially attempted to fine the boy $10,000, they eliminated the fine upon determining that the boy had no income.

A more interesting case popped up in Georgia. FCC agents and local police tracked down a man who was interfering with communications between school busses. When the FCC (accompanied by local police) interviewed the man, he admitted that he was causing the problems and explained that he was doing so because he was upset that he had lost the contract to provide the communications network for the school busses. The man went on to explain that he had reprogrammed a radio to cause the interference and even showed it to the FCC agents and to the police. Two months later, the FCC sent the man a fine for $17,000 and – here's a surprise – his story quickly changed. Go figure! The man no longer admitted that he had caused interference on purpose. His new story: the transmit button was accidentally pressed on his radio. (In his own eloquent explanation, the guy told the FCC that he had incorrectly mounted his transmitter, which caused "PTT of the VHF to mash against the base of the UHF and go into the TX by itself.") In order to get around the pesky fact that he had admitted to everything two months earlier, the man now claimed that the presence of the police officer made him nervous. The FCC went with the first story and discounted the tale that was spun when the man realized there would be a $17,000 fine.

Papers, please, let us see your papers – The FCC fined the buyer and seller of a radio station $3,000 each for failing to submit with their assignment application all of the agreements underlying their transaction, even though they had made a "passing reference" to a third-party agreement. The FCC insisted, in retrospect, that that third-party agreement should have been included with the application. This appears to set new precedent in this area.

In the FCC application to sell the station, both of the parties advised the FCC that they were not including every document regarding the sale of the station. Two of the documents not included were a shared services agreement and a separate purchase agreement between the buyer and a third party. The buyer withheld these particular items because, as it understood the relevant rules and policies, there was nothing requiring applicants to include agreements with third parties as part of another deal.

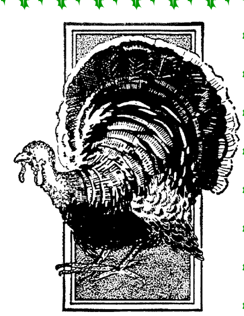
The FCC agreed that its decisions and orders "do not explicitly require" buyers and sellers to submit such third party agreements. However, the FCC claimed that applicants must furnish all information necessary to enable the Commission to effectively evaluate a transaction. Since the applicants knew about these particular side deals, it was incumbent on the applicants (at least according to the FCC) to recognize that the Commission might want to take a look at the terms of the side deals when evaluating the application. What is established by the latest FCC decision is the curious holding that the FCC will decide, after-the-fact, whether or not a document should have been included with an application. As we now know, failure to include a document can result in a fine. So the take-home message here appears to be that it may be prudent to err on the side of disclosure when it comes to side deals. And even if you elect not to submit one ancillary agreement or another, it is probably advisable to alert the Commission, in clear and unmistakable terms, to the existence of the withheld materials (along with an explanation for why you're withholding them).

The take-home message here appears to be that it may be prudent to err on the side of disclosure when it comes to side deals.

Holiday Schedule Reminder

Fletcher, Heald & Hildreth, P.L.C.
will be officially closed on
December 25-26 and January 1.

We wish you
safe and happy holidays.



(Continued from page 5)

respond in writing. Further, if a complainant has misdirected his complaint to a VPD which happens not to have been the source of the problem, that VPD can't just declare the complaint to be somebody else's problem and throw it away; rather, the recipient-VPD must assist the complainant in correctly directing the complaint. As another aid to consumers, a complaint will no longer be required to be filed first with the programming distributor but, instead, may be filed first with the Commission.

Analog v. DTV – The same rules apply. In looking at the consumer impact of the now-imminent DTV transition, the *Declaratory Ruling* portion of the order also offers the clarification that digital programming is fully subject to essentially the same closed captioning requirements as analog programming. While there would not seem to have been much doubt about the matter, the Commission explicitly states that *there is no exemption for DTV programming just because it is digital*. The only real difference is the controlling date for determining whether a program is considered to be "new" or "pre-rule." At this point, ***all*** "new", non-exempt English-language programs must have captions, while providing captions for only 75 percent of "pre-rule" programming is sufficient. Spanish language programming is currently subject to lesser requirements, but the same rules will kick in for new programs as of January 1, 2010, and for pre-rule programs as of January 1, 2012. For shows in either language, the dividing line between new and pre-rule programming is the date on which the program first aired.

Digital programming is fully subject to essentially the same closed captioning requirements as analog programming.

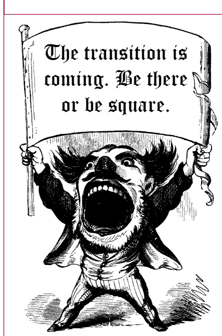
For analog programming the magic date was set at January 1, 1998, *i.e.*, the effective date of the rules. Because there were no technical standards for display of closed captioning on DTV receivers at that point, the setting of the critical date for digital programming was delayed until there were. The established date is now July 1, 2002.

As an operational matter, the Commission notes that for those viewers relying on digital-to-analog converter boxes, it will be necessary for stations to continue to broadcast captions in the analog standard following the DTV transition. While the boxes will convert digital programming to analog for viewing, the requirement for the converter boxes is only that they pass through analog caption information in a manner that can be decoded by analog sets.

The Commission also seeks to disabuse stations of the notion that certain of the self-executing exemptions from captioning requirements will come into play because of the change from digital to analog. For example, a station may *not* claim the "new network" exemption because of a change from analog to digital. It also may *not* claim the exemption for channels with less than $3 million in revenues the previous year based solely on switching from a primary analog channel to a primary digital channel. For example, if a station's analog operation on Channel 5 produced the bulk of its revenues in 2008, while its digital operation on companion Channel 45 produced little revenue this year, the station can***not*** claim exemption for its all-digital operation on Channel 45 for 2009.

Comments sought on $3 million exemption. Speaking of the $3 million revenue exemption, the Commission is examining this rule provision more closely and has sought comment on how it should apply to digital stations. The language of the rule specifies that this revenue-based exemption is for any "channel" that has revenues below $3 million. In the new multicast environment, however, the question arises as to what constitutes a "channel." Is each multicast programming stream a separate channel, or is a "channel" the entire 6 MHz television channel that each station is allotted? Obviously, the answer to that question could have a significant impact on how much captioning must be provided on each multicast programming stream. The Commission notes, however, that the impact could be less than might be expected, as many programming suppliers already include captions, and stations will continue to be required to pass through captioning that they receive. The Commission also asks whether the $3 million threshold continues to be appropriate or whether there should be some sort of sliding scale or perhaps a different (lesser) figure for each multicast stream.

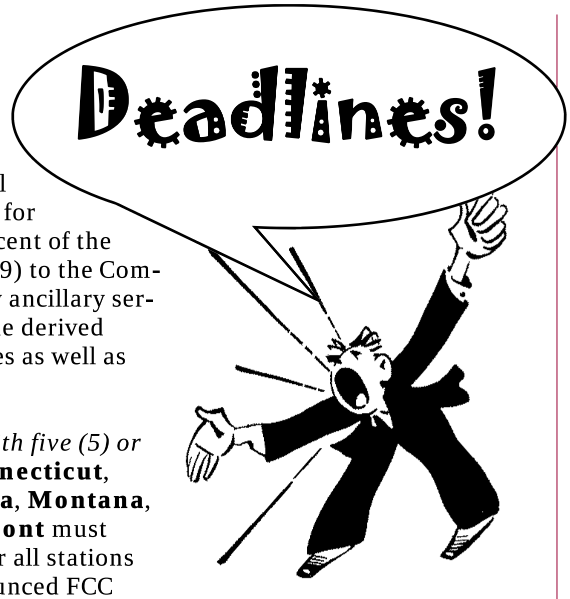
Comments are due and the rule interpretations in the *Declaratory Ruling* become effective 30 days after publication in the Federal Register. The new information collection and posting requirements become effective 30 days after notice of OMB approval is published in the Federal Register.



AN IMPORTANT PUBLIC SERVICE ANNOUNCEMENT BROUGHT TO YOU BY THE *Memo to Clients*

The *Memo to Clients* Digital Transition is coming!!! Will you be ready? See the announcement on the back page of this issue if you can't read the following message:

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* stations *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.

January 10, 2009

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. The period to be included is October 1 through December 31, 2008. This fourth quarter report will be filed through the Consolidated Data Base System (CDBS), the general 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 fourth quarter reports on 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, or other evidence to substantiate compliance with those limits, 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.

(Continued on page 17)

(Continued from page 16)

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.

February 1, 2009

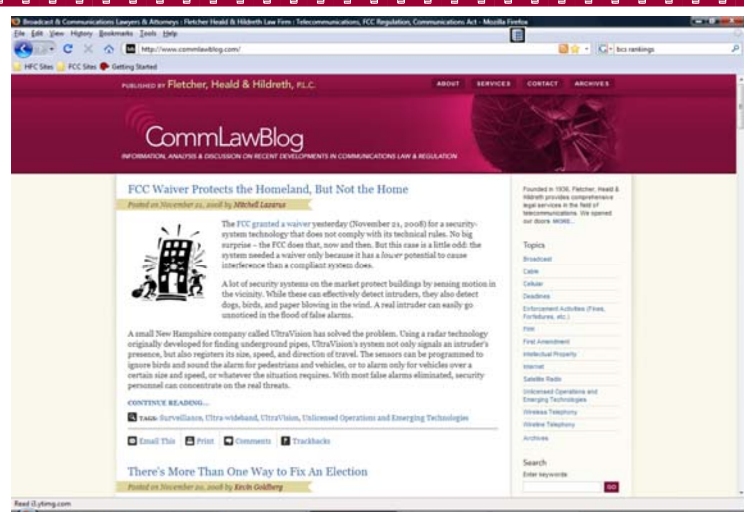
EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in **Arkansas**, **Kansas**, **Louisiana**, **Mississippi**, **Nebraska**, **New Jersey**, **New York**, and **Oklahoma** must place EEO Public File Reports in their public inspection files. 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 **Arkansas**, **Louisiana**, or **Mississippi** 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 **Kansas**, **Nebraska**, or **Oklahoma** 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 **Arkansas**, **Louisiana**, **Mississippi**, **New Jersey**, and **New York** 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 **Kansas**, **Nebraska**, and **Oklahoma** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323 or 323-E.

FHH'S COMMLAWBLOG — NEW AND IMPROVED!!!



If you took our advice and and checked out FHH's blog at:

www.CommLawBlog.com

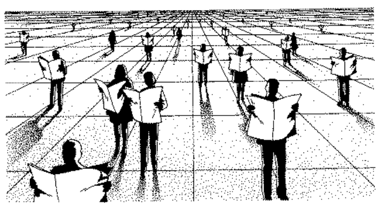
you would have been among the first to learn of the FCC staff's work-around on the Moment Method Modeling front (we have reprinted the blog posting in this issue of the *Memo to Clients* on page 10), or the continuing adventures of the Number 38 DIGITAL TV TRANSITION Ford Fusion, sponsored by the FCC in the NASCAR Sprint Cup Series. (See the blog for photos *and* video.) We also provided extensive coverage of the Supreme Court oral arguments in *FCC v. Fox* (the first broadcast indecency case to make it to the Supremes in 30 years). 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.

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

Updates on the News

And the last shall be first –We all know that Hawai'i was the last state to join the Union (it's Number 50 – hence "Hawaii 5-0"). But with the FCC's blessing, it will be the first state to make the state-wide DTV transition, starting on January 15, 2009. Why jump the February 17 gun? It turns out that a number of TV stations on Maui have their analog facilities (and, we suspect their digitals as well) located in an area frequented by the Hawaiian petrel (for the ornithologically-challenged, that's a bird) for breeding purposes. And the Hawaiian petrel's breeding season happens to be in February. Who knew? Obviously, it would not be ecologically responsible to send truckloads of tower crews tromping around the landscape while the petrels are trying to do their thing. So the U.S. Fish and Wildlife Service, the Hawai'i Association of Broadcasters, a number of elected officials and, ultimately, the FCC all agreed that it would be a good idea to move the transition up a month in the Islands. That way, by the time February rolls around, everything in the area of the petrels' honeymoon suites will be peaceful and quiet and conducive to whatever activities the petrels may choose to engage in. The FCC is gung-ho about this – it has even set up a website (www.dtv.gov/Hawaii) dedicated to Hawai'i's early transition.



AM on FM translators – Still no word on the whereabouts of the decision which would change the rules to permit AM licensees to retransmit on FM translators. That decision was drafted, but abruptly pulled from the Commission's agenda. While the proposed rule change may be in limbo, we understand from the FCC's staff that the staff ***is still authorizing*** such operations on a case-by-case basis pursuant to STAs.

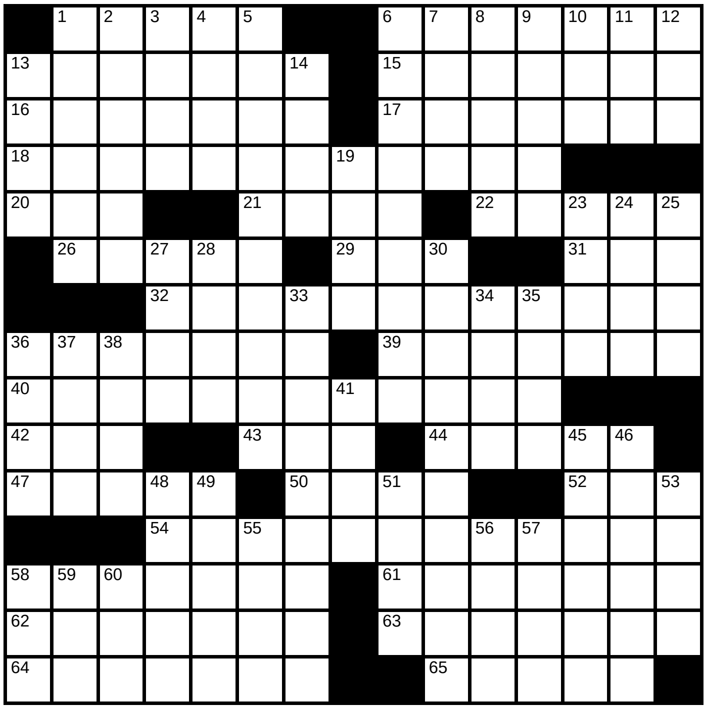
Where never is heard an indecent word – On November 4 (yes, Election Day), the Supreme Court heard oral arguments in *FCC v. Fox*, the indecency case out of the Second Circuit that involves "fleeting expletives" uttered by Cher and Nicole Richie. As you may recall, in the wake of the Janet Jackson Super Bowl affair in 2004, the Commission abandoned its longstanding policy of restraint and, instead, announced that it would penalize the "fleeting" broadcast of indecent words. Fox, which was on the wrong end of that particular decision, appealed to the U.S. Court of Appeals for the Second Circuit, which held in Fox's favor in 2007. The Second Circuit held that the FCC hadn't provided an adequate explanation of its change in policy. The Second Circuit also threw in some "dicta" (*i.e.*, discussion that doesn't constitute a component of the court's technical justification for or explanation of its ruling) indicating that the FCC's policy might be unconstitutional in any event. The Supremes agreed to review the Second Circuit's decision and, after receiving extensive briefing in the case, heard the oral argument earlier this month. Three FHH attorneys attended the argument – their reportage can be found on our blog, www.commlawblog.com (get to the blog page and enter "supreme court indecency" in the Search box).

Our vote for the most noteworthy aspect of the argument (besides Scalia's passing observation that folks don't "use 'gollywoggles' instead of the F-word")? For 60 minutes 11 very bright people – the nine members of the Court and two accomplished attorneys – discussed whether the FCC could properly penalize the broadcast of two particular words, and yet ***neither*** of those words was articulated in the courtroom. The same thing happened in the 1978 *Pacifica* case (which involved George Carlin's monologue about seven dirty words).

It's possible that the Supremes will have yet another chance to weigh in on indecency this term—the FCC has decided to ask the Court to review the Third Circuit's decision in the Janet Jackson case. Don't look for a decision as to whether the Court will agree to hear that appeal for several months. Though it's a bit late in the term, it's at least possible to get briefing, argument and decision in by the end of June. We shall see.

Fairness Doctrine on the come-back trail? – While there has been a certain amount of noise about possible resurgence of the Fairness Doctrine, we have seen no solid evidence that such a resurgence is likely. However, we note with interest that Senator Charles Schumer (D-NY), who is viewed by many as a Democratic leader in the Senate, recently likened the need for the Fairness Doctrine to the need to regulate broadcast "pornography". Schumer was quoted as saying that "the very same people who don't want the Fairness Doctrine want the FCC to limit pornography on the air. I am for that. But you can't say government hands off in the one area to a commercial enterprise but you are allowed to intervene in another. That's not consistent." We're not really sure what he was trying to say there, but it could be interpreted as an indication that he wouldn't have any problem with a revivified Fairness Doctrine. While that's a far cry from actually drafting or sponsoring legislation to that effect, it's nevertheless troublesome when political leaders hint that they might support such legislation. Of course, we might be reading Schumer's statement incorrectly. Keep your fingers crossed and stay tuned as the new Administration (and new Congress) crank up their engines and start to get traction early next year.

FCC Quote of the Month — "We conclude that the typographical errors in the staff orders do not constitute reversible error." (FCC 08-222—you can look it up.)



Calls of the Wild

Could it really be November again? Sure enough!! And that means it's

***MTC Crossword Puzzle Time*!!**

This month we give you the gimme of all gimmes. A tap-in. A chip shot. A slam dunk. A piece of cake. The long theme entries consist of current (as of 11/19/08) call signs of actual stations, strung together to form sentences (of sorts). So even before you start, you know for sure that each of the theme answers will consist of three four-letter call signs, each beginning with either K or W. (Note – we didn't include suffixes like "-TV" or "-FM".) And to make things *even more incredibly easy*, not only have we provided helpful (and, we think, pretty darn obvious) clues, but we have also provided the service (AM, FM or TV) ***and*** the city of license of the stations in question. CDBS, here we come. Where's the challenge?

As always, anyone completing the puzzle may be assured of suitable recognition if he/she alerts us to the achievement by emailing us at cole@fhhlaw.com.

Above

1. The Last Supper, *e.g.*

6. Spiked military device for, *e.g.*, puncturing tires

13. Silt or bank

15. West Maui town

16. Where to look for a pig?

17. Blood and navel, *e.g.*

18. After a spectacular high school hoops career in the Philly area, ____ (Las Cruces, NM, AM; Gloversville, NY, AM; Easton, PA, AM)

20. -quette or -ology prefix

21. Unicorn feature

22. Asgard inhabitants

26. Uncle Tom creator

29. Tumor suffix

31. Italian multinational oil and gas company

32. What frat brothers say when planning a party (Waverly, AL FM; Lebanon, TN, FM; Goldfield, NV, TV)

36. Venetian Moor

39. Hunched over

40. Question to which one possible answer is: "Lang and Lane" (Jackson, AL, FM; San Antonio, TX, FM; Parowan, UT, AM)

42. Poetic time of day

43. Woodman composition

44. Colorado beerman

47. Racket

50. Slangy denial

52. Airport info

54. Title character of classic 1933 film mauls co-star in tragic alternate ending (Everett, WA, TV; Ansonia, CT, AM; Princeton, IN, AM)

58. World ___ (global network)

61. Apply Nix, perhaps

62. "'Twas brillig, and the slithy toves ___"

63. Menaced, dog-style

64. "This new and gorgeous garment, majesty, _______ so easy on me as you think" (Shakespeare, *Henry IV, Part II, Act 5, Sc. 2)*

65. Daly namesakes

Down

1. Forget-____ (flowers)

2. Direction to one hanging a picture

3. 1948 Hitchcock film edited to appear as a single continuous shot in real time

4. Source of the ear whence a silk purse

5. "____ is" (expression of incredulity)

6. Costume element used in *The Dark Knight*

7. Swiss flower

8. ____ Apso

9. Oncle spouse

10. Fix (like a quiz show)

11. Three Dog Night hit

12. Mas companions

13. Dam

14. A ____ clock scholar

19. Think or believe (arch.)

23. Ooze

24. *Bus Stop* author

25. Next door neighbor of Brown U. in Prov.

27. Due

28. TV orchestra leader of yore

30. Forerunner

33. Long shot, as a rule

34. ____ avail

35. Japanese stringed instrument

36. "____ Marshall, Counselor At Law"

37. Red Sox GM Epstein

38. Hagar's daughter

41. Author C.P.

45. Decide again

46. Periods of inactivity

48. Waterski fins

49. Lady of Rohan (portrayed by Miranda Otto in *The Two Towers* and *The Return of the King*)

51. Beatnik abodes

53. Colored

55. Rex's shamus

56. Whack, old-style

57. Frayed

58. Sent. or phr. components

59. Ultimate *Godfather* part

60. Banned pesticide

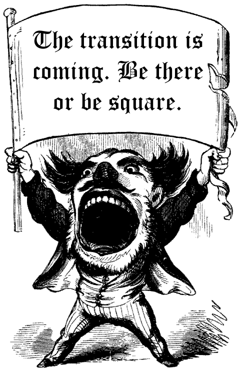
Fletcher, Heald & Hildreth, P.L.C.
11th Floor
1300 North 17th Street
Arlington, Virginia 22209

First Class

Coming Next Year: The Memo to Clients Digital Transition

As announced in last month's *Memo to Clients,* **we are going to stop distributing the *Memo* in a paper edition**. Instead, we will distribute it electronically. No firm date has been set yet, but we expect we will stop the paper edition sometime in the first quarter, 2009. If you want to be sure that you continue to receive the *Memo* uninterrupted, listen up!

We already have an e-mailing list of several hundred subscribers. If you are among them, you need do nothing – your continued receipt of the *Memo* is taken care of.



If, on the other hand, you are one of our 1,400 or so subscribers who receive their monthly *MTC* fix on paper via snail mail , and if you wish to continue to receive the *Memo* (and who wouldn't?), you will need to send us the email address(es) through which we can alert you to each month's edition. Just specify your preferred email address(es) in an email to **cole@fhhlaw.com**; it *will be helpful if the subject line reads "**MTC email address change**"*.

We received a reasonably good initial response to last month's notice, but there are still more than 1,000 of you out there who will be *Memo*-less when we make the transition ***unless*** you get us your preferred e-mail address(es) (Yes, you can list as many separate addresses, and addressees, as you want.) As the FCC did in the DTV Transition, we will provide further warnings as the Big Day approaches – but we encourage you to act sooner rather than later to avoid any possible delivery interruption.