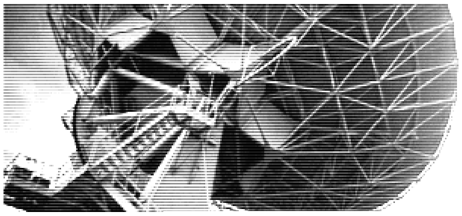

FLETCHER, HEALD & HILDRETH

Communications Law & Regulation

MEMORANDUM TO CLIENTS

News and Analysis of Recent Events in the Field of Communications

DTV Update

February 17, 2009 or . . .?

At Last Minute, Congress Muddies DTV Transition Timetable

By Harry F. Cole
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With just weeks to go before the years-in-the-making DTV Transition was scheduled to occur at long last, the politicians blinked. Well, at least some politicians. Senators, mainly. House members, too, but not so much. As of press time, it appears that the February 17 deadline – a deadline which many thought had been permanently etched in stone – may not be permanent after all. But then again, maybe it is. Confused? Join the club.

The actual need for any extension of the deadline is a matter of some dispute. In a years-long process which occasionally resembled the herding of cats, the FCC's staff had patiently and very effectively managed to get virtually the entire full-service TV industry lined up and ready to hit their marks on, or even before, February 17. That alone was a herculean feat for which the staff, and the industry, should be applauded.

It appears that the transition deadline may not be permanent after all. But then again, maybe it is.

But the higher-ups still fretted that the public at large might not be ready for the transition. Data available from the Wilmington, NC, DTV experiment last Summer suggested that a small but significant percentage of purely over-the-air viewers might encounter problems. The FCC re-doubled its educational efforts, dispatching staffmembers nation-wide to educate and enlighten the Great Unwired. Through the Fall there appeared to be cautious optimism that everything would go smoothly and according to schedule.

Any such optimism, however, was not deeply rooted. With the first sign of some limited, potential problems, optimism was blown away by darker negative forces. That first sign was the January 5 announcement by NTIA that it was freezing the DTV converter coupon program because it had maxed out on the $1.34 billion that Congress originally allotted to that program. Of course, the fact that NTIA had run out of cash indicated that the public at large had taken all those DTV PSAs to heart and had signed up for their government-issue DTV coupons in droves – which should have encouraged any glass-half-full types willing to think about it. But the glass-half-empty folks saw it differently: with a coupon freeze on, there might be as many as six million households that might not be able to get their coupons before February 17! The horror!

Bear in mind that the mere lack of coupons did ***not*** mean that consumers couldn't go out and buy DTV converters. It simply meant that – having declined the opportunity to sign up for coupons for the 10 months or so that the coupons had already been available – they would have to pay full price for their converter boxes. Such missed opportunities are often the cost of procrastination.

But rather than impose a procrastination tax by sticking to the February 17 deadline, the politicos started the drumbeat for extending that deadline. On January 7 (two days after the coupon freeze) Consumers Union urged Congress to extend – a suggestion which was seconded in the press by influential House personnel. On January 8, the Obama Transition Team called for an extension. By January 12, press reports indicated that extension bills were being drafted in both the Senate and the House. On January 14, Commissioner McDowell wrote to Chairman Martin, describing serious reservations he had about the Commis-

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January, 2009 **No. 09-01**

Inside this issue . . .

"Out, damn'd spot! Out, I say!" (Macbeth, Act V, Scene 1)

Commission Conks Non-Comms for Commercial Content

Agency amerces ad airings

By Peter Tannenwald
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The FCC has spanked three noncommercial radio licensees for violating the statutory prohibition on promoting commercial products and services for consideration – in common parlance, they ran commercials.

What precisely constitutes a "commercial" for the FCC's purposes is not always easily determined. As we observed in the May, 2008, *Memo to Clients*, NCE stations can*not* accept payment in return for the on-air promotion of commercial activities. But they *may* accept "underwriting" contributions and may, in turn, acknowledge the generosity of the contributing underwriter by giving an on-air shout-out mentioning the underwriter. The essential question, then, is: when does such an announcement cross the line from mere acceptable acknowledgement to punishable promotion?

According to the Commission, the announcements that got the three licensees into hot water included qualitative statements, price-related information and prohibited calls to action. Phrases like "flexible financing", "Bud and Bud Lite are discounted", "our aim is excellence and our goal is perfection", and "let me suggest a visit..." all apparently pinned the needle on the FCC's commercial-o-meter over into the red zone. Pricing information – *e.g.*, a reference to a "10% discount" – was a no-no. Also panned was the description of an underwriter as the "longest continuous builder in Northeast Florida". It is not unusual for stations to mention the year when a business was founded, but it appears that the FCC believes that a statement comparing the age of one business to the age of others goes beyond a permitted factual statement and veers too far into the forbidden "qualitative" zone.

The FCC also raised its eyebrows over the 60-second length of an underwriting announcement. It did not explicitly prohibit 60-second announcements or set some other time limit, but it suggested that the longer the announcement, the more likely that prohibited content will creep into the copy.

Another point was that the mere furnishing of a program to a station constitutes consideration. In one of the three cases, the offending announcements had occurred in the course of a program that was produced by a person not affiliated with the licensee but who provided the programming to the licensee for free. The licensee pointed out that, even if the program producer had received consideration in return for including the announcements in his show, the licensee had ***not*** received ***any*** such consideration, so no violation could be said to have occurred. The Commission, however, was not favorably impressed by that argument.

According to the Commission, the Communications Act bars any payment in return for mentions on NCE stations, even if the licensee is not itself the recipient of the payment. Moreover, the FCC found that the station in this case *did* receive some consideration in the form of the program itself. Thus the fact that payment by an underwriter goes to a program supplier who is unaffiliated with the station licensee does ***not*** necessarily insulate the licensee: the fact that the producer received consideration for promotion of a commercial product or service may be enough to trigger the FCC's enforcement process.

And while the Commission has in several past cases seemed to cut some slack when third-party programmers were involved, it wasn't so inclined here. That was probably because the announcements at issue in the latest action were numerous, lengthy and involved the same advertisers and the same program producer that had gotten the same licensee into trouble for similar violations in 2003. At that time the licen-

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Focus on FCC Fines

By R.J. Quianzon
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$750,000 AM station comes with $4,000 fine – The new owner of a Pennsylvania AM station discovered that his acquisition came with an unexpected surprise – a fine from the FCC for the misdeeds of its last owners! In June, 2007, Joseph Green, a buyer who owned no other stations, plopped down $750,000 and purchased the company that owned an AM station in central Pennsylvania. Perhaps unknown to Mr. Green, FCC agents had visited the station six months earlier and determined that the station's public file was not in order (since it lacked a required few lists).

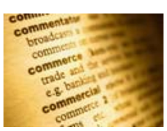
Soon after buying the company – while that new station aroma was still lingered in the air – Mr. Green was presumably surprised to receive a letter from the FCC proposing to fine the company $4,000 for not maintaining its lists. Mr. Green wrote back to the FCC and explained that he had just bought the company and should not be responsible for what the old owners had done. The FCC did not agree and provided Mr. Green with reference to numerous cases where buyers folks have been held responsible for the problems of the companies they have acquired. Mr. Green was given 30 days to pony up the cash.

This case is a reminder to readers that there are significant differences between buying a company that owns a station and buying just the company's assets. The FCC reasoned that the company that had committed the infractions was still the very same company today. The only thing that had changed was the identity of the owner of the company's stock, and that difference was not a matter of concern to the Commission in this context. In contrast, if Mr. Green had simply purchased the assets of the station and had asked the FCC to issue a new license in his name, this problem would never have occurred. While there are tax and business reasons that encourage some buyers to purchase a company rather than its assets, if you're a buyer you must beware that when you buy a company you assume its liabilities as well.

A day late and $8,000 short – The FCC issued an order fining a California company $8,000 for an operational violation. Not surprisingly, the company was not pleased with the decision and petitioned the FCC to reconsider the fine. The FCC refused to reconsider the fine and issued a second order. The company pressed on a second time – perhaps employing a "pretty please" argument – and again asked the FCC to reconsider.

With its second attempt, the company missed a deadline. Under FCC rules, a petition for reconsideration must be received within 30 days of the public notice of the action sought to be reconsidered. The company filed its petition on the 31st day. Oops. In a single short paragraph, the FCC declared that the petition was late and could not be considered. Readers should be aware that the FCC strictly enforces its deadlines and can quickly dispose of its work by summarily rejecting filings that do not meet those deadlines.

Station alleges that electronic filing is unconstitutional – An upset AM licensee in Michigan raised an interesting claim not often seen in FCC proceedings. Back in 2004, the licensee failed to file an application to renew its license but nevertheless continued operating the station. The FCC found the station (whose previous license had long since expired) operating a couple of years later and fined the operator for unauthorized operation. The operator objected to the fine and the expired license by claiming that it did not have a computer and could therefore not file through CDBS. The FCC did not accept that excuse and fined the station. The station then sought reconsideration and raised the claim that mandatory electronic filing was unconstitutional. The FCC dismissed the claim; the license remains expired and the former operator still owes a fine (although it appears that the licensee may have blinked – CDBS indicates that it has lawyered up and recently filed a renewal application).



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see escaped with a letter of admonition. No such luck this time around – instead, the licensee got stung with a $5,000 fine.

The other two licensees got off easier, each with a $2,500 fine. One involved a number of "commercial" announcements which were made during the course of play-by-play coverage of a local non-profit baseball team. The other involved a total of 12 announcements (for two local businesses) which, in the Commission's view, crossed the line into "commercial" territory.

The offenses in these cases date back as far as 2005. We are seeing an effort by the FCC's Enforcement Bureau to flex its muscle and look tough, including taking rigid positions in compliance negotiations, possibly in an effort not to appear soft-hearted to the incoming Chairman (whoever he or she may be). Targeted licensees are likely to have some rough sledding for a while.

Courting trouble?

Royalty Ratemaking Ready to Roll

By Kevin M. Goldberg
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We haven't fully resolved the ongoing controversy surrounding the copyright royalties paid by webcasters in exchange for the right to perform sound recordings during the years 2006-2010, but it's already time for non-interactive webcasters (which includes radio stations simulcasting an over-the-air signal on the Internet) to worry about another increase in the rates for 2011 and beyond.

With the appeal of the Copyright Royalty Board's (CRB) March, 2007 rate-setting decision still pending in the United States Court of Appeals for the District of Columbia Circuit, the CRB is already starting up the next ratemaking proceeding. Of course, this also comes as the CRB considers expanding webcasters' filing requirements (from the current reporting requirement covering two seven-day periods per quarter to a comprehensive year-round "census" requirement).

The ratemaking proceeding is a trial-type process in which interested parties present detailed statistical and economic evidence designed to assist the CRB in determining the value of a non-interactive performance of a sound recording (that particular version of a musical work that you hear over the Internet) under a "willing buyer/willing seller" standard.

Anyone can participate, though the extended, intensive – and almost invariably pricey – process often deters individual webcasters from joining in the fun, especially if they believe that one or more trade associations will represent their interests. Still, if you want a seat at the table, it's yours – the cost of the ante is only $150.00 and the time required to file an original and five copies of a Petition to Participate with the CRB by February 4, 2009, to reserve your right to participate. More information regarding the details of how and where to file the Petition are available in the January 5, 2009, Federal Register notice of this proceeding.

The substantive aspects of the Petition are remarkably simple, requiring just:

- The petitioner's full name, address, telephone number, facsimile number (if any), and e-mail address (if any); and
- A description of the petitioner's significant interest in

(Continued on page 11)

Kevin's Copyright Corner

Have they got a deal for you!

SoundExchange, CPB Strike Deal For Webcast Royalties Through 2010

By Kevin M. Goldberg
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Attention all broadcasters:

Are you a noncommercial broadcaster currently engaged in webcasting?

Are you one of the more than 450 public radio webcasters that are either:

- A Corporation for Public Broadcasting (CPB)-supported station;
- An NPR member;
- A National Federation of Community Broadcasters Member; or
- Part of American Public Media, the Public Radio Exchange or Public Radio International?

If the answer to both of these questions is "YES!", you'll want to read more about an exciting new offer available to you.

SoundExchange and CPB have announced that a settlement has been reached that will alter the way in which such stations pay royalties and report webcasting performances through 2010.

The current royalty rates have been the subject of significant discussion in the broadcasting community, including several informative articles posted on our blog (www.commlawblog.com). The sharp increase in rates for the period 2006-2010 was especially feared by noncommercial stations with a large web audience, as those ***non***-commercial stations would pay at ***commercial*** rates anytime their internet listenership exceeded 159,140 "aggregate tuning hours" in a given month, as opposed to the flat fee these stations (and small webcasters) had paid prior to the institution of new rates.

Pursuant to the Webcaster Settlement Act of 2008, this settlement agreement can go into effect immediately, with the following applicable terms:

- Any eligible radio station which chooses to participate will not have to make any further royalty payments until December 31, 2010, as CPB will make a single, up-front payment of $1.85 million to SoundExchange on behalf of public radio stations.
- SoundExchange will also create a consolidated playlist reporting system for use by all stations which choose to

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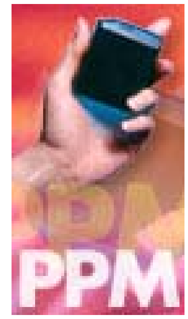
Can it hear you now?



PPM Settles In As Litigating Parties Settle Out

By Davina Sashkin
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There's been a lot of activity in the realm of Arbitron's Portable People Meter (PPM) since our last update in the October *Memo to Clients*. No, PPM is not going away. The settlement of two major lawsuits and the announcement of another PPM market Media Rating Council (MRC) accreditation seems to confirm that PPM is here to stay and gaining acceptance. PPM has also been in the news for its continued alteration of the radio landscape, in sometimes surprising ways.

Settle Down

As reported in the October *Memo to Clients*, a rash of PPM-related litigation erupted last Fall. As so often happens, though, cooler heads appear to have prevailed. In early January, settlements were reached between Arbitron and the states of New York and New Jersey. As we mentioned in October, N.Y. Attorney General Andrew Cuomo had implored N.Y. businesses to boycott PPM for its alleged discrimination against minority-oriented formats and cell-phone-only households, and Arbitron returned the favor with a lawsuit, which the state of NY then countered with a suit of its own. Not to be outdone, New Jersey filed suit against Arbitron the same day, alleging violations of New Jersey consumer protection and civil rights laws relating to the marketing and commercialization PPM.

A rash of PPM-related litigation erupted last Fall but, as so often happens, cooler heads appear to have prevailed.

Arbitron has now entered consent decrees with each state, in which decrees Arbitron has agreed to pay the states nearly $400,000 in legal costs, and to pay a single lump sum of $100,000 to the National Association of Black Owned Broadcasters (NABOB) for a joint radio project between NABOB and the Spanish Radio Association designed to: (a) support minority radio; (b) complete a non-response bias study in the New York radio market (to be overseen by Cuomo's office and due by July 15, 2009); and (c) and fund a trade press advertising campaign promoting minority radio. Arbitron also agreed to make changes to its PPM methodology both in general and in certain specific respects regarding the Philadelphia and NYC markets.

The M-R-C K-e-y

One of the central bones of contention in the PPM dust-up has been the lack of MRC accreditation, a lack which could be seen by PPM skeptics as an indication that the PPM system may somehow be flawed. While there is still no word on the coveted MRC accreditation of PPM in New York and Philadelphia, MRC recently awarded accreditation to a PPM market using the "Radio First" telephone-based panel recruitment methodology. Arbitron can now count Riverside-San Bernardino, CA-The Inland Empire as its second MRC-accredited market (the other, Houston, uses an address-based recruitment methodology). Baby steps, we suppose.

PPM Losers... and Winners

Much of the radio industry remains entrenched in opposition to the adoption of PPM, particularly stations with minority-oriented formats who find that their audience ratings under PPM have plummeted. Now you can count talk radio and Steve Dahl among those opposed. Dahl, a popular on-air talk personality in Chicago for 30 years (could anyone possibly forget the Comiskey Park climax of his "Disco Sucks" campaign in 1979?), hung up his headphones in December due to a decline in his numbers after CBS Radio switched him to mornings on an otherwise all-music station. Published reports indicate that he blames his numbers dip on Arbitron's switch to PPM. (Don't cry too much for Dahl, though – CBS still has to pay out the remainder of his contract at more than $1M per year through June, 2011.)

Not everyone is at odds with PPM, though. Tiny, non-commercial, Contemporary Christian station WGTS(FM) in the Washington, D.C., market is enjoying a ratings bonanza under PPM. The station ranked sixth overall in the market in November, and seventh in December. According to the *Washington Post*, "over one recent three-week period tracked by Arbitron, WGTS (91.9) achieved what is surely a first for a religious station in Washington, and maybe in any major metropolitan area: It landed at the top of the ratings for an entire weekday time period (7 p.m. to midnight)." Perhaps there are some things to like about PPM after all?

Soon-to-be-Ex-Chairman sends MLK Day greetings

Departing Martin Takes 31 Parting Shots At Cable

By Harry F. Cole
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In what has to have been an unprecedented farewell kiss-off by any Chairman, on January 19, 2009, now-former FCC Chair Kevin Martin appears to have caused the Enforcement Bureau to issue 28 separate notices of apparent liability (NALs) and three forfeiture orders, all directed to cable companies, seeking an aggregate of more than $500,000 in fines.

Don't check your calendars – January 19 was, indeed, Martin Luther King Day, a Federal holiday. (It's probably a fair question to ask whether the Bureau staffers – many of them union members – got time-and-a-half for coming in on their day off.)

The fines all stem from the cable industry's ongoing conversion to digital signal distribution, which usually cannot be seen on a TV set without a cable box of some sort, for which a monthly gratuity to the cable company gets tacked on to your bill. An earlier round of related NALs was described in the October, 2008 *Memo to Clients*.

Fifteen of the new fines (ranging from $7,500 to $22,500 each) were directed to operators who had moved program services to digital tiers, unavailable to analog customers, without first giving those customers the notice required by the Section 76.1603(b) of the rules. These fines were accompanied by an order requiring the operators to refund affected subscribers the princely sum of $0.10 per channel per month.

In the forfeiture orders, three systems were each spanked for $20,000 for navigation device-related violations arising from their shift to switched digital video (SDV) platforms. (By the way, "forfeiture orders" are the next step after NALs in the Enforcement Bureau's playbook.) These folks also got hit with refund obligations on top of their fines. One operator was fined $7,500 for failing to notify its local franchising authority of the shift to SDV. Three cable systems which had previously been ordered to shell out refunds for various violations were fined $25,000 each for failing to provide the Commission with a timely description of their proposed refund methodology. (They had previously been ordered to refund subscribers for certain similar violations.)

And nine systems were whacked $25,000 each for suggesting to the FCC that some of this is none of their beeswax, which in govermentese is called "failing to respond fully and completely" to FCC inquiries sent to them last October. (Think Glenn Close in *Fatal Attraction*: "I will not be ignored.")

Having confirmed that the 31 *billets doux* were out the door, Martin then took pen in hand to send a three-page letter to Senators Rockefeller and Hutchinson (the new head honchos on the Senate Commerce, Science and Transportation Committee) to let them know what a good boy he had been, beating up on the bad, bad cable industry and all.

Notwithstanding Martin's grandstanding letter (in which he parrots language from some of the NALs, accusing the cable operators of "contempt for the Commission's authority", among other things), the NALs do ***not*** constitute final determinations of misconduct. Rather, they are more in the nature of accusations to which the targeted companies may respond. Of course, the charges may lead to final determinations sometime down the line . . . but then again, they may not. If the cases get litigated out to the max, it could take years before we know for sure who's right and who's wrong, particularly since a new Chairman will be piloting the FCC cruise liner when the seagulls come home to roost. And if the kerfuffle gets resolved through the settlement/consent decree process, we may never get a clear-cut ruling of guilt or innocence. However it all ends up, it will be out of Martin's hands (and in the hands of an Administration which may take more kindly to cable than Martin did).

> *Having confirmed that the* billets doux *were out the door, Martin wrote to the Senate to let them know what a good boy he had been.*

The underlying factual basis for the Commission's claims may not be 100% favorable to the Commission's position. It appears that most if not all of the cablers ***did*** respond to the Commission within the deadline established in the October NALs. Considering that that deadline was only two weeks after the inquiries were sent out, some of the responding companies said that they did not have enough time to pull together all the information the FCC requested. Some also pointed out that the requested information included materials covered by confidential provisions in agreements they have with third-parties, certainly a valid complicating factor for anyone who takes his/her contractual obligations seriously.

Alas, the Commission was unmoved by such considerations. (The fact that it took the FCC more than two months to crank out the NALs, though, would seem to lend credence to the claim that a two-week response limit might not have afforded enough time – but you never know about these things.)

A curiosity appears in the NALs for shifting program services to digital tiers without notice. Those NALs indicate that the shifting of each program service is a separate violation, and each violation warrants a $7,500 fine. But only two cable operators were hit with fines of more than

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"I see dead markets"

Forgotten But Not Gone: Arbitron-Abandoned Market Still Alive and Kicking For Multiple Ownership Purposes

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We'll leave to others to decide who's the Scrooge in this Yuletide saga, but the facts do provide an important cautionary tale: you can try to run, but you can't hide from dead markets. When the FCC says that it will not recognize changes to radio markets for two years, it means it. Even if a market ceases to exist on Arbitron's books, you cannot exceed the FCC's ownership limitations in a once-defined geographic market for two years following the market's demise.

Check out this cautionary saga that popped up just before Christmas, 2008.

Historically, Arbitron recognized a radio market in Johnstown, Pennsylvania. Forever Communications, which owns a number of stations in Pennsylvania – including in that Johnstown market – told Arbitron in March, 2007, that Forever wasn't going to be renewing its subscription to the Johnstown book. Six months later, Arbitron announced that it was "cancelling" the Johnstown book, effective Fall, 2007.

Less than a month after that announcement, Forever filed an application seeking consent to its acquisition of four stations in the Johnstown area. The proposed acquisition would have put Forever over the permissible ownership limits for the Johnstown market. But, Forever pointed out, as of the date of its application there was no longer any Johnstown market and, therefore, its application was subject to the contour-overlap multiple ownership test, a test which Forever passed with flying colors.

Not so fast, said a petitioner who objected to the application. The petitioner pointed out that the Commission has consistently held that changes in a market will ***not*** be deemed effective, for purposes of determining multiple ownership compliance, until the changes have been in place for at least two years. Under that analysis, Forever had jumped the gun by about 23 months.

Forever countered that the two-year limit applied only to changes in market boundaries – which, according to Forever, means only expansions or contractions of existing markets, but ***not*** elimination of markets. This creative argument was based on language in the FCC's 2003 Ownership Report and Order in which the Commission referred to Arbitron actions "enlarging" a market or "shrinking" a market, with no reference to "eliminating a market".

The Audio Division was not convinced. As they saw it, the two-year limit was intended to prevent circumvention of the multiple ownership rules through alteration of Arbitron markets. The Division had little problem seeing the wholesale dumping of a market – apparently as a result of a business decision of an interested party (*i.e.*, Forever's decision not to re-up for the Johnstown book) – as leading to just such a circumvention. As far as the Division is concerned, obliteration is just the ultimate form of shrinkage.

The FCC did say that if Forever (and its proposed seller) are patient for another year, the deal could be granted. So mark your calendars for October, 2009, and let's see what might roll in the door then.

There's a very prosaic point here: any station sale transaction involving an Arbitron market must take into account the two-year market definition change requirements. No changes to such markets – even the elimination of the market itself – counts until the second anniversary of the change. Any station sale transaction should take this timing into account – otherwise, you risk suffering Forever's fate: stuck in a unexpected, and possibly unpleasant, two-year holding pattern.

(Continued from page 6)

$7,500, even though several more were alleged to have moved more than one service without notice.

Time will tell whether the accused cable operators have been (a) unjustly vilified, or (b) properly brought to justice, or (c) something in between.

But whatever the merits of the MLK Day orders, they are a remarkable final testament to the former Chairman's style of administration. Why, after all, was it so all-fired important to get the orders out the door before he left the Commission? Yes, we all know of his pronounced lack of affection for the cable industry, and some of us who have seen our own analog cable signals flicker into darkness unless we rent expensive cable boxes may feel that the lack of affection is warranted. But isn't it a bit, er, cheesy to insist that the Bureau staff come in on a Federal holiday to crank out orders on the technical last day of his tenure so that Martin can then claim credit for them in a letter to the Hill?

In any event, the Martin regime is now in the history books, for better or worse. Many industries and individuals affected by the Commission's activities will breathe a sigh of relief, while keeping their fingers crossed that the new Administration will not bring with it some new regulatory yoke or quagmire.

Once more, with filing

FCC Whacks Six Licensees for EEO-Related Violations

By Anne Goodwin Crump
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With the release of six notices of apparent liability (NAL) at the very tail end of 2008, the FCC has given us a glimpse of what EEO enforcement is likely to look like for the foreseeable future. And the outlook is what you might expect: continued emphasis on detailed record-keeping despite the absence of any indication that any unlawful employment discrimination has occurred.

The six decisions appear to be directed to the broadest possible range of stations, with stations in the east and west, large and small licensees, minority and non-minority ownership. One common factor that all share is the age of the alleged violations: all of the alleged recordkeeping shortfalls took place at least two years ago, with most of the data going back to 2003 or 2004. The penalty in all cases was a combination of a fine (with amounts varying from $7,000 to $20,000) and reporting conditions.

In none of these cases was there ***any*** *allegation of actual discrimination.*

Each of the NALs arose from the Commission's random audit program. Each year the FCC requires that randomly-selected stations submit detailed information concerning their EEO efforts. The FCC's review process is apparently rigorous – how else to explain the multi-year timeframe from initial submission of the EEO information to the 2008 issuance of the NALs?

There are lessons to be learned from the NALs.

The first is that, if your station's employment unit is not going through some sort of self-assessment regarding EEO matters on a periodic basis, ***it should start doing so immediately.*** The common thread among all of the decisions was that the missing paperwork made it impossible for the station or stations to engage in the required self-assessment. The FCC's rules do, in fact, require that employment units periodically review their EEO practices, and that requirement was the focus in all of the decisions. Accordingly, stations should actually take the time to sit down and look at where they are recruiting, how effective that recruitment is, and what could be done differently to improve results. It might be possible to remove non-productive recruitment sources from the list of sources contacted and to replace those with other, perhaps more responsive, sources. The important thing is to see what tweaks could be made to the recruiting system to make it better.

Another word to the wise is that, if your review shows a lack of information concerning exactly where applicants came from or how they learned about the opening, ***change that pattern at once***. Stations are required to list the total number of interviewees and the total number of interviewees referred by particular recruiting sources each year in their public file reports. In addition, should you find yourself the subject of one of the FCC's periodic audits, it will be necessary to supply the recruitment source *for each interviewee*. Therefore, make sure that you keep this information as you go. The FCC acknowledges that you may not know a source for everyone who applies for a position. Nonetheless, the Commission still seems to think that if you are serious enough to interview a person, and if you actually talk to that person, you should be able to get a referral source from him or her. Accordingly, it would be prudent to ask, as an essential question to be posed to all interviewees, how they happened to hear of the job opening – and then be sure to make a note of the response in whatever interview-related materials you retain for your files.

Additionally, if your stations are recruiting through only internet sources and in-house referrals, ***broaden your sources before you hire anyone else***. The FCC has already stated that internet sources alone are ***not*** sufficient. Likewise, if recruitment efforts include only on-air announcements, you need to look elsewhere in addition. The Commission's rationale on the latter is that only those persons who are tuned in to the station at the time that the announcement is made will know about the opening. The upshot is to *not* rely on *only* one source for recruitment, but rather to expand outreach efforts broadly. While the Commission has indicated that reliance on a single source may be enough if that source is broad enough, a better approach is to rely upon different types of recruiting.

And the final tip – which returns us to the overall theme of paperwork – is to document everything that you do in the way of general community outreach. FCC rules require that each station employment unit, depending on the size of both the station(s) involved and the size of the market, complete two to four general EEO outreach efforts in a two-year period. The stations

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also must keep documentary evidence of such participation, which is where some of the stations targeted in the NALs fell down on the job. Basically, even if you made the required efforts, if you can't document them, they didn't happen and you can't take credit for them.

Perhaps the most intriguing common aspect of the decisions, however, is what the FCC did ***not*** allege. In none of these cases was there ***any*** allegation of actual discrimination. Rather, the licensees' sins fell exclusively into the categories of recordkeeping and failure of adequate self-assessment. The implication seems to be that if the licensees had just kept better records of where their interviewees learned of the opening and the like, then the licensee's employment profile (and, ultimately, the employment profile of the overall broadcasting industry) would somehow ineluctably mirror the ideal of diversity.

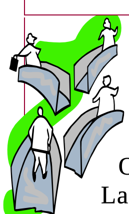
There appear to be more than a few problems with the FCC's approach here. The primary target of EEO rules should, it would seem, be actual unlawful discrimination. The failure to keep exhaustive records of interview minutiae – for example, how each interviewee claims to have learned of a job opening – does not relate to such discrimination at all. But historically, the FCC has seemed to view the goal of its EEO program to extend well beyond the enforcement of anti-discrimination laws. In defending an earlier version of that program in the U.S. Court of Appeals for the D.C. Circuit in 2001, the Commission argued that its goal was simply to assure that broadcasters engaged in "broad outreach" in their recruitment. But the Court concluded that the FCC really had a different agenda:

> [If] the Commission's only goal [were to assure that broadcasters engage in "broad outreach"], then it would scrutinize the licensee's outreach efforts, not the job applications those efforts generate. Measuring outputs to determine whether readily measurable inputs were used is more than self-evidently illogical; it is evidence that the agency with life and death power over the licensee is interested in results, not process, and is determined to get them.

Those observations led the Court to conclude that that earlier version was unconstitutional. The current version, adopted in response to the Court's ruling, was intended to avoid those constitutional pitfalls. But to the extent that the Commission continues to harp on results, the closer it treads to the same pitfalls.

Interestingly, Commissioners Copps and Adelstein issued a separate statement applauding the NALs and asserting that "employment in broadcasting does not reflect America" and that it is a "legal obligation" to have a "communications industry that reflects our nation's diversity". But that notion – that the FCC is both empowered and, indeed, obligated, to take steps to achieve some idealized industry employment profile – seems flatly inconsistent with the Court's 2001 decision. It will be particularly interesting to see whether the Commission as it develops in the Obama administration will pursue that Copps/Adelstein line of thinking. If it does, the Commission may find itself back in court.

For the time being, though, we can expect the current EEO program, complete with annual random audits, to continue full speed ahead.



FHH - On the Job, On the Go

On January 21, **Frank Montero** made a presentation at an MMTC Legislative and Regulatory Policy Briefing on Capitol Hill, hosted by Congresswoman Hilda Solis for the incoming administration.

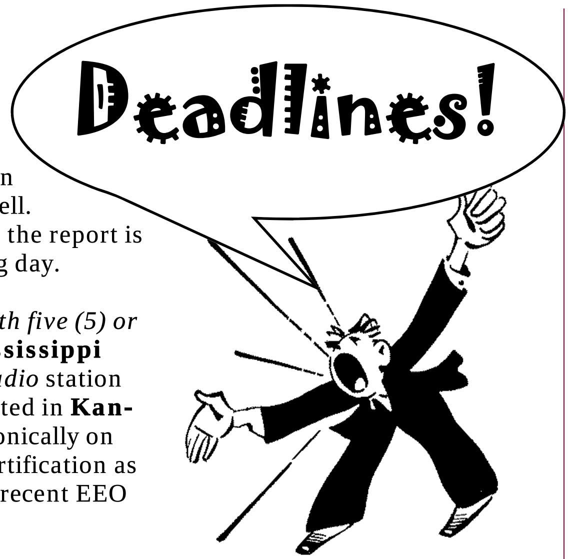
On February 27-28, **Joe Di Scipio** will be the Master of Ceremonies at the Syracuse University College of Law Communications Law Symposium ("Memo to President Obama: Communications Policy for the New Administration") in Syracuse.

And with the arrival of the New Year, can the NAB Convention be far behind? Apparently not, as **Paul Feldman** has already been inked in as a speaker at the NAB's Telecom 2009 Conference (to be held Las Vegas in connection with the NAB Convention) in April. His topic: "Net Neutrality — What is it? Where is it going?"

Here's to **Scott Johnson**, who was recently named a Bronze Fellow by the South Carolina Broadcasters Association Educational Foundation. **Scott** was recognized for his contributions to the Foundation's program supporting the education of South Carolina broadcasters.

And finally, a big *Memo to Clients* shout-out to **Anne Goodwin Crump**, who had not one but two blogs noted and quoted in the trade press in January. You don't have to read about her blogs in the trades, though — just go directly to the source at www.commlawblog.com and get ahead of the curve! And while you're there, why not post a comment congratulating her for being 2009's very first *Media Darling of the Month!*

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.

February 12, 2009

Closed Captioning – Comments are due in the proceeding in which the Commission is seeking to define how the per channel, revenue-based exemption to closed captioning obligations should by applied in the multicast world – should each programming stream be considered a separate channel or should the station as a whole be considered one channel?

April 1, 2009

EEO Public File Reports – All *radio* and *television* stations *with five (5) or more full-time employees* located in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, **Tennessee**, and **Texas** 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 **Indiana**, **Kentucky**, and **Tennessee** 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 **Texas** 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 **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, and **Tennessee** 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 **Texas** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323 or 323-E.

April 10, 2009

DTV Consumer Education Quarterly Activity Reports – All *television* stations must file a report on FCC Form

(Continued on page 11)

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the subject matter of the proceeding.

You can also join up with some friends and jointly file a Petition with the following information:

- The full name, address, telephone number, facsimile number (if any), and e-mail address (if any) of the person filing the petition;
- A list identifying all participants to the joint petition;
- A description of the participants' significant interest in the subject matter of the proceeding; and
- If the joint petition is filed by counsel or a representative of one or more of the participants that are named in the joint petition, a statement from such counsel or representative certifying that, as of the date of submission of the joint petition, such counsel or representative has the authority and consent of the participants to represent them in the royalty rate proceeding.

If you are webcasting and interested in participating, but have further questions about the Petition or the entire proceeding, please contact a Fletcher, Heald & Hildreth attorney.

(Continued from page 4)

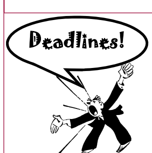
become a part of this program. Those stations will be responsible for providing playlist information to CPB.

- Stations wishing to participate must register their intent with CPB on a designated website. CPB will provide details regarding that registration website in the near future.

- This agreement does not affect the "sound performance complement" portion of the statutory license (the restrictions on the number of songs that can be played from a certain CD or by a certain artist within a given time-frame, the length of time for which a program can be archived, etc.), meaning even participating stations will still be subject to those "sound performance" limitations.

- As a condition of the settlement, NPR will withdraw its appeal of the Copyright Royalty Board decision. (We see this as an indication that more settlement discussions continue between SoundExchange and those segments of the webcasting community that are part of the pending court appeal).

No station is required to participate in this settlement. Thus, a station that is certain it will never exceed the aggregate tuning hour limitation in any given month may simply decide to ride out the next two years until the new rates are determined for 2011 and beyond. Still, if you believe you may be eligible and wish to participate, keep an eye out for further communications from CPB or contact a Fletcher, Heald & Hildreth attorney.



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388 listing all station activity to educate consumers about the DTV transition. The period to be included is January 1 through March 31, 2009. As was true for previous Form 388 reports, this quarterly report will be filed through the Consolidated Data Base System (CDBS), the general electronic filing system for applications and reports. At the time of this writing, this report is scheduled to be the last such report to be filed.

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.

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.

The show must go on!

Programmers vs. Cable Guys: Hearing Lurches Forward

FCC Order pulls plug on Bureau order pulling plug on ALJ order which ignored Bureau order

By Lee G. Petro
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If you have been a loyal reader of our blog (www.commlawblog.com), you may recall our post from last October describing a battle between a number of video program services (including Wealth TV, the NFL Network and MASN), on the one hand, and some large cable operators (think Cox, Comcast and Time-Warner, for example), on the other. The programmers charged that the cable guys have discriminated against the program guys because the cable guys have their own program services that compete with the program guys' offerings. The Media Bureau agreed that there appeared to be enough smoke to warrant checking for fire, so the Bureau designated the matter for a full trial-type hearing before an administrative law judge (ALJ).

So far, so good. But the Media Bureau has plainly gotten out of the habit of issuing Hearing Designation Orders (HDOs), and the resulting rustiness was obvious. Normally, when a matter is designated for hearing, the designating office (in this case, the Media Bureau) turns the whole thing, lock, stock and barrel, over to the ALJ with no strings attached: the Bureau identifies the issues to be heard but then leaves the ALJ to figure out how best to manage the case from there, on whatever schedule the ALJ might deem appropriate.

That, however, was not exactly how the Bureau tried to do it here. Instead, the Bureau's HDO instructed the ALJ to complete the hearing within 60 days. That clearly demonstrated the Bureau's lack of familiarity with the hearing process: in view of the trial-type procedures involved (including pre-trial discovery, motions, presentation and cross-examination of witnesses, preparation of proposed findings of fact and conclusions of law, possible interlocutory appeals, etc., etc., etc.), even the simplest hearings normally require at least 9-12 months to complete. And hearings involving large companies and claims of commercial discrimination are decidedly ***not*** simple hearings.

With less than a month before the recommended decision was to be issued by the ALJ, two things happened, one surprising, the other not so. First, the ALJ issued an order which stated that it was impossible to resolve the factual disputes within the time provided by the Bureau and thus set a new hearing schedule that went well beyond the December deadline. The Order also expanded the issues to be resolved. That should not have surprised anybody – it's standard operating procedure in hearing practice.

But then, four days later, the presiding ALJ issued an order announcing his retirement, effective January 3, 2009. The last remaining ALJ on board at the FCC stepped in, took over, reviewed the status of things, and advised all concerned that he agreed with his predecessor that it would be impossible to adhere to the 60-day deadline mandated by the Media Bureau.

Needless to say, the Media Bureau was none too pleased with this turn of events – so much so that, on Christmas Eve, it left a lump of coal in the ALJ's stocking, telling him thanks but no thanks. On December 24 the Bureau issued an order announcing that the ALJ's authority had expired when the original 60-day period had expired, so the case was no longer before the ALJ. Instead, the Bureau declared, the Bureau would resolve the matter. This, too, was a dramatic breach of hearing SOP. Normally, once the designating office (here, the Bureau) has issued the HDO, that office has no further ability to dictate the hearing process.

> *The FCC's order places full authority with the ALJ to proceed with the hearing as he sees fit.*

The Bureau's December order also raised conceptual problems. Since the issues to be resolved hadn't changed since the matter was first designated for hearing in October, why did the Bureau think that it could resolve the issues NOW when it was convinced in October that it could NOT resolve them?

Probably recognizing the extraordinary, and likely extra-legal, nature of the Bureau's order, the ALJ issued his own order on January 6, 2009, seeking status reports in advance of the still-scheduled (at least according to the ALJ) March, 2009 hearing.

This, of course, put the parties in something of a bind, since they were looking at two sets of instructions – one from the Bureau, the other from the ALJ – which were flatly inconsistent with each other. In response, the parties appropriately sought clarification as to which orders they should be following.

In one of the first orders issued by the FCC following Commissioner Copps's ascension to the Acting Chairmanship, the Commission rescinded the Bureau's orders and expressly reinstated the ALJ's authority in the matter. In doing so, the Commission ordered the ALJ to issue a revised hearing schedule and to make its recommended decisions to the full Commission as expeditiously as possible.

The Commission's order appears to place full authority with the ALJ to proceed with the hearing in the manner he sees fit. However, the Commission's order indicated that the case will still be guided by the original order issued by the Media Bureau. As a result, it is not 100% clear whether the original ALJ's order enlarging the matters to be heard is valid, or whether the ALJ will be limited to examining

(Continued on page 14)

Say what?

Closed Captioning Hits the Federal Register

But effectiveness still in limbo

By Anne Goodwin Crump
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Back in November the Commission released a Declaratory Ruling, Order and Notice of Proposed Rulemaking (DRONPRM) in which it (a) imposed a number of new obligations on TV licensees and other video programming distributors and (b) sought comment on how the revenue-based per channel exemption from closed captioning requirements should be applied to stations with multicast programming streams. But as we reported in the November, 2008, *Memo to Clients*, neither the effective date of the changes nor the deadlines for comments and reply comments would be set until the DRONPRM popped up in the Federal Register.

*Comments on the proposed rules are now due by **February 12**; reply comments by **February 27**.*

Lo and behold, more than two months later, the DRONPRM was published in the Federal Register, in two separate items, on January 13, 2009. (The rule changes which were adopted appear in one document, while the proposed rule changes, on which comment is sought, appear in another.) As a result, a couple of clocks are now running.

First, if you want to comment on the proposed rules, you have until ***February 12***; reply comments will be due on ***February 27***. In case the precise subject matter of the Commission's proposals may have slipped your mind over the holidays, here's a quick refresher. The Commission's rules (Section 79.1(d)(12), to be exact) provide that no video programming provider will have to lay out any coin to caption "any channel of video programming producing annual gross revenues of less than $3,000,000 during the previous calendar year." But it's not clear how that exemption would or should be applied to multi-channel DTV broadcasters: should each digital stream be deemed a separate and independent "channel" for these purposes, or should the term "channel" be deemed to mean the entire 6 MHz chunk of spectrum used by the licensee?

Also, the Commission has questioned whether $3,000,000 is an appropriate threshold – and even whether a single threshold, as opposed to some sliding scale, might be better suited. (Note that, notwithstanding the exemption, all video providers are required to pass through any captioning that has already been included by program producers supplying the video providers.)

Second, the "declaratory order" portion of the DRONPRM will be effective as of ***February 12***. That portion was devoted to emphasizing that the shift from analog to digital would ***NOT*** alter the pre-existing captioning obligations. That is, there is no exemption for DTV programming just because it is digital.

Likewise, the transition to all-digital broadcasting, whether on February 18 or some later date, does *not* relieve stations of the obligation to continue to caption programming in a manner that can be decoded by analog TV sets. Finally, the transition does not open up the opportunity for stations to claim the self-implementing exemption for channels with less than $3,000,000 in revenue or the new network exemption just because of a change from primarily analog to all-digital operation. In other words, captioning obligations are still in place, and don't try to be too cute.

Third, the new contact information requirements and complaint process are still ***not*** yet in effect. Those items require review and approval by the Office of Management and Budget (OMB). The good news there is that, if you feel like filing comments with the FCC concerning the paperwork reduction aspects of the order – and particularly with regard to the contact information posting and notification requirements – you've got have until March 16, 2009, to do so. (The FCC will then presumably consider those comments in the preparation of the showing which it will have to make to OMB.)

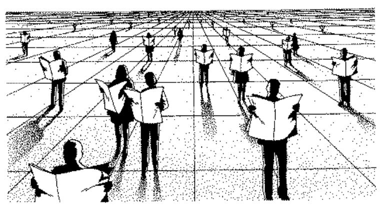
In the meantime, the new FCC complaint process will ***NOT*** be in effect. That process calls for complaints to be filed with either the video programming distributor or the Commission, provides for a shorter turnaround time in responding to complaints, and requires stations and cable operators to provide assistance in forwarding misdirected complaints to the correct entity. Similarly, the new requirement that stations both provide and keep updated contact information for both complaints and inquiries of an urgent, primarily technical nature and those of a more general nature are also ***NOT*** yet in effect.

If and when the OMB approves the new requirements, stations and cable operators will have 30 days in which to submit their contact information to the Commission. They will also have to post the information on their website (if they have one), obtain entries in local telephone directories, and, for cable operators, include the information in their bills.

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

Updates on the News

Out with the old – The Kevin Martin Era ended not with a bang, but with a whimper . . . or maybe it was more like a whine. Martin's resignation was effective January 20, Inauguration Day. As reported elsewhere in this issue (*see* page 6), he made it to the office on January 19 – even though it was a federal holiday (Martin Luther King Day) – in order to get his last licks in on the cable industry. He also managed to crank out a letter to Congressman Dingell, defensively responding to the report issued in December by the majority staff of the House Committee on Energy and Commerce. (That report was described in last month's *Memo to Clients*.) His letter had the persuasive power of the classic schoolyard retort, "am not!!" Or perhaps it more closely resembled the seemingly outraged yipping of a small dog who, in the safety of its owner's car, feels the need to give the 150-pound Rottweiler on the sidewalk what for. One may well ask why Martin bothered. After all, it was reasonably clear that little if anything was going to come of the House report, at least as far as Martin himself was concerned. With his departure from the FCC, the Committee would likely have little or no continuing interest in him or his management style. But for whatever reason, he apparently wanted to get the last word in, and that he did, for what it was worth.



In with the new – The smart money has been saying for some time that President Obama's choice for Chairman will be Julius Genachowski, a Harvard Law School buddy of Obama and Chief of Staff to former Chairman Hundt during the Clinton years. As of this writing, however, the Genachowski nomination has not been formalized. (This could just be the result of routine start-of-the-administration distractions, although one observer has suggested that Genachowski's activities in the private sector may brush up close enough to "lobbying" to give some Obama advisors pause. Ideally we'll have a better idea about all this before our next *Memo to Clients*.) In any event, in the interim the President has elevated Commissioner Copps to the position of Acting Chairman. Copps lost little time in serving notice on one and all that he plans to run the show differently from Martin in at least three areas: "how the various Bureaus and Offices work with each other; how the Commissioners communicate with one another and with the Bureaus; and how the Commission communicates with the public." It had been said that, in the Dark Days of the Martin Chairmanship, Martin insisted on controlling virtually all communication flow – so that Commissioners could not contact Bureau personnel without the Chairman's OK, and Bureaus could not even speak with each other absent preapproval from Martin. Copps is apparently committed to allowing communications to flow freely. Let's hope that he is willing and able to make good on that.

The effect of Copps's declaration of change – given in remarks made to the entire Commission staff – was apparently something like the climax of *Yellow Submarine*, when the Beatles arrive, the Blue Meanies are routed, and blue skies and pretty flowers return to the previously desolated Pepperland. According to several folks, after Copps's remarks morale among Commission staffers immediately skyrocketed out of the depths to which it had plunged under Martin.

Recession? What recession? – Apparently the place to be this month was in line for funding for DTV-related projects. The Commission doled out more than $20 million in the hope of facilitating the DTV transition. A number of grassroots groups – including AARP, Communication Service for the Deaf, the Hispanic Information and Telecommunication Network, and several state public broadcasting organizations – copped a total of $8.4 million for plans to target seniors, people with disabilities and Spanish-speaking households with preparations for the transition. But the big winner was IBM, which walked away with a contract worth $12 million. In return, IBM has to provide call center support to assist the Great Unwashed as they grapple with the nitty-gritty of shifting to digital. According to the Commission, IBM will have to brace for up to two million calls during the week of the transition – including some 400,000 calls the day after the transition. No word yet on what music they plan to play for callers placed on hold.

(Continued from page 12)

only the issues originally specified by the Bureau.

One can assume that Chairman Copps would rather have avoided dealing with a squabble of this sort right of the bat, what with the DTV Transition a mere month away. But to his credit, he and his fellow Commissioners acted, and acted quickly. Moreover, they acted in a way which respects the hearing process, as cumbersome and unpleasant as that process can be. While the result will likely delay any resolution of the underlying discrimination complaints for some time, adhering to established procedures and processes is a welcome change from the often ad hoc and less than transparent ways of the Martin Commission. This may be a sign of hope for the new Administration. We shall see.

FM ALLOTMENTS ADOPTED – 12/19/08-1/20/09

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
WY	Basin	130 miles S of Billings, MT	300C3	08-43	TBA

FM ALLOTMENTS PROPOSED – 12/19/08-11/20/09

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (*i.e.*, Drop-in, Section 1.420, Counterproposal)
WY	Ten Sleep	187 miles S of Billings, MT	267A	08-242	Cmnt: 03/09/09 Reply: 03/24/09	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.

(Continued from page 1)

sion's readiness for the transition. On January 16, Commissioners Copps and Adelstein wrote to Congress with similar concerns. A number of Republican members of the House sent a letter to the President-Elect on January 14, urging that the February 17 date be maintained, but by then the momentum toward extension seemed irresistible.

On January 26 the Senate passed a bill extending the deadline to June 12. At that point the conventional wisdom was that an extension was a done deal. But wait! The House took up a corresponding bill on January 28 and it failed to pass. (Actually, the extension was supported by a significant majority of the House, but as it turns out the bill needed a two-thirds majority because of certain parliamentary arcana. Who knew?) Reports indicate that the House may try again in the next week or so — which is good, of course, because February 17 is only about three weeks away. If it does pass this time, White House sign-off is thought to be a virtual certainty.

The good news is that the Senate bill would ***not*** require stations to continue analog operation until June 12. Rather, it would merely permit stations to continue to operate analog until then. (The original February 17 deadline mandated that all analog operation stop as of that date – except, of course, for stations operating pursuant to the "analog nightlight" service which a skittish Congress authorized in December.) So all the stations which had diligently arranged themselves to shift to digital-only on February 17 will presumably still be able to do so, if they want.

Stay tuned for further developments on the deadline front (or better yet, check our blog – www.commlawblog.com – every day or two for updates).

An extension of the deadline will likely entail some tweaks to the Analog Nightlight program. That program (described in last month's *Memo to Clients*) permits some continued analog operation past the February 17 deadline. Acting under extraordinarily short Congressionally-imposed time constraints – the "Analog Nightlight" Act became law on December 23, requiring the Commission to draft, accept and consider public comments, and adopt new procedures by January 15 – the FCC staff was able to get the nightlight service into the books on schedule. But now it's back to the drawing board for the staff, which will have to accommodate the extended deadline.

Meanwhile, the FCC has also fired up the Replacement Digital Translator program also described in last month's *Memo to Clients*. That program is still in the rulemaking stage, although the Commission is accepting, and granting, STAs for interim operation pending final adoption of rules.

The bottom line is that the Transition may be with us a little while longer. And while that may be something of a disappointment to those of us who have had enough of the Transition already, it may not really be a bad thing. Extension of the deadline (at least as envisioned in the Senate bill which has passed) may lead to a more gradual transition overall: instead of a near-universal analog shut-down on February 17, we are more likely to see stations, or even whole markets, shutting down analog operations at different points between now and June. That in turn may reduce the likely trauma both to the public and to those who would have to deal with the public's trauma. But then again, maybe not. Stay tuned.

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First Class

COMING IN APRIL, 2009: The Memo to Clients Digital Transition

As previously announced, **we are going to stop distributing the *Memo* in a paper edition**. Instead, we will distribute it electronically ***starting with the April, 2009 issue***. If you want to be sure that you continue to receive the *Memo* uninterrupted after March, 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**".*

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.