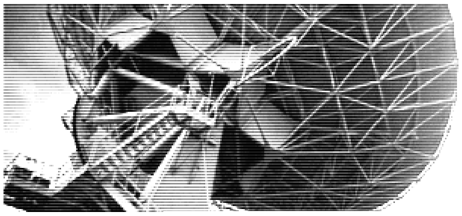

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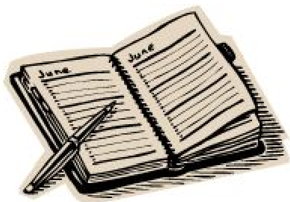
Communications Law & Regulation

MEMORANDUM TO CLIENTS

News and Analysis of Recent Events in the Field of Communications



"Did we say February 17? Oops – we meant June 12"

FCC Puts the Brakes on Analog Shut-Downs

Commission announces new limits on pre-June 12 terminations

By Harry F. Cole
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Talk about a 24/7 agency. For two consecutive weeks the FCC kept its own nightlight burning beyond the usual Friday afternoon quitting time: first, a set of DTV orders in the evening on Friday, February 13, and then. during the evening of February 20, a Second Report and Order and Notice of Proposed Rulemaking (SRONPRM) adopting new rules and proposing others to govern the recently-extended DTV transition.

While some of the rule changes are obvious and necessary simply to assure that the Commission's rules reflect that Congressionally-mandated June 12, 2009, national transition date, others – including both adopted *and* proposed rules – appear to arise from the Commission's continuing concern about the public's readiness for the transition. In any event, if you declined to take advantage of the opportunity to terminate your analog prior to February 17 pursuant to the relatively simple process specified in the Commission's Third Periodic Report, tough luck: the Commission appears to be determined to make your life harder.

*Stations still operating analog must notify the FCC **no later than March 17, 2009** of their planned analog sign-off dates.*

February, 2009 **No. 09-02**

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Adopted rule changes

Among the changes which the Commission has formally adopted (and which will take effect upon publication of the SRONPRM in the Federal Register) are the following:

- ***Binding notice re termination date*** – Stations which have not yet terminated analog operation will be required to file a notice, ***no later than March 17, 2009***, advising the Commission of the specific date on which they intend to take their analogs dark. This notice will constitute a *binding obligation* on the station's part to turn off the analog as of the date specified in the notice. Failure to file a notice by March 17 will be deemed to mean that the station will continue analog operation until June 12 – and, again, the station will be bound to that date. Once March 17 comes and goes and each station's termination date has been established, the only circumstances that will permit an earlier termination of (or substantial reduction in) analog service will be "equipment failure, nature disaster or other unforeseeable emergency".

- ***Next Form 387 status reports due April 16*** – Stations which have not already terminated analog service will be required to file an updated Form 387 (DTV Transition Status Report) by ***April 16, 2009*** to reflect their chosen termination date.

- ***Analog nightlight program extended through July 12, 2009*** – The analog nightlight program which the Commission adopted in January (*see* last month's *Memo to Clients* for details) has been extended to July 12 (*i.e.*, 30 days after the national transition date). Note that this is separate from the "enhanced nightlight" service which the Commission has endorsed in connection with some early termination situations. ("Enhanced nightlight" service involves provision of analog service including DTV transition and emergency information together with local news and public affairs programming, available in English and Spanish and accessible to the disabled.)

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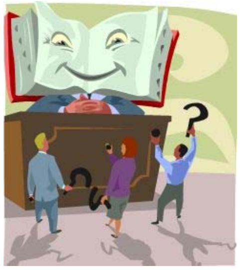

Just another four-letter word?

FCC Inquiry Into "Hate Speech" Sought

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In the post-inauguration glow that descended on Washington in late January, the National Hispanic Media Coalition (NHMC) (assisted by the Media Access Project and Georgetown Law School's Institute for Public Representation) filed a petition asking the FCC to open an inquiry into "hate speech". In particular, NHMC urged the FCC to "invite public comment on hate speech in the media in local communities, inquire into the extent of hate speech, examine the effects of hate speech, including the relationship between hate speech in the media and hate crimes, and explore options for counteracting or reducing the negative effects of hate speech."

It appears that the inspiration for the petition came from a campaign speech made by then Candidate Obama to the Congressional Hispanic Caucus. Referring to "the 12 million people living in the shadows", Obama opined that "they're counting on us to stop the hateful rhetoric filling our airwaves, rise above the fear and demagoguery, and finally enact comprehensive immigration reform". In NHMC's view, this was a clarion call for the FCC to police the media for "hate speech" – and particularly "hate speech" directed at Latinos.

According to NHMC's petition, hate speech in the media creates an atmosphere that encourages prejudice and violence, and can be linked to the increase in violence against Hispanics in recent years. That may be, but it's difficult to perceive how and why the FCC should be called upon to investigate (and, presumably, clamp down on) any abuses which might exist. After all, "hate speech" is nothing more nor less than "speech" – and the First Amendment (not to mention its statutory descendant, Section 326 of the Communications Act) shield speech from governmental restriction. By seeking to sic the FCC on "hate speakers" through some regulatory means, NHMC is wading into very murky and dangerous constitutional waters.

In 1992, Congress did direct NTIA – which does not itself exercise the regulatory, licensing function of the FCC – to examine the role of telecommunications in hate crimes. The result was a 1993 report to Congress, *The Role of Telecommunications in Hate Crimes*. (NHMC notes that it is sending a copy of the FCC petition to NTIA in hopes that they will update their inquiry.) NHMC specifically notes that talk radio, which NHMC views as a hotbed of hate speech, was still in its infancy when the NTIA report was written and not yet the influence-wielding juggernaut which NHMC believes it to be today. According to the petition, the likes of Michael Savage, Rush Limbaugh, and Neal Boortz abuse the public airwaves by inciting anger and fear against Latinos under the guise of immigration policy critique.

The petition doesn't stop at broadcasters, though. NHMC also cites numerous examples of hate speech on cable news networks as well as the Internet, never mind that the regulation of content distributed over those media is even more constitutionally suspect than regulation of broadcast content. Of course, the petition notes that it proposes only an *inquiry* by the FCC to collect data; it does not propose any particular remedies. As NHMC sees it, the mere asking of questions by a regulatory agency holding life and death power over broadcast licenses raises no First Amendment concerns. Others might disagree with that notion.

The conundrum of Commission regulation of broadcast content is chronic. Despite the very clear constitutional and statutory proscriptions against such regulation, the temptation to exercise some measure of control over broadcast content has proved irresistible to the Commission time and again. Most notably, of course, is that perennial whipping boy, "indecency".

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Focus on FCC Fines

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Call-in contests are no joke – A Pittsburgh AM station was hit with a $6,000 fine for a joke contest that one of its announcers kiddingly described on Thanksgiving Day in 2007. The drive time announcer that day was apparently concerned that he had no listeners (it was Thanksgiving, for crying out loud). His concern was unwarranted, as it turned out: at least one person was listening. Unfortunately, that person apparently failed to grasp that the "contest" wasn't really a contest, and when the listener failed to win, he complained to the FCC.

It all started when the host of a news and talk show on the CBS AM affiliate justifiably expected an extremely quiet Thanksgiving morning for his three-hour news show. In what the station describes as a "harmless prank", the host embarked on a "laughably absurd" gig claiming that he would give away one million dollars an hour to the station's thirteenth caller. At the end of the show, the host announced that the station had not received even thirteen calls during the past three hours and that it was so quiet that the contest would just have to continue to the next day.

The station later admitted that it had received more than 50 calls during the three hours. One of the callers was so upset that he penned a complaint letter to the FCC. The station never denied that the host repeatedly announced the million dollar contest. Instead, the station said that the idea was so absurd that it was clearly a joke. The station defended itself by noting that the host was laughing when he announced the contest and said that the million dollars was in a barrel or in a suitcase.

Taking a page from the Queen Victoria songbook, the FCC was not amused. The FCC pointed to the decidedly unfunny language of Section 73.1216 of its rules. According to the FCC, the goal of the rules is to prevent any broadcasting practices that deceive audiences. In the Commission's view, the announcements on the station could legitimately have been understood by listeners to mean there was a $1,000,000 contest underway. Since there wasn't really such a contest, those listeners were misled. Down comes the $6,000 forfeiture hammer.

The moral here is simple: all on-air personnel should be instructed, clearly and forcefully, that it is ***NOT*** a good idea to say ***ANYTHING*** about any type of contest (or audience-participation activity which might be seen by the unsuspecting as a "contest" of one sort or another) that is not, in fact, a real contest carefully designed and implemented by the station. Without diligent and detailed planning, the risk of running afoul of the Commission's contest rules is astronomical. (See related story below.) Better safe than sorry.

(As an aside, the FCC also took the opportunity to remind licensees that the fake contest was not a "broadcast hoax". The hoax ban is limited to the broadcast of false information concerning a crime or catastrophe.)

For real contests, always broadcast your rules – An Entercom licensee in Kansas got spanked with a $4,000 fine as a result of a $1,000 contest it conducted. Listeners had to call in and "Guess what is in Santa's Sack." A listener called in and guessed $1,000. Station staff told the caller she was wrong. But the following day, the next participant in the contest called in, guessed the same $1,000 answer, and won!

The disgruntled first listener complained, calling the station and even visiting its studios, arguing that she had given the correct answer and should have been awarded the prize. After more than a month without an answer from the station, the listener fired off an angry e-mail to the FCC. As we have previously advised in this column, there is a point of no return beyond which the station is powerless to avoid FCC problems in situations like this. That point is when the complaint is filed with the Commission. Up to that point, it may be possible to give the prospective complainant enough incentive *not* to file a complaint, thereby keeping the FCC out of the situation. But once the complaint is filed, the bell has been run and even the complainant can't unring it.

In the Kansas case, after the complaint to the FCC, the station quickly paid the listener $1,000, but so what? The FCC responded to the complaint with an investigation, which focused solely on how the contest had been conducted, not whether the complainant had ultimately been placated. And sure enough, the investigation disclosed that the station had not complied with its own contest rules. In fact, the station never broadcast the full rules of the contest over the air. Although the station had noted that the full contest rules were available for review on its website, the FCC reminded the station that the station had an affirmative duty to broadcast the material terms of its over-the-air contests over the air. So even though it eventually paid the complainant/contestant $1,000, the station is still on the hook to the Commission for $4,000 for the violation.

Do not broadcast telephone calls unless . . . – Among the easy targets for FCC fines are telephone calls which are broadcast or recorded prior to the other party's consent. In most cases the FCC does not even have to search out the calls because the angry recorded/broadcast

(Continued on page 11)

Performance (royalty) anxiety?

Congress Considers New Copyright Burden for Broadcasters

By Kevin M. Goldberg
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Talk about irony. Just one day after the 50th Anniversary of "The Day the Music Died", legislation – the Performance Rights Act (PRA) – was introduced that could hasten the death of all music on over-the-air radio.

If you believe PRA supporters (including perhaps most prominently the Recording Industry Association of America), payment of copyright royalties for performance of sound recordings is nothing more than fair and just compensation for intellectual property.

Opponents of the proposal – including the NAB, State Broadcast Associations and others – see it differently. In their view, it's a new tax that would cripple broadcast radio. The opposition goes further: the ultimate effect of the PRA would also be disastrous for the recording artists and record companies who are pushing for its enactment. That's because the revenues many recording artists and record labels seek in exchange for performance of their copyrighted recordings would be reduced, while the essentially free broadcast advertising of concerts (and related merchandise) that has existed for years would also dwindle, leaving everybody involved worse off than before. And the record industry would have no one to blame but itself.

Kevin's Copyright Corner

Faithful *Memo to Clients* readers may recall that similar legislation was introduced in late 2007 (during the 110th Congress) as HR 4789 and S 2500. HR 4789 passed the House Judiciary Committee before time ran out on the bill; the Senate version did not advance.

The current version of the PRA differs slightly from the 2007 flavors. Introduced in identical House and Senate bills on February 4, 2009, this year's model must be taken seriously simply because it has the backing of key members of each chamber. The primary co-sponsors of S 379 are Senate Judiciary Committee Chairman Patrick Leahy (D-VT) and the Ranking Member of that Committee, Orrin Hatch (R-UT), with Senators Dianne Feinstein (D-CA), Bob Corker (R-TN) and Barbara Boxer (D-CA) claiming original co-sponsorship. HR 848 was introduced by House Judiciary Committee Chairman John Conyers (D-MI) and Darrell Issa (R-CA); other original co-sponsors are Howard Berman (D-CA), Marsha Blackburn (R-TN), Jane Harman (D-CA), John Shadegg (R-AZ), and Paul Hodes (D-NH).

According to Senator Leahy's Statement on Introduction, the PRA is intended to remedy two disparities:

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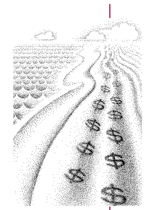
Rate lock-in through 2015 possible

NAB/SoundExchange Settle On Webcast Rates



By Kevin M. Goldberg
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The National Association of Broadcasters (NAB) and SoundExchange, the designated "receiving agent" that collects and distributes copyright royalties paid as part of the statutory license applicable to webcasting, have announced a settlement under the "Webcaster Settlement Act" which sets the royalty rates to be paid by broadcasters streaming music on the Internet during the years 2009-2010.

The full terms of this settlement have not been released, but here's what we already know:

The terms of ***this*** settlement apply to broadcast stations, whether they are simulcasting an over-the-air signal on the Internet, streaming original program on the Internet, or doing both; there is an emphasis on "this" because SoundExchange has one other settlement in place, with CPB-Member stations, NPR, NPR Members, National Federation of Community Broadcasters members, American Public Media, Public Radio Exchange, and Public Radio International.

While we have heard rumors that other segments of the webcasting community may be close to similar settlements, these are the only two settlements to date. So any webcaster outside of the categories listed above (college radio stations not covered by the NAB or CPB deals, and nonbroadcast – web-only – webcasters, especially smaller webcasters, and religious broadcasters stand out at this point) are still subject to the 2006-2010 rates set by the CRB 2007 and the result of the upcoming ratemaking proceeding.

Broadcasters do not have to accept the terms of this settlement, but if they do, they will lock in their royalty rates for 2009-2010 (regardless of the outcome of the pending appeal of the highly contentious 2007 Copyright Royalty Board decision) *and* for 2011-2015 (regardless of the outcome of the upcoming ratemaking proceeding). The "per performance" method of calculation will remain in place, meaning stations will pay royalties calculated according to the number of songs played multiplied by the number of listeners who hear each song multiplied by the applicable royalty rate for the year: $ 0.0015 in 2009 (down from $ 0.0018), with a gradual increase to $ 0.0025 in 2015.

In addtion to the change in royalty rates, the NAB settled another aspect of the statutory license with four major record labels in a way that will clearly benefit broadcasters

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- "When webcasters, satellite radio companies, or cable companies play music, and profit from its use, they compensate the performing artists. Terrestrial broadcast radio is the only platform that still does not pay for the use of sound recordings."

- "[The United States] is the only Nation that is a member of the Organization for Economic Cooperation and Development but still does not compensate artists. An unfortunate result of the lack of a performance right in the United States is that American artists are not compensated when their recordings are played abroad."

A brief primer on copyright law as it applies to the music you hear on the radio may be in order here. Every song heard on the radio or via an Internet stream consists of two copyrighted works. There is the copyright in the "musical work", which is the written music and lyrics (sometimes known as the "composition"). Think sheet music – the notes and words in their unperformed state. This copyright is most often owned by the songwriter (or his or her music publishing company, if the rights have been transferred).

Broadcasters have been exempt from performance royalties because of the essentially symbiotic relationship between recorded music and radio.

There is also a separate and distinct copyright in the "sound recording", which is that version of the song you're actually hearing. This copyright vests in the actual performer (or his or her record label, if the rights have been transferred).

Here's an example that might assist the uninitiated in understanding the difference between the two:

> The song "Yesterday", according to the *Guinness Book of World Records*, has the most registered cover versions of any song in history (over 3,000 exist). The copyright in the original musical work (before that right was later sold) was owned by the publishing company set up by its credited songwriters, John Lennon and Paul McCartney. They, along with the rest of the Beatles, separately owned a copyright in the sound recording of "Yesterday" that we're all familiar with. When Ray Charles recorded a version of "Yesterday" in 1967, he had to pay royalties (to the Lennon/McCartney publishing company) for use of the musical work, but he obtained his own copyright in his cover version. Anyone who uses the Ray Charles version of "Yesterday" has to pay royalties to both Lennon/McCartney (for the underlying musical work) ***and*** to Ray Charles (for his particular performance as captured in that sound recording).

A crucial question at this point in the discussion is: what is a "use" of a copyrighted work? That is, what do you have to do with a musical work in order to subject yourself to the obligation to pay royalties? With some limited exceptions, ***any*** public performance of a musical work triggers that obligation: juke boxes, stadium PA systems, Internet streaming, satellite radio, Muzak services, etc., etc. They're all public performances. And so, too, is broadcasting – with one major difference.

As noted above, public performance of a particular recording of a song involves two separate and distinct copyright interests, one in the underlying musical work, the other in the particular recorded performance. A single playing of a recording may constitute multiple "performances" or "uses" for copyright purposes. For example, if a radio station is simultaneously streaming its over-the-air programming onto the Internet, it would have to pay royalties:

- to ASCAP, BMI or SESAC, for performing the musical work over-the-air; ***and***
- to ASCAP, BMI, or SESAC, for performing the musical work by streaming it; ***and***
- to SoundExchange, Inc., for performing that particular recording by streaming it.

Note that the broadcast of the sound recording would NOT trigger any obligation for the radio station to pay for the "performance" copyright under current law. That's because broadcast stations have always been exempt from paying royalties for performing sound recordings over the air. The theory is that the broadcast of the work provides advertising to the performer. The exemption recognizes the essentially symbiotic relationship between recorded music and radio. As discussed above, there exists no equivalent exemption from performance of sound recordings in digital format (via the Internet, digital download, on satellite radio, etc).

Efforts to impose a performance right obligation on broadcasters have been made, and rejected, at least three times in the past (in 1971, 1976, and 1995). The PRA tries again, proposing:

- Application of the performance right in sound recordings for ***all*** audio transmissions, *including over-the-air broadcasting*. This new performance right can have no adverse impact on the right of songwriters to recoup royalties for performance of their musical works.

- Broadcasters would not be subject to the "sound performance complements" applicable to digital performances (which include prohibitions on certain pre-announcing of songs, on the consecutive

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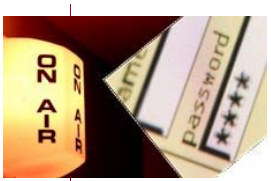

On-Air? On-Line?

Broadcast Contest Rules May Apply to On-Line Contests

By Peter Tannenwald
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And you thought that a contest on your website couldn't get you in trouble with the FCC? No such luck – you've got at least one more think coming!

As it turns out, while the FCC's jurisdiction over broadcasters is generally limited to their over-the-air activities, a contest on a website that does not toe the line with FCC disclosure requirements for on-air contests can still raise the FCC's ire ***IF*** on-air announcements allude to the contest and ***IF*** the station somehow ties the website to listening to the station in some way. Who knew? Recently, a Los Angeles FM licensee found out the hard way from the Enforcement Bureau.

Even the slightest on-air reference to an off-air contest can bring the on-air contest rule into play.

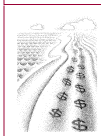
The station, KOST, set up a website which included contests open to members of its "KOST Rewards Program". To become a member (and therefore eligible to participate in the contests), you had to register on the site. You would then "earn points" by, among other things, going onto the Rewards Program site and identifying songs which had been broadcast on the station at particular times (not that anyone would want to stimulate listening or anything like that). Using the points you earn, you could then buy "raffle tickets" with which you could enter website contests.

The overall Rewards Program was, of course, heavily promoted on the air. While the licensee appears to have tried to avoid "substantive" promotion of any website contests, the promos did occasionally refer to them – including, for example, an on-air mention that listeners could enter on the station's website to win tickets to *Les Misérables*. And the promos of course encouraged members to listen, listen, listen to the station. (Example: "[B]ecome a member of our new KOST Rewards Program" and "earn Rewards Points just by *listening*".)

The web page said that contestants could register for the *Les Miz* tix from May 29 to June 2 (all this happened in 2006), but the website did not disclose how many tickets would be given away or when winning names would be drawn. While the contest was not supposed to close until 8:50 p.m. on June 2, the station drew winning names twice earlier that day and announced them on the air. One more drawing was held after closing time. So in the end, those who entered early had three chances to win, while those who entered late on the final day had only one chance. A disgruntled losing contestant, noticing the seeming unfairness, complained to the Commission, which asked the licensee to explain itself.

The station said that the contest was conducted exclusively on the website, so please, FCC, stop bothering us. The FCC said nay nay, you promoted the contest over the air, and you made listeners tune in to get the benefits from the website. That was enough to invoke the FCC Rule Section 73.1216, requiring full disclosure of the prizes, timing of events, and opportunities to win. The station is now being directed to drop $6,000 to the U.S. Treasury pot as penance for its lapse.

So even though the licensee really tried to keep the contest a strictly on-line, website-based activity – and therefore unaffected by Section 73.1216 (which the Commission's own rule acknowledges "does not apply to licensee-conducted contests that are not broadcast or advertised to the public") – the Commission appears to view even the slightest on-air reference to the contest to have brought that rule into play. Promotion Departments everywhere – beware.



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simulcasting on the Internet. The "sound performance complement" section of the statutory license restricted webcasters' playlists in certain ways and, thus, in the case of a broadcaster simulcasting on the Internet, often required adaptation of the over-the-air broadcast to the webcasting rules. Broadcasters simulcasting on the Internet will no longer be bound by certain rules (it has not been stated exactly which) that restrict among other things:

- The number of songs by a single artist or from a single album that could be played in a certain time period
- The archiving of certain programs for more than a defined period of time or if the program is not of sufficient duration
- The "preannouncing" of a specific upcoming song (while at the same time requiring the contemporaneous display of information about a song as it is being played)

More information about this and any other settlements should be available soon. In fact, the February 15, 2009 deadline set forth in the Webcaster Settlement Act has now passed and outstanding negotiations should have ended.

But we know enough to say this: the settlement is not "landmark" by any means. In fact, the biggest surprise may be that the status quo continues despite the efforts of the NAB and others to overturn the 2007 Copyright Royalty Board decision that sharply increased rates. This may

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playing of songs by the same artist or from the same compact disc or the repeating of programs)

♬ Broadcasters would be forced to pay performance right royalties at a rate set by the Copyright Royalty Board, with the following exceptions:

- **Incidental performance** of a sound recording (less than 30 seconds of music coming in or out of commercial or in the background of talk or news programming or during a commercial of less than 60 seconds' duration) or performance of a sound recording during a **religious service** will *not* trigger payment of royalties for the performance.
- **Small Commercial Broadcasters** – defined as broadcasters with less than $1.25 million in gross annual revenues – can elect to pay a flat performance royalty fee of **$ 5,000.00 per year**.
- **Noncommercial broadcasters –** defined as public, educational or religious broadcasters under Section 118 of the Copyright Act – can elect to pay a flat performance royalty fee of **$ 1,000.00 per year.**

Of course, the NAB and various State Broadcast Associations are already mounting a defensive effort. NAB CEO David Rehr drafted a letter that has already been circulated to all Senators urging them to vote against S. 379 because it is nothing more than a "performance tax" that will put "at least half of" all royalties "directly into the pockets of the big record labels, funneling billions of dollars to companies based overseas." Mr. Rehr argues that "For more than 80 years, a symbiotic relationship has existed between local radio stations and the recording industry" that has resulted in "85 percent of listeners of all audio services [identifying] radio as the place where they first heard music that they purchased".

Several State Broadcast Associations have jointly signed a resolution asking Congress to refrain from imposing "any new performance fee, tax, royalty or other charge relating to the public performance of sound recordings on a local radio station for broadcasting sound recordings over-the-air, or on any business for such public performance of sound recordings." In support of the resolution, the Associations argue, among other things, that:

© "Local radio stations already contribute more than $2.4 billion in value to the record labels and their performers by promoting their recorded music, concerts, merchandise and careers to an average of 235 million listeners per week."

© The imposition of a performance tax will harm local broadcasters' abilities to serve the public interest by imposing additional financial obligations on an already financially weakened broadcast industry. (They estimate that more radio stations – in addition to the 235 stations which have already gone dark – would be forced to go off the air, to change formats from music to talk, or to refrain from programming niche music formats.)

Imposing this royalty at this time does not benefit anyone for whom the benefit is intended.

© The PRA is nothing more than a "bailout" of record labels and performers.

© There are key differences (a) between over-the-air radio and digital radio and (b) between the United States and foreign countries, in terms of the radio business and regulatory schemes. Those differences justify continued disparate treatment under copyright laws.

While we do not agree that the PRA constitutes a "tax" in any conventional sense (since a tax is generally charged by the government to serve the needs of the public, while these royalties would be paid in exchange for the use of another's copyrighted materials), we do not believe that the PRA is the "right" answer, either. Record labels and artists are compensated for the performance of their works in the form of the free advertising they receive each time a song is played. This leads to purchase of CDs and, more importantly, sales of concert tickets and merchandise (the latter two benefitting the performer, not the songwriter, if they are not one and the same).

Requiring payment of these royalties would provide a double benefit – and in many cases, it wouldn't even be the performer that would receive the double benefit, but rather the record label, which often gets the lion's share of the revenues. Imposing this royalty at this time does not benefit anyone – well, certainly not those for whom the benefit is intended. Indeed, it is most likely to victimize all when there is less overall music played on fewer radio stations in the end. And as the amount of music played plummets toward zero, so too will the royalties that artists could expect to be paid. What's 50% of zero? Oh yeah: zero.

(Continued from page 6)
bring a measure of certainty to broadcasters who are, or are considering, webcasting; however, the continued increase in rates after an initial decline, combined with other administrative requirements that may also increase in the near future, may mean the result is "we're certainly not going to stream".

We've talked to plenty of broadcasters who are still shying away from what is clearly a mainstream method of delivering their signal because the costs and regulatory compliance efforts are too excessive to justify the additional revenues. A short term dip in royalty fees combined with relief from playlist restrictions that, frankly, many broadcasters weren't even aware of, is unlikely to change that mindset.

Report from the front

DTV In A State of Flux

By Lee G. Petro
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703-812-0453

[*Editor's note: This article was prepared* before *the February 20 order described in the article on Page 1. We're still including it here to record the regulatory activity that led up to that point.]*

Whew...

There are many analogies that we could use to refer to the past month's developments in DTV Land –a roller-coaster ride, the perfect storm, a tsunami, a black hole, and our personal favorite, a train wreck. However, none of these completely captures what broadcasters, viewers, and the FCC's staff have been through as the once-unshakable DTV Transition deadline of February 17, 2009, was pushed back by Congress until June 12, 2009.

As faithful *Memo to Clients* readers will recall, when we went to press last month the Senate had voted to extend the national DTV transition deadline to June 12, but the House's effort to do the same had been stymied by some parliamentary technicalities. As predicted, those got resolved the first week of February, and the legislation toddled on over to the White House for the President's John Hancock, which finally made it onto the signature line on February 11 – less than a week before the original February 17 deadline.

Stations which managed to get their analogs turned off by February 17 turned out to be the lucky ones.

As noted above, the DTV Delay Act delayed the final deadline for the cessation of analog operation by full-power television stations until June 12, 2009. It did provide, however, for the early termination of analog service by full-power television stations in accordance with the procedures laid out by the Commission in its Third Periodic Report. Thus, despite the fact that there are supposedly 6 million viewers who might not be prepared for the DTV Transition, the Commission was granted the authority to permit full-power television stations to cease analog service to many of these same people prior to June 12, 2009.

Having extended the deadline, Congress then dumped into the FCC's lap the problem of how to protect viewers from losing much needed analog service, while dealing with cash-strapped television broadcasters who had been compelled – by Congress and the FCC – to plan for a February 17 termination of analog operation, and whose 2009 budgets did not contemplate an additional four month of such operation. In a series of public notices, all released in the last several days of the run-up to February 17th, the Commission attempted to balance these competing interests.

In particular, the Commission required broadcasters to notify the Commission of which stations still planned to terminate analog service in February, notwithstanding the June 12 extension. The FCC gave the thumbs up to most such stations, but denied authority to cease analog service to some stations where there would be no remaining top-four network affiliates providing analog service. In the major markets, this was not a problem, as the network owned-and-operated stations all determined that they would continue to provide an analog signal until June 12, 2009. However, in smaller markets, the Commission's staff spent President's Day weekend huddled over DMA maps looking at contours to determine if the public would be left in the dark. (For a nearly day-by-day history of that final 10 days or so of frantic regulatory activity, check out the February archives of our blog at www.commlawblog.com.) At the end of the day, 641 stations terminated analog service on or before February 17, 2009.

In the several days surrounding the termination of analog service by many stations, the FCC received close to 100,000 telephone calls at their call center. Of these calls, a full 6% were either not aware of the transition, did not think their television stations were going digital, or did not know the specific date of the transition. Approximately 25% of the callers had trouble with the NTIA converter box coupon program, either because they had not received their requested coupons, their local stores were out of converter boxes, or they had failed to request a coupon in the first place. Not surprisingly, given the number of VCRs and DVD players that still blink 12:00 repeatedly, nearly 20% of the callers also complained that setting up the converter boxes was difficult.

Stations which managed to get their analogs turned off by February 17 turned out to be the lucky ones. While the Commission initially indicated that the remaining 1,500 or so stations would be permitted to terminate analog operation relatively easily, as provided in the Third Periodic Report (and as expressly mandated by Congress in the DTV Delay Act), the Commission issued

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But the history of "indecency" regulation suggests that even the Commission will not be inclined to expand that horizon to include "hate speech". In 2004, the Commission grafted the notion of "profanity" onto its indecency jurisprudence. As the FCC then defined "profanity", it was nothing more than Indecency Lite, a concept apparently designed primarily to permit the Commission to penalize the occasional use of the words "fuck" and "shit" even when they were not used in any sexual or excretory context (*i.e.*, when they fell outside the strict FCC definition of "indecency").

According to a court opinion relied on by the Commission back in 2004, profanity includes "certain of those personally reviling epithets naturally tending to provoke violent resentment" or "language so grossly offensive to members of the public who actually hear it as to amount to a nuisance." While that appears to describe "hate speech" in its broadest sense, the Commission has made clear that it does *not* intend to consider racial or ethnic epithets as falling within this definition of "profanity".

That being the case, it's hard to imagine that the Commission will be particularly enthusiastic about initiating a full-blown inquiry into "hate speech". That's especially true in view of the fact that the ultimate fate of the Commission's indecency policies — and, possibly, the fate of other content-based regulations in general — may be altered significantly by the Supreme Court when it rules on the pending *Fox* case. A decision on that should be out by July, and maybe even sooner.

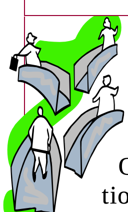
But however the Supreme Court might act and however the FCC might react, NHMC has teed the ball up.

(Continued from page 8)

a late-night decision on February 20 which, in many cases, makes pre-June 12 termination considerably more difficult. (*See* article on Page 1 for a description of the new procedures.) Whether or not the Commission can lawfully impose such additional burdens is a very real question, given the language of the DTV Delay Act. However, it's far from clear that anyone will have the inclination, or the ability, to try to get a court to look at that question before the DTV transition has been wrapped up.

Meanwhile, the FCC and NTIA still have their work cut out for them. The call-in centers' information shows that the educational efforts mandated by the government have not completely saturated the viewers, and that more work is necessary to make the coupon program function efficiently and expeditiously. One can also assume that the Commission's staff will continue to travel the highways and byways of our fair country, coaxial cable in tow.

Given the highly-fluid state of the transition, we recommend that you contact the attorney with whom you normally work if you have any questions. The delay in the transition date has created several riddles, wrapped in a multitude of mysteries, which are festering inside enigmas, that must be parsed out carefully to keep broadcasters in compliance with the shifting landscape. That's where we come in...



FHH - On the Job, On the Go

On January 27, **Frank Jazzo** was a panelist for the Legal and Regulatory Session at the annual convention of the Tennessee Association of Broadcasters in Murfreesboro.

On February 12, **Ron Whitworth** moderated a communications law career panel hosted by the Communications Law Institute at the Catholic University of America. Panelists included representatives from the FCC as well as from the private sector.

Scheduling your trip to the NAB in Vegas in April? Look for **Frank Jazzo**, **Paul Feldman**, **Joe Di Scipio**, and **Harry Cole**, all of whom are scheduled to be appearing in convention-related activities. **Frank** and **Harry** will be on regulatory panels during the Convention. **Joe** is the Program Committee Chair of the "Representing Your Local Broadcaster—Change: Evolution or Revolution?" panel convened in connection with the NAB Convention by the ABA Forum on Communications Law, the NAB and the FCBA. **Joe** will also be moderating a panel at the Forum on Restructuring and the Art of the Deal. And **Paul** will be speaking on "Net Neutrality—What is it? Where is it going?" at NAB's Telecom 2009 on April 22 in Las Vegas.

Finally, a tip of the *MTC* rabbit-ears to **Lee Petro**, who was interviewed about the DTV Transition by Family Radio Stations. Lee's dulcet tones were broadcast on the Family system nationwide on more than 50 radio stations ***and*** internationally by satellite to Europe and Asia ***and*** just about everywhere else by the Internet. That strikes us as a boatload of media — so is it any surprise that **Lee** is our *Media Darling of the Month*?

(Continued from page 1)

- ***Consumer education requirements extended*** – For stations choosing the consumer education requirements under Option 1, the obligation to remain at the PSA equivalent of DEFCON One continues, even though those stations have already been pumping out three PSAs and three crawls per day-quarter for some time now. Option One stations have to continue at that pace through June 30. The precise content of the announcements might change, however, depending on the FCC's action with respect to proposed rule changes. Option 2 stations must re-set their 100-day countdown clock and start a whole new series of on-screen countdowns. Again, the content of the countdown notices may change as the FCC gives further thought to what they should say.

- ***Form 388 reporting requirement extended*** – Since the requirement to report DTV consumer education efforts was originally set to wrap up at the end of the first quarter of 2009 (consistent with a February national transition date), the Commission has extended that requirement to encompass the extended transition period. This means that stations will be required to file one more such report than was previously the case.

The time frame provided for comments in response to the SRONPRM is limited to five (count 'em, five) days.

Proposed rule changes

The Commission seeks comment on a number of transition-related proposals. Whether the FCC really does want folks to file comments may legitimately be questioned, though, since the time frame provided for those comments is limited to five (count 'em, five) days following publication of the SRONPRM in the Federal Register – oh yeah, and no reply comments will be permitted. In any event, some of the proposals advanced by the Commission include:

- ***New early termination drill*** – In order to assure the public at least 30 days' notice prior to termination, and in light of the March 17, 2009, deadline for determining proposed termination dates, the Commission proposes not to let ***any*** station shut down analog operation prior to ***April 16, 2009***. No prior FCC authority is proposed to be required to terminate analog operations after that date as long as the shut-down date is specified in the March 17 notice, although major network affiliates would be required to certify, in their notices, that at least 90% of their analog viewers will continue to receive "some analog service (full service or enhanced nightlight)" until June 12, 2009, *and* that they will comply with other on-going public interest obligations proposed in the SRONPRM (*see* below). Network affiliates proposing early termination would be required to identify, in that certification, the stations that would continue to provide analog service.

- ***Public interest obligations for early-terminating major network affiliates*** – Major network affiliates proposing early termination would be required to: (a) provide on-air crawls (which would include the FCC's toll-free number – 1-888-CALLFCC) prior to termination; (b) ensure on-air educational information, both pre- and post-transition, including information on converter box installation and areas where service may be lost as a result of the transition; and (c) participate in "market outreach" activities, either alone or in conjunction with other stations in the market, such activities to include toll-free phone assistance and engineering support for consumers, consumer walk-in centers, coordination and cooperation with local community resources, and the like. Any network affiliate wishing to terminate early but unable to make the required certifications would be able to offer a demonstration of exigent circumstances necessitating early shutdown – but the Commission emphasizes that such stations would bear a "heavy burden", and the odds appear heavily weighted against the grant of any such showings.

Other odds and ends – The Commission also wonders, among other things:

- Should the content of its 100-day countdown requirement be adjusted in light of the extended transition date and the possibility that stations in a given market may cease analog operation on different dates? Should the 100-day countdown reflect the broadcasting station's own termination date or the June 12 national date, or should each station be required to provide multiple separate 100-day countdowns?

- Should stations which have already broadcast the required 30-minute informational video about the transition be required to provide another "up-to-date" 30-minute video? The Commission seems to be leaning in that direction, as it also asks whether such an updated video should be required to (a) include the termination dates of other stations in the market and (b) specify changes in the broadcasting station's service area.

- Should stations be required to provide additional regularly-scheduled PSAs advising of "changes in the geographic area or population covered by the station" if two percent or more of the station's analog viewers are predicted to lose service as a result of the transition? (Note that this two percent would be calculated strictly on the basis of existing viewers losing signal; it would ***not*** include consideration of any previously

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caller tells the FCC about the violation. This was the case in separate cases in Michigan and West Virginia.

In June, 2006, Pittsburgh Steelers quarterback Ben Roethlisberger was involved in a serious motorcycle accident. The next morning, a Michigan radio station (presumably staffed by Lions fans) called a restaurant in Pittsburgh that was famous for its sandwich named after Roethlisberger. The station began the phone call by asking live, "You're on the air . . . is that O.K.?" The restaurant representative answered in the affirmative, and the conversation began. As the call progressed, the station rep seemed clearly to be teasing Steelers fans; the restaurant became angry and hung-up.

The restaurant complained to the FCC. The station defended its actions, observing that the recording was made through the station's 10-second delay system. Because of that, had the restaurant not assented to the broadcast (in the exchange at the beginning of the call), the station would have hit the DUMP button and the call would have been erased. The station argued that the nature of the recording through the delay system was not the kind of "recording" proscribed by the rules.

The FCC did not accept that argument, noting that its rules prohibit both the broadcast of telephone calls and the recording for broadcast of the calls. In the Commission's view, the DUMP button system "recorded" the call from the very start of the conversation, *i.e.*, *before* consent had been given, and the station should have had the permission of the restaurant before even that type of recording occurred.

The Michigan station was stuck with a $6,000 fine, based upon the facts that (a) $4,000 is the standard fine for such misconduct and (b) the station licensee had been fined for earlier misconduct, justifying a 50% add-on.

In a West Virginia case, a similar fine was decreased from the $4,000 standard because the licensee there was a first time offender. The fine arose from a morning radio stunt called "Wake Your Lazy Carcass Up." As the name suggests, the radio station randomly selected victims from a phone book and called them in the morning, on-the-air. Needless to say, for the full comedic effect, the station did not pre-call and pre-clear their victims. The obviously angered recipients filed complaints with the FCC and the FCC dutifully fined the station, but only $3,200 because of the licensee's rookie status in the violation business.

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unserved viewers that the station might pick up with its digital signal.) Again, it appears that the FCC has already pretty much decided that this is the way to go, since it proposes relatively detailed notice requirements ("geographically specific information" detailing anticipated loss areas, information describing areas where the analog signal is "generally sufficient" for indoor antenna reception but where "it is likely" that an outdoor antenna will be necessary, etc.)

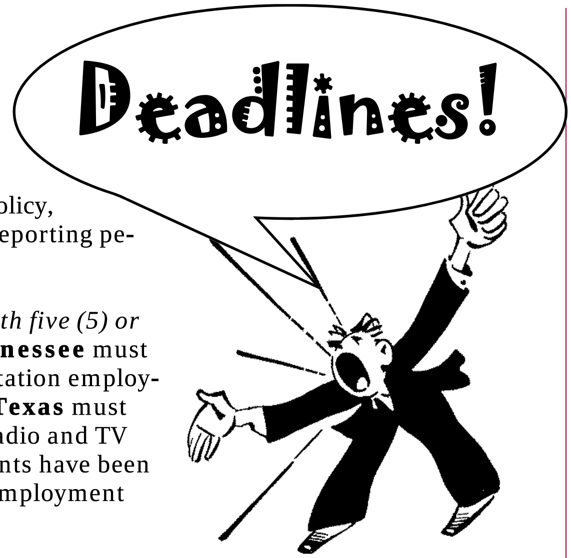
The SRONPRM appears to erect (or proposes to erect) considerably more obstacles to early analog termination than had been imposed by the Third Periodic Report. That's interesting, because the DTV Delay Act specifically provides that "[n]othing in this Act" is intended to prevent early termination of analog service "so long as such prior termination is conducted in accordance with the . . . requirements in effect on the date of enactment of this Act, including the flexible procedures established in the Matter of Third Periodic Review". So the Act seems to say that, as long as a station complies with the Third Periodic standards, that should be that.

The Commission tries to dance around that language, finding some verbiage in another section of the Act to cling to in support of the SRONPRM's obvious departure from the Third Periodic standards. But it's hard to take the FCC's self-serving reading seriously when Congress carefully emphasized that "nothing" in the DTV Delay Act was supposed to interfere with early termination undertaken consistently with the Third Periodic. So regardless of anything else Congress may have said anywhere else in the Act, Congress was clear that "nothing" else in the Act was supposed to preclude such early termination.

This looks like a ready-made appeal point for anyone eager to run to court. But, to continue the Jack Bauer analogy noted in a post on our blog (at www.commlawblog.com), when Jack has hijacked your car and is driving it, and you, at breakneck speed down some dark and unfamiliar terrain in the middle of nowhere, you're not really in a position to try to get your situation in front of a judge. Instead, you may just have to go along for the ride, wherever it may go and however long it may last.

The SRONPRM is but the latest demonstration of the Commission's valiant efforts to comply with the extraordinary practical problems dumped on it by Congress's later-than-last-minute extension of the national transition date. The fact that the FCC's staff has been forced to work through holiday weekends and late into the night (as evidenced by, for example, its post-quitting time orders released on consecutive Fridays in February) is a testament to the staff's diligence – but it also gives rise to potential problems. The Commission's damn-the-torpedoes-full-speed-ahead approach may be commendable, but it opens the real possibility of unconstitutional actions. The SRONPRM does nothing to dispel such concerns.

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 388 and list all station activity to educate consumers about the DTV transition. The period to be included is January 1 through March 31, 2009. As with previous reports, the first 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.

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.

June 1, 2009

EEO Public File Reports – All *radio* and *television* stations *with five (5) or more full-time employees* located in **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **Michigan**, **Ohio**, **Nevada**, **New Mexico**, **Utah**, **Virginia**, **West Virginia**, and **Wyoming** 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.

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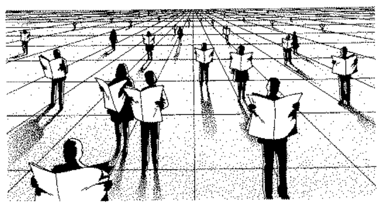
Stuff you may have read about before is back again . . .

Updates on the News

Notice? We don't have to give you any stinking notice! – Back last September the Commission issued an order increasing all application fees across-the-board. This was mandated by Congress and was not open to public comment. While the bump in fees amounted to a 4.9% uppage, it was merely an effort to adjust for cost-of-living increases, and it did not attract much attention. That was especially so because the increases were not to take effect until 90 days after the FCC notified Congress of the changes. When next we heard about the new fees, it was on January 29: a notice popped up in the Federal Register spelling out the new fees and indicating that they were effective as of that very day, January 29. But wait – the fee calculating function in CDBS wasn't reflecting the new fees. What to make of that?



We called the FCC's Office of Managing Director (OMD), which is generally responsible for fee collections. It turns out, we were told, that the 90th day after Congressional notification was really December 30, so by the terms of the Commission's September, 2008 order, the new fees were supposed to have taken effect then. But apparently the date got past the powers-that-be at the FCC – something to do with the end-of-year holiday season, and/or the then-impending change of administrations, or maybe some other distractions. Whatever the reason, the December 30 date came and went. By the time the Commission got around to sending the notice to the Federal Register, it was January 29.

While the notice as originally sent to the Register apparently specified the December 30 effective date, somebody at the Register pointed out that that would cause the announcement of the new fees, in January, to have a retroactive effect, which would not be permitted. So it was decided (by whom? we're not sure) that the Federal Register notice should show January 29 as the effective date.

But the OMD folks weren't even ready to go in January, so despite the Federal Register notice they continued to charge the old fees. In early February, they then posted new "unofficial" fee "guides" on the OMB/Application Fees website indicating, without explanation, that the new fees would be effective on February 18. But February 18 rolled around and the new fees still weren't in effect – and a quick check of the OMD/Application Fees showed that all trace of those new fee guides had been removed. We called OMD again, and were advised that the fees still weren't in effect; they declined to tell us when they would take effect, but suggested we keep checking back in at the website.

So enjoy the continued opportunity to file applications with last year's low, low rates. If the new rates ever finally do take effect, we'll let you know.

Moment method computer modeling now in effect – The changes in the AM technical rules to permit moment method computer modeling for some directional antenna proofs have finally taken full effect. Those rules, adopted in September, got held up because the Commission had to revise some of its application forms to accommodate the changes, and those revisions in turn had to be reviewed and approved by the Office of Management and Budget. In early February that process was completed, so long-suffering AM licensees (and their consulting engineers) now can take the method modeling super-highway to AM Proof City.

(Continued from page 12)

EEO Mid-Term Reports – All *television* station employment units *with five (5) or more full-time employees* and located in **Ohio** and **Michigan** 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 **Arizona**, **Idaho**, **New Mexico**, **Utah**, and **Wyoming** 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.

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Arlington, Virginia 22209

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.