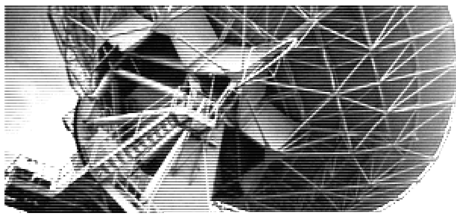

FLETCHER, HEALD & HILDRETH
Communications Law & Regulation

MEMORANDUM TO CLIENTS

News and Analysis of Recent Events in the Field of Communications

Back and forth and back and . . .

Third-Adjacent Protection From LPFM's On The Chopping Block, Again

House, Senate bills would boost Lilliputians' status in FM hierarchy

By Lee G. Petro
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Bills (H.R. 1147 and S. 592) have been introduced in Congress that may lead to a wave of new Low Power FM stations – possibly as many as 3,000. The bills would statutorily eliminate the third-adjacent channel protection to full-power FM stations. The House version has garnered the support of 22 Representatives (from both sides of the aisle) thus far.

In addition to adding one more back (or maybe it's one more forth) to the long-running back-and-forth struggle over third adjacent protections, the bills – if ultimately passed – are also likely to fan the FCC's ardor for "localism".

The issue of third-adjacent protection has been around since the LPFM service's creation in 2000. As originally conceived by the FCC, LPFM stations were ***not*** subject to any third-adjacent protection vis-à-vis their full-service siblings. But because of concern that a gazillion LPFM stations peppered across the landscape would cause erosive interference to existing full-power stations, Congress promptly stepped in and overruled the Commission by amending the Communications Act to insure that third-adjacent protections would be retained. Still, acknowledging some doubt as to the extent that such interference really does pose any threat, Congress directed that the FCC study the issue further.

> *Both bills provide that third-adjacent protections **must** be maintained for full-service NCE FM stations which provide radio reading services on their SCA's.*

That in turn led to the 2003 Mitre Report, prepared for the Commission by the Mitre Corporation (at a cost of more than $2,000,000). Mitre concluded that third-adjacent interference should ***not*** be much of a problem. (Mitre's conclusions have been questioned by some, including most notably the NAB.)

Buoyed by the Mitre Report, in 2004 the FCC asked Congress to re-amend the Act to delete the third-adjacent provision which had been added in 2000, but it remains on the books to date. As reported in our December, 2007, *Memo to Clients,* in late 2007 the FCC adopted interim processing rules that would permit LPFM stations to seek waivers of the second-adjacent channel protections. (A rulemaking to make such procedures permanent is still pending.) The 2007 action also boosted the status of the LPFM service in a number of respects.

The bills recently dropped into the Congressional hoppers would further elevate the status of LPFM stations. Interestingly, though, both bills identify one broadcast service which will still trump LPFM. The bills provide that third-adjacent protections ***must*** be maintained for full-service noncommercial FM stations which provide radio reading services (RRS) on their SCA's. But if third-adjacent interference is such a problem that RRS need statutory protection, why should such interference be permitted for everybody else? (The RRS carve-out gives rise to other conceptual problems as well: what if a commercial station puts an RRS on its SCA – shouldn't it be entitled to protection? And is

(Continued on page 11)

March, 2009 **No. 09-03**

Inside this issue . . .

MMTC Urges "Platform Neutrality" 2
It Doesn't Pay to Pay-to-Play 3
LPFM Stuck With $20K Fine for "Advertisements" 3
Navigating the Webcaster Royalty Maze 4
Reminder: Environmental Hoops Must Be Cleared in Proper Order 6
Court Contravenes Communications Act, Contradictory Commission Concurs 7
Buyer Protection Plans 8
Deadlines 12
Anti-Trust Thresholds Increased for DOJ/FTC Review of Transactions 14
No Latitude for Wrong Longitude 15
Updates on the News 16
Allotments 17

Discriminatory anti-discrimination ban?

MMTC Urges "Platform Neutrality"

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The Minority Media and Telecommunications Council (MMTC) has asked the FCC to impose on cable, satellite and telecommunications companies delivering multi-channel programming the same prohibition against discriminatory advertising practices as the Commission has imposed on broadcasters.

A year ago the FCC took the wraps off a number of "diversity" initiatives designed to stomp out, however indirectly, improper discriminatory practices. One of those initiatives specifically prohibited advertising contracts that contain "No Urban/no Spanish" clauses. "No Urban/no Spanish" is a buzzword for clauses through which the parties (the station and the advertiser) agree not to air the advertiser's ads on stations with formats aimed at certain racial or ethnic audiences. The FCC believes such clauses may violate existing federal anti-discrimination laws.

The rule announced last year requires broadcast licensees to certify in their license renewal applications "that their advertising contracts do not discriminate on the basis of race or gender and that such contracts contain nondiscrimination clauses." That certification requirement itself won't technically come into play until the next round of license renewals a couple of years from now, since no interim certifications are required. However, because the renewal certifications will presumably be retrospective – that is, the certifications, when made in the renewal, will presumably refer back to the licensee's practices during the preceding license term – broadcasters should already have taken steps to make sure that they will be able to properly certify when the time comes.

And now MMTC has proposed that the same prohibition be extended to all platforms that deliver commercial advertisements to the public: cable, satellite, even the new-fangled telecom hybrid systems. According to MMTC, the FCC should assure "platform neutrality" and "regulatory parity" between and among the various program delivery genres. MMTC is, however, vague on any specifics.

And understandably so. The concept of "platform neutrality" or "regulatory parity" – by which MMTC seems to suggest that all program-delivery services should be subject to precisely the same regulatory constraints – runs counter to longstanding regulatory, and legislative, concepts. Perhaps the most obvious example of this is the Commission's treatment of indecency. Under a "platform neutrality" approach such as MMTC seems to posit, all program delivery services – including cable and satellite – would be subject to the same murky indecency standards that the Commission imposes on broadcasters. But we all know that the FCC has ***not*** imposed those same standards and, indeed, has resisted considerable pressure that it do so.

[Note: Adopting some such uniform approach across platforms could conceivably be justified, as a number of commenters have suggested. After all, cable and satellite operators all utilize some spectrum licensed by the Commission, even if it involves merely auxiliary channels for CARS services and the like. But the Commission has declined to take that bait, and certainly the non-broadcast services have shown no enthusiasm for placing themselves in the regulatory yoke which has thus far been reserved for broadcasters. But we digress.]

MMTC's proposal thus puts the Commission in an odd and possibly uncomfortable position. As is clear from the adoption of the "diversity" initiatives last year, the Commission is inclined to take aggressive steps to weed out supposed discriminatory conduct among its regulatees (even though the precise nature and extent of

(Continued on page 9)

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(Except, of course, for the $50K to Uncle Sam)

It Doesn't Pay to Pay-to-Play

Consent decree targets payola/plugola

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Earlier this month, the FCC approved a consent decree with a radio group owner, ending an investigation into the licensee's possible payola violations. While the order approving the consent decree did not include a description of the company's alleged violations, the consent decree itself remains instructive for anyone seeking to avoid similar trouble. As the consent decree included a $50,000 "voluntary contribution to the United States Treasury", that trouble is well worth avoiding.

While payola has a long and storied history in broadcasting, the actual word "payola" does not appear in the FCC's rules. Rather, payola and plugola are violations of the FCC's sponsorship identification rules. The sponsorship identification rules provide that, when a broadcaster receives any "valuable consideration" in connection with the broadcast of programming, the broadcaster ***must*** air (1) a disclosure of the fact that the programming was sponsored and (2) the identity of that sponsor.

While this concept is relatively straightforward, many station employees find it difficult to determine exactly what constitutes "valuable consideration" and when that consideration is sufficiently related to programming to warrant a disclosure. For this reason, among others, it is important for stations to develop a clear set of policies that will help their employees understand what is and isn't allowed under the rules.

This is where a read-through of the consent decree becomes helpful. The consent decree includes a detailed "company compliance plan" that seems to indicate what the FCC considers "best practices" in developing payola policies. In fact, this compliance plan is virtually identical to the compliance plans the FCC endorsed two years ago in its payola settlements with Clear Channel, CBS Radio and others.

Some of the items in the compliance plan may not be applicable to all broadcasters. A single station owner probably wouldn't need to establish a compliance hotline for employees to call for advice on compliance. Every company, however, can take note of the broad elements of the

(Continued on page 13)

Focus on FCC Fines

[Editor's Note: Our usual "Focus on FCC Fines" reporter R.J. Quianzon is currently on assignment (whatever that means). He will return next issue.]

"Out, damn'd spot" (reprise)

LPFM Stuck With $20K Fine for "Advertisements"

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The Enforcement Bureau has come down hard – very hard – on a low power FM station for broadcasting thousands of prohibited advertisements over the course of some 14 months. Total fine specified in the Notice of Apparent Liability: a cool $20,000. Ouch! And this is an 11-watt (yes, when they say "low power", they really mean it) station we're talking about. Double Ouch!

The Bureau's decision highlights the perennial problem presented by the limits on noncommercial educational (NCE) licensees. (By definition LPFM stations are NCE.) NCE licensees are prohibited from broadcasting any promotional announcements on behalf of for-profit entities at any time in exchange (in whole or in part) for any consideration of any kind. BUT they MAY broadcast announcements which identify and acknowledge non-profit ***and/or*** for-profit entities ("underwriters", to the *cognoscenti*) who contribute to the station's operations, monetarily or otherwise.

The trick is telling the prohibited promo from the acceptable acknowledgement.

The FCC "affords latitude to the judgments of licensees" in this area: if the licensee exercises reasonable, good faith judgment in this area, the FCC says it won't second-guess that judgment. Which is all well and good, but danger still lurks in these waters because the agency has provided only very broad guidelines with which to navigate them.

The Commission has posted on its website a couple of general discussions of its policies in this area. These include a 1992 reprint of a 1986 policy statement and a set of comments presented by Kenneth Scheibel, the Commission's resident guru on such things, back in 1999. The policies can be summarized like this: underwriter announcements may ***identify*** the for-profit contributor and the goods or services which it offers, but those announcements may ***not*** "promote" those goods or services.

A prohibited "promotion" usually involves one or more of the following elements:

- ***Price information*** – Underwriter announcements

(Continued on page 10)

A tricky web for webcasters

Navigating the Webcaster Royalty Maze

By Kevin M. Goldberg
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If you are a broadcaster engaged in webcasting, heads up: recent developments have significantly altered your copyright royalty landscape. SoundExchange, Inc. has entered in two agreements which provide for alternative royalty calculation methods.

SoundExchange, of course, is the designated "receiving agency" that collects royalty payments from webcasters and distributes them to recording artists whose copyrighted sound recordings are being performed in accordance with the statutory license.

On March 3, 2009, two agreements reached between SoundExchange and representatives of distinctly situated webcasters were published in the Federal Register. They reflect efforts to address the high royalty rates imposed on webcasters for 2006-2010. (Those rates result from a March, 2007, decision of the Copyright Royalty Board (CRB) currently on appeal to the United States Court of Appeals for the District of Columbia Circuit.) The recent agreements are also motivated in part by the fear that a new CRB proceeding aimed at setting royalty rates for 2011-2015 could lead to similarly unpalatable rates.

And one more goal of the agreements: at least some relaxation of the unduly burdensome and expensive reporting requirements imposed on webcasters. Those requirements currently mandate the reporting of every song played during two weeks of every quarter; a year-round "census" reporting requirement has been proposed.

The SoundExchange agreements could affect broadcasters who are simulcasting over-the-air programming via the Internet pursuant to the statutory license. One agreement is between SoundExchange and the National Association of Broadcasters (NAB); the other is between SoundExchange and the Corporation for Public Broadcasting (CPB). (A third agreement was made with a very specific set of small, Internet-only, webcasting companies, but that deal is, as far as we are aware, not relevant to any over-the-air broadcasters).

The NAB/SoundExchange and CPB/SoundExchange agreements propose significant changes to the royalty fee structure and the reporting requirements as applied to some or all webcasters. ***They may require action by April 2, 2009***. Here's a summary of the two agreements.

Kevin's Copyright Corner

NAB/SoundExchange Agreement

The NAB/SoundExchange Agreement permits, but does not require, eligible stations to (a) pay reduced royalty rates and (b) in some very limited cases, avoid the filing of quarterly playlist reports. A station may elect to participate under the regulatory scheme created by this agreement for the years 2006-2015 if it is a commercial webcaster that "has a substantial business owning and operating one or more terrestrial AM or FM radio stations that are licensed by the Federal Communications Commission." This agreement does ***not*** apply to noncommercial webcasters. (Note that the definition of "commercial" as opposed to "noncommercial" for purposes of the statutory license for webcasting differs from the definition of those terms for FCC purposes. Please check with us if you have any questions about your particular status.)

In order to take advantage of the terms of the NAB/SoundExchange Agreement, a station must file a "Notice of Election of Rates and Terms for Broadcasters 2006-2015" form with SoundExchange before the following deadlines:

> *By April 2, 2009 if the station was already webcasting on March 3, 2009*
>
> *Within 30 days of commencing webcasting if the station was not webcasting on March 3, 2009.*

A participating station must also "make good" on all unpaid royalties, including late fees imposed at a rate of 1.5% per month, compounded monthly, dating back to January 1, 2006. These late fees must be paid by April 30, 2009.

Effect on Royalty Rates

A webcaster electing to participate in the NAB/SoundExchange Agreement will enjoy a slight discount in its royalty rates for the next two years. Additionally, it will have the benefit of knowing its royalty rates for the years 2011-2015, regardless of how the recently-started CRB proceeding to set those rates ends up.

(Continued on page 5)

(Continued from page 4)

Each webcaster will still have to pay a $500 annual minimum fee per channel by January 31 of each year. The monthly payments thereafter are (with comparable rates currently applicable under the March 2007 CRB decision in parenthesis – rates for 2011-2015 have not yet been set):

2006: $ 0.0008 per song per listener ($ 0.0008)
2007: $ 0.0011 per song per listener ($ 0.0011)
2008: $ 0.0014 per song per listener ($ 0.0014)
2009: $ 0.0015 per song per listener ($ 0.0018)
2010: $ 0.0016 per song per listener ($ 0.0019)
2011: $ 0.0017 per song per listener
2012: $ 0.0020 per song per listener
2013: $ 0.0022 per song per listener
2014: $ 0.0023 per song per listener
2015: $ 0.0025 per song per listener

SoundExchange has made available a new, downloadable Statement of Account Form (currently in Microsoft Excel format only) to be used by stations in filing their monthly royalty fees under the NAB/SoundExchange Agreement. Payment is still due within 45 days of the end of the month to which it pertains. Stations not electing to participate will continue to use the relevant form already in existence.

Playlist reporting may actually become more difficult for most participating commercial webcasters, but not for a very limited number of "small broadcasters".

The NAB/SoundExchange Agreement also provides a limited exemption that allows a webcaster to pay a portion of its monthly royalties based on an "aggregate tuning hour" (ATH)formula. The exemption is available to webcasters who avail themselves of the similar exemption relative to full census playlist reporting (discussed in more detail below). For royalty payment purposes, it is important to note that a webcaster who does take advantage of this limited ATH calculation can do so for only the percentage of the month indicated in the table below. The ATH royalty fee is calculated by multiplying 12 (*i.e.*, the number of songs assumed to have been played in the given hour) by the number of listeners by the number of hours of programming.

Effect on Playlist Reporting

There are two changes to the reporting requirements under the NAB/SoundExchange agreement. Reporting may actually become *more* difficult for participating commercial webcasters, but will clearly become easier – in fact, will go away – for the very small number of commercial webcasters that meet the NAB/SoundExchange definition of "small broadcaster".

Changes to Reporting Requirements for Participating Webcasters

Historically, webcasters have been required to report all songs played (a practice which allows SoundExchange to allocate royalties fairly on the basis of actual performance). Webcasters participating in the NAB/SoundExchange Agreement will now have an alternative:

> Playlist information must be filed on a *monthly* basis, rather than the quarterly basis previously required.
>
> Playlist information will now consist of a "census" filing covering all songs played during the reporting month – instead of the two-week reporting period previously required.

A limited exemption to this reporting rule is available. Where compilation of playlist information is not practicable with respect to certain percentages of programming (for instance, syndicated programming received from other sources where the syndicator does not provide all of the required information necessary for the report), the broadcaster does not have to file a full report for the following portion of each month. Instead, broadcasters in that position need file just a list of songs played:

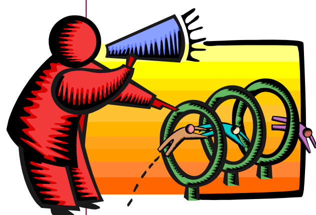
2009: 20% of monthly programming
2010: 18% of monthly programming
2011: 16% of monthly programming
2012: 14% of monthly programming
2013: 12% of monthly programming
2014: 10% of monthly programming
2015: 8% of monthly programming

Special Waiver of Reporting Obligation for "Small Broadcasters"

A small number of commercial webcasters are exempt from the playlist reporting requirement. These webcasters will instead file only a list of the songs played. Alternatively, they will be completely exempt from the reporting requirement if they elect to pay a $100 "proxy fee" at the same time they pay their $500 annual minimum royalty fee payment (*i.e.*, by January 31 of each year).

This exemption applies only to "small broadcasters". A "small broadcaster" is defined as a broadcaster whose webcasting transmissions (a) have totaled fewer than 27,777 aggregate tuning hours in the previous year and (b) are expected to do the same in the current year. An aggregate tuning hour is determined by adding the number of listeners that hear each hour of your webcast. Doing the math, 27,777 aggregate tuning hours equates to having about 3.17 listeners at every hour of every day. Granted, you may have several hours where you do not have any listeners, but it is easy to see how most broadcasters will easily eclipse this maximum. Note that the small broadcaster can exceed the maximum once during the period up to 2015, but it must then institute measures that guarantee it does not

(Continued on page 11)



First verify, then certify, THEN modify

Reminder: Environmental Hoops Must Be Cleared in Proper Order

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Back in the day, the conventional "environmental" certification required of construction permit applicants tended to be limited to the (usually) non-existent potential RF effects on passers-by at the proposed transmitter site. But in 2005 a "Nationwide Programmatic Agreement" (NPA) entered into by the Commission, the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers became effective. (A copy of the NPA and related information may be found at http://wireless.fcc.gov/siting/npa.html.) Since then, applicants for new FCC construction permits have been required to take extensive steps to confirm that their proposed construction would not cause unacceptable disruption to environmental, historical or cultural interests.

The Audio Division recently reminded us all of those requirements. In a 22-page decision, the Division took to task an applicant whose supposed efforts to comply with the requirements were "woefully insufficient". While the Commission ultimately granted this particular applicant the permits it had asked for, the Division's decision sends a clear message to future applicants: take the environmental certification requirement seriously ***before*** you make that certification.

*The decision sends a clear message to future applicants: take the environmental certification requirement seriously **before** you make that certification.*

The applicant in this case was proposing to locate three FM antennas on a single tower to be built on a mountain in Wyoming. In each of the three CP applications the applicant certified that the proposed construction would not have a significant environmental impact. But a petitioner opposed the applications, alleging that the applicant had not verified the accuracy of its certification. As often happens when a petitioner shines a harsh light on such things, a considerable number of previously undisclosed details popped up.

As it turned out, the applicant had indeed taken virtually no steps to confirm that its certification was accurate. Sure, one of its principals had looked over the endangered species list and maybe received some off-the-cuff thoughts from personnel at the Bureau of Land Management indicating that the site was the "best available". But that fell far short of what the Commission expects.

What *does* the Commission expect?

With respect to the effect of the proposed construction on endangered or threatened species, the applicant is supposed to make a "meaningful evaluation of the effects of their proposals on listed and threatened species and habitats before filing the application." The Division indicates that a statement from the Fish and Wildlife Service (FWS), or alternatively an opinion from a "qualified biologist using the most current data", would usually do the trick.

With respect to the effect of the proposed construction on historic properties, the Commission's rules, the NPA and other related authorities lay out a number of chores that need to be completed. Those include preparation and submission of a Form 620 ("New Tower Submission Packet") to the relevant State Historic Preservation Office (SHPO) and/or Tribal Historic Preservation Office (THPO). And the preparation of the Form 620 in turn requires additional research concerning, among other things, the "area of potential effects" that would be adversely affected by the construction.

With respect to the effect of the proposed construction on matters of religious or cultural importance to any Native American tribes, the NPA specifies notice requirements, and the Commission has established a mechanism by which those requirements can be satisfied with relative ease.

Our Wyoming applicant appears to have ignored all of these requirements. After all, the folks at the BLM had not said diddly-squat about Indian religious sites. Moreover, since there were already two non-broadcast towers in the vicinity of the proposed site, the applicant figured any historical or religious sites that might ever have been located there had already been destroyed.

Once the Commission started asking questions about the applicant's certification, though, the applicant got a lot more serious about the process. The applicant obtained a letter from the relevant SHPO confirming that no historic properties would be affected, a letter from the FWS confirming that there were no endangered species in the area, and a report from an environmental consultant demonstrating that appropriate contact had been made with Indian tribes. Enough documentation to convince the Division that the proposed construction would be consistent with the applicable NPA considerations.

Still, the Division was clearly unhappy about the fact that the applicant had certified without having any clue about the validity (or lack of validity) of its certification. Sternly shaking its bureaucratic finger at the applicant, the Divi-

(Continued on page 14)

Thumb on the scale?

Court Contravenes Communications Act, Contradictory Commission Concurs

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When times get hard, nervous or impatient creditors tend to be more likely to foreclose on borrowers who, caught in the economic downdraft, find themselves unable to make timely payments. The foreclosure process is governed by state laws and procedures. While those laws and procedures vary from state to state, the overall process tends to be relatively straightforward. But when the borrower is a broadcaster and the collateral for the loan is a broadcast station, things get tricky – as demonstrated by a recent Media Bureau decision.

The case arose out of a court-ordered sale to satisfy a judgment against a South Carolina FM licensee. The licensee's creditor had taken the routine approach of filing a collection suit. In such situations, the next step is usually for the creditor to ask the state court to appoint a receiver to take control of the license – with the ultimate goal of having the receiver sell the station and use the proceeds to pay off the creditor. The receiver then gets appointed, an application (Form 316) for FCC consent to the involuntary assignment is filed and granted, and the receiver takes it from there, disposing of the licensee's assets pursuant to the court's directives.

The Commission concluded that more than a "bare license" was involved because the buyer was also buying (drum roll, please) the station's public inspection file and advertiser lists.

In this case, however, the court got ahead of itself, and authorized the sale of the station *before* it had authorized the appointment of a receiver. It was only *after* the station's license had been auctioned off to the creditor that the court got around to issuing a further order. The purpose of that later order, which designated a receiver, was to handle what the court termed the "formality and collateral" function of actually moving the license from debtor to creditor.

The debtor called "foul". The FCC agreed, concluding that the court's action had violated the Communications Act and Commission policy. But in the end the Commission stood by its guns and let the deal happen.

Agreeing with the debtor/licensee, the FCC first concluded that the state court's authorization of the auction of the station was flatly contrary to established Commission policy. Even though the Commission usually defers to state court decisions, the FCC observed that an FCC license is a privilege to use the airwaves and cannot be viewed as some sort of mortgageable chattel in the ordinary commercial sense. (If you have questions about that policy, *see* the articles in the November, 2008 (page 6) and the April, 2005 (page 7) *Memos to Clients*, which are available from our website at www.fhhlaw.com or from the links on our blog at www.commlawblog.com.) So a state court is not in a position to bless the immediate sale of a license on the courthouse steps.

No problem, argued the receiver and court-anointed winning bidder. What the court really *meant* to do was not to attach the license, but rather to allow a security interest in the proceeds of the sale of the license, and such security interests have previously been approved. Nice try, but the Commission did not accept that attempt to go back and fix up the record of the proceeding – since it was contrary to the plain language used by the court.

The next step is a little murkier. The FCC observed that, in its follow-up ruling, the state court had ordered that a receiver be appointed to come in after the auction and, in effect, implement the auction results (while conserving the debtor's assets in the meantime). In cases of bankruptcy or receivership, it has long been the Commission's policy that a trustee or receiver may hold licenses on a temporary basis pending sale of a station's assets. Accordingly, the Commission accepted the receivership – and the application for consent to assign the license to the receiver on a temporary basis. So the Commission approved that end of the deal, even though the purpose of the receiver's appointment was to implement a transaction which had been improperly undertaken.

What appears to have saved the day for the receivership was the language of the court's further order, which spoke of finding a purchaser and obtaining FCC consent to assignment of the license – even though the receivership appointment was clearly intended to implement the sale which the court had already approved, contrary to FCC policy.

The licensee/debtor also challenged the sale based on the assertion that the only item being sold was the station's license and that the sale therefore violated the FCC's "bare license" policy. The FCC has historically not allowed the sale of a "bare license" because there is, as a technical matter, no property right in the license *per se* upon which a value can be placed for the purposes of a sale. But the Commission concluded that, in this case, the sale involved *not just* the license, but also (drum roll, please) the station's public inspection file and advertiser lists. Those add-ons, meager though they might be, were deemed suf-

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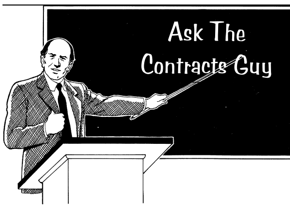

Caveat emptor!

Buyer Protection Plans

"Material adverse change" provisions in acquisition deals

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In some corners of the business world, purchase/sale transactions happen fast. Buyer and seller meet, agree on terms, commit those terms to writing, and proceed to closing without delay, maybe even in a matter of days. Not so in Broadcast Land. Thanks in large part to the FCC's regulatory role, there is an unavoidable lag-time between (a) the time buyer and seller strike their deal and (b) the consummation of the transaction. In typical deals, this period can be anywhere from 45 to 90 days – or longer, if the Commission's processing of the assignment is slowed by objections or other regulatory phenomena.

This lag-time can pose risks to the parties, most notably to the buyer who has agreed to pay a fixed price at closing. Obviously, that buyer runs a risk that, during the lag-time, the assets to be purchased may deteriorate, either physically (think an intervening tornado blowing over the tower), financially (the seller's business tanks) or otherwise.

But if you're a buyer, fear not. Buyers can include several "outs" in their contracts that enable them to walk away without penalty, or at least adjust the purchase price, if conditions change. Such "outs" may be included in the reps and warranties required of a seller (examples: "all equipment is in good operating order", "all licenses are valid and in force", etc.). Typically, such provisions relieve the buyer of its obligation to complete the deal if the seller's reps/warranties are no longer true when the closing rolls around.

Another approach – and this month's lesson – involves provisions known as "material adverse effect" (MAE) or "material adverse change" (MAC) clauses. Such provisions give buyers the right to walk away upon the occurrence of events which fall within the MAC or MAE definitions (definitions which the buyer and seller negotiate as part of their agreement).

MAC or MAE clauses can be effective to avoid disputes between a buyer and seller when closing day arrives and the buyer doesn't think the seller is delivering what the buyer bargained for. In fact, there are very few situations in which it might *not* be desirable – at least from the buyer's perspective – for a buyer to try to add MAC/MAE clauses. (One such exceptional instance: situations in which, during the interim lag-time, the buyer operates the station pursuant to a Local Marketing Agreement or Time Brokerage Agreement. There the buyer is essentially "test-driving" the station, and any harm that might befall the station's facilities or operations during that test-drive period could likely be attributable to the buyer rather than the seller.)

Let's take a look at the elements of typical MAC or MAE clauses. These clauses generally state that if a "condition" or "event" occurs, and if condition or event is "adverse", and, finally, if the adverse condition or event is "material" to the assets or business of the stations, then the buyer doesn't have to buy the stations. Got that? OK, class dismissed.

The real meaning of MAC/MAE clauses is usually found in the exceptions to the occurrence of the triggering condition or event.

Seriously – it's as simple as that. The Contract Guy has reviewed many contracts that essentially state the obvious in so many words. Occasionally, the parties may try to get fancy, embellishing the term "material" with seeming redundancies, like "significant" or "important" or "meaningful", etc. Interestingly, though, the real meaning of MAC/MAE clauses is usually found in the *exceptions* to the occurrence of the triggering condition or event. These exceptions typically include: (1) factors affecting the broadcasting industry as a whole; (2) national, regional, or local economic conditions; and (3) new government laws or regulations. The exceptions are sometimes called "carve-outs", presumably because they can seriously eviscerate a buyer's ability to walk away because of a perceived "material adverse" circumstance.

One often effective way to draft MAC/MAE clauses is for the buyer to try to define the parameters of the basic assumptions it made when it decided how much to pay for the broadcasting assets. Those parameters may not be, and frequently aren't, spelled out anywhere in the purchase agreement.

If, for example, the buyer's entire strategy is based upon maintenance of a certain ratings share in one or more markets for the stations, then the agreement should define a drop in the ratings below those levels to be a MAC (assuming that the seller is willing to accept such a term). If a buyer can pinpoint a few major items like this with some degree of precision, then both the buyer and seller (and any other interested parties) will know during the lag-time exactly what the consequences of seller's failure to maintain those metrics will be. Sellers

(Continued on page 9)

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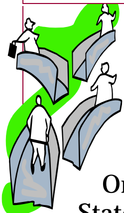
such conduct has not yet been made a matter of record before the Commission). So the Commission might normally be expected to be favorably disposed to MMTC's proposal. But the notion of "platform neutrality" is itself so radically contrary to the Commission's historic approach that it is difficult to imagine the FCC embracing it. Moreover, the cable/satellite/telecom operators who would be subject to the proposed regulation would likely resist it strongly. While they may not object in principle to the vague feel-good notion of the "anti-discrimination" certification, they most likely would object to other regulatory burdens that would logically flow from "platform neutrality".

While MMTC has filed its proposal, the FCC is under no obligation to do anything with it. Time will tell whether the Commission chooses either to advance MMTC's concept or to let it molder somewhere in the FCC's files along with many other proposals that, for whatever reason, did not capture the FCC's fancy.

(Continued from page 8)
are generally – and wisely – reluctant to agree to vague MAC/MAE clauses that might provide an easy way out when buyer's remorse strikes. But seller's may be more agreeable to a limited set of clearly-drafted parameters defining the buyer's right to bail on a deal. The agreement should also specify which party will bear the burden of proving that a particular MAC or MAE has occurred.

There is a certain law of diminishing returns in negotiating the specific MAC or MAE parameters, because, if all things go as planned with the performance of the broadcasting assets, these provisions will never be used. But there may still be an advantage to tying down clear MAC/MAE terms, since litigation over MAC and MAE clauses occurs with surprising frequency in some very large acquisition and merger transactions. In Clear Channel's 2007 sale of its television station assets to Newport Television, for example, an MAE clause was central to a dispute about whether Newport was unfairly trying to back-out of the deal.

In summary, a buyer in a broadcasting transaction (at least a transaction not involving a pre-closing time brokerage or local marketing agreement) should strive to supplement a seller's general representations and warranties by adding MAC or MAE clauses to the purchase agreement. To be effective for the buyer, however, such MAC or MAE clauses should be as specific as possible in defining what parameters will constitute a MAC/MAE and establishing whether the buyer or seller will bear the burden of proving that such events or conditions have occurred.



FHH - On the Job, On the Go

On March 25, **Frank Jazzo** and **Michelle McClure** attended the Society of Satellite Professional International (SSPI) Gala in Washington. They were then joined by **Ron Whitworth** on March 26-27 at the Satellite 2009 exhibition.

On March 28, the Other Frank, **Frank Montero**, along with **Harry Cole**, attended the National Alliance of State Broadcasters Associations' State Leadership Conference in Washington. The **Other Frank** will also attend the annual Kagan confab on April 1. And, travelin' man that he is, **Frank M** will also be providing a presentation on FCC developments at the Puerto Rico Broadcasters Association convention and the Radio Ink Hispanic Radio Conference in May.

Vegas, anyone? We'll be there. **Frank Jazzo**, **Paul Feldman**, **Joe Di Scipio**, **Matt McCormick** and **Harry Cole** are all scheduled to appear in convention-related activities. **Frank** will be a panelist on the "Navigating My Radio Station Through the New FCC" on April 20. **Harry** will be holding forth on the "Regulating Broadcast Programming – Is Content King or Will Government Reign?" panel the same day. **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. **Paul** will be speaking on "Net Neutrality—What is it? Where is it going?" at NAB's Telecom 2009 on April 22. And on April 23, **Matt** will be a panelist in the "Current Issues in Law and Policy" session at the Broadcast Education Association Convention, also in Las Vegas. Starting April 19, **Jim Riley**, **Lee Petro** and **Michelle McClure** will also be in attendance in less high-profile roles.

Hitting Vegas a week earlier will be **Peter Tannenwald**, who will speak at the CBA@NAB in the Las Vegas Hilton on April 16. **Peter** will also be attending the National Translator Association Convention in Denver, May 15-17.

And last but not least, on April 3, **Kevin Goldberg** will be speaking at the New York Press Association Spring Conference on "Legal Issues for Bloggers".

(Continued from page 3)

may ***not*** contain any information about pricing. Particular prices of any goods or services, indications of savings or monetary value associated with the goods or service, special discount offers that might be available – they're all to be avoided.

- ***"Calls to action"*** – Language which encourages the audience to patronize the underwriter is also *verboten*. "Stop by our showroom" or "Try our product the next time you're in the market" or "Call us today for more information" – steer clear of them all.

- ***Special inducements*** – This tends to bridge the first two elements, above. Think things like "We're giving a special bonus to customers who sign up this week" or "Free samples to the first 50 callers" or "Pre-holiday discounts now in effect".

- ***Qualitative or promotional language*** – This is where things tend to get fuzzy. You're supposed to avoid language which appears to promote the qualitative desirability of the underwriter's goods or services – for instance, "comparative" references stating or implying that the underwriter's goods/services are somehow preferable ("the best plumbers in town" or "cheaper than everybody else" or "largest service department"). The prohibition also extends to language which goes beyond the mere identification of the underwriter's goods or services. For example, you could say that an underwriter "provides a full line of widget products", but ***not*** that that underwriter "provides a full line of widget products in a rainbow of beautiful colors and wonderful textures guaranteed to delight the eye and stay within your budget".

The FCC clearly has a limit in mind — 30 seconds — for the acceptable length of underwriter announcements.

The trouble is that the there is a lot of room between the obviously promotional and the narrowly identifying. And let's be frank here: underwriters usually want, and probably expect, more than a "name/rank/serial number" announcement in return for their contribution. So the NCE licensee ends up pulled between the need to comply with the FCC's less than specific limitations and the underwriter's preference for at least a little bang for its buck.

The recent LPFM decision suggests that the NCE licensee's ability to cater to that preference may be shrinking. The Enforcement Bureau identified the following terms as prohibited:

- With respect to restaurants: "a unique eatery" whose food is "made with only the freshest ingredients"; "their world-famous pepperoni rolls".

- With respect to a copy center: "your one-stop shop for black and white [and] color copies. You can stop by one of our two locations."

- An automotive service center: the owner "takes pride in their honest and reliable service".

While we understand that these could all be read as "promotional" in some sense, each of these descriptives seems, well, descriptive. They certainly don't go overboard and could reasonably have been deemed to be within the "latitude" that the FCC says it accords to NCE licensees. Curiously, in singling out these particular portions of the various announcements, the Commission made no mention of several fairly clear price references elsewhere in the same announcements: "at affordable prices", "she wasn't charged an arm and a leg", "park for free", "free local shuttle service". Since price information is forbidden, one might have thought that the Commission would be concerned about such references – but if it was, you can't tell it from the decision. In other words, the Commission overlooked some seemingly blatant problematic language and instead whacked the licensee for language which appears – to us, at least – as much closer to, if not comfortably inside, the permissible range.

Meanwhile, the decision also includes the observation that "many" of the announcements in question "appear to exceed thirty seconds in length". Of course – as the Bureau expressly acknowledges – there is no limit on the length of underwriting announcements. But that doesn't stop the Bureau from raising its regulatory eyebrow for all to see: the Commission "has found that the longer the announcements, the more likely they are to contain material, as here, that is inconsistent with the 'identification only' purpose of such announcements." So even though the Commission has not imposed any length limits on such announcements, it clearly has limits in mind – um, let's say 30 seconds – and it doesn't seem shy about trying to get that message across.

This case may be an aberration, and may not signal a tightening of standards on underwriting announcements. But at a minimum it should encourage all NCE licensees to take a closer look at their underwriting scripts and to weed out any quasi-promotional language that may have snuck in over time. This may require some uncomfortable chats with underwriters unhappy that their announcements are being neutered, but that could be the cost of compliance.

Careful script review would be especially prudent in view of the current economic environment. Commercial broadcasters historically have often bridled at NCE underwriting announcements that tended to sound like real spots. After all, one station's "underwriting contribution" is another station's "advertising revenue". Beyond a fair amount of grousing, though, the commercial folks have not seemed particularly enthusiastic about trying to call in the *Federales* to stop improper underwriting. But as the number of available advertising dollars shrinks, there may be more incentive for some commercial broadcasters to file complaints with the Commission in an effort to re-direct dollars from the NCE's to their own bottom-lines. As Sergeant Esterhaus used to admonish the Hill Street Blues squad, "Let's be careful out there."

(Continued from page 1)

this carve-out constitutionally permissible, since it appears to impose different regulatory standards based on the content of one's transmissions?)

Perhaps more significantly, the bills would also bolster the Commission's quixotic efforts to promote "localism" in broadcasting generally. The bills are critical of broadcasters, suggesting that there has been "too much [media] consolidation". (The House version goes further, asserting that, as a result of that consolidation, "there have been strong financial incentives . . . to reduce local programming." The Senate version is silent on that point.) The bills call for a "renewal of commitment to localism". The bills also suggest that increasing the number of LPFM stations will increase minority and female ownership in broadcasting and will enhance communications during "local or national emergencies".

The Commission (whether under Acting Chairman Copps or under his permanent successor) is likely to read that Congressional language as a direction to charge full speed ahead with the localism proposals which largely languished over the last year. While the Commission's continued obsession with the DTV transition is likely to distract it from "localism" for another couple of months, we can anticipate a return of the "localism" juggernaut before too long.

If the bills pass and third-adjacent protections (except for NCE stations with RSS on their SCAs) are eliminated, and if the FCC then picks up where it left off back in 2007 and adopts final rules eliminating the second-adjacent channel protections, full-power FM stations will be protected only from co-channel and first-adjacent interference (whether the source is LPFM, FM Translator or FM Booster operations). Given the NAB's opposition to LPFM in the past, this should shape up to be a good fight. Stay tuned.

(Continued from page 5)

exceed it again.

If you are eligible for "small broadcaster" status, you can elect that status by filing the proper form with SoundExchange before the following deadlines:

By April 2, 2009 if the station was already webcasting on March 3, 2009

Within 30 days of commencing webcasting if the station was not webcasting on March 3, 2009

Each successive annual election – with the payment of the $ 100 proxy fee – is then made by January 31. The forms are available on the SoundExchange website.

CPB/SoundExchange Agreement

CPB and SoundExchange entered into an agreement that will effectively exempt eligible webcasters from making *any* payments or reporting playlist information directly to SoundExchange through December 31, 2010. Eligible webcasters *will* still have to make royalty payments, but to CPB instead of SoundExchange. Again, a webcaster can ***elect*** to participate if eligible. You are eligible to take advantage of the terms of the SoundExchange/CPB agreement if:

1. you are qualified to receive funding from CPB;

   OR

2. you are a member of:

   a. National Public Radio, ***OR***

   b. American Public Radio, ***OR***

   c. Public Radio International, ***OR***

   d. Public Radio Exchange, ***OR***

   e. The National Federation of Community Broadcasters.

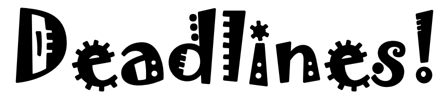
CPB will pay a lump sum of $ 1.85 million to SoundExchange to cover the royalty fees for participating stations for the years 2006-2010 and will make all required playlist reporting to SoundExchange for that period as well. Eligible stations opting to take advantage of the CPB/SoundExchange Agreement will ***not*** have to make any further annual or monthly royalty payments to SoundExchange and will ***not*** have to file quarterly playlist reports with SoundExchange through 2010. Note, however, that CPB may require eligible and participating stations to provide CPB with information that they will forward to SoundExchange. Also, participating stations must agree to withdraw from the appeal of the March, 2007, Copyright Royalty Board decision.

Eligible stations opting to take advantage of the CPB/SoundExchange Agreement will not have to make any further annual or monthly royalty payments to SoundExchange.

We understand that these are major changes requiring you to interpret rather quickly whether you are eligible for one or more of these exemptions, and then further decide whether or not to actually participate. Please do not hesitate to contact us if you have any questions whatsoever.

[Editor's note: Too many words, not enough pictures? For a step-by-step interactive walk-through covering the royalty options currently available to webcasters, check out Kevin's post on our blog: http://www.commlawblog.com/2009/03/articles/intellectual-property/a-stepbystep-guide-to-webcaster-royalties/]

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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plan: training (and periodic refresher training) for all programming staff on the sponsorship identification rules, documenting items received from record companies, and setting clear employment policies concerning compliance, including clear disciplinary consequences for violations.

In addition, the consent decree includes several "business reforms" that describe exactly how the company should approach various activities. The acceptance of cash in return for airplay without the required on-air disclosures, for example, is described as a "prohibited activity". The acceptance of items for use as contest prizes, however, is described as a "permissible restricted activity" — that is, an activity that is allowed provided proper disclosures are aired. The business reforms even describe those activities that might seem to trigger disclosure obligations but that the FCC considers "nominal" (*e.g.*, copies of CDs used to familiarize employees with recordings, low value promotional items, etc.).

The recent consent decree is available through the FCC Enforcement Bureau's website at: http://www.fcc.gov/eb/broadcast/sponsid.html. That page also contains links to the FCC's earlier consent decrees. If your station hasn't revised its payola policies in the last two years, a review of these documents and a conversation with your communications attorney may help stop a payola problem before it starts.

(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.

Television Ownership Reports - All *television* stations located in **Ohio** and **Michigan** 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 **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **Nevada**, **New Mexico**, **Utah**, **Virginia**, **West Virginia**, and **Wyoming** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323 or 323-E.

July 10, 2009

DTV Consumer Education Quarterly Activity Reports - All *television* stations that did not transition to DTV-only operation by March 31 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 April 1 through June 30, 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 first 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.

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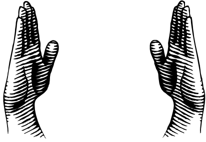
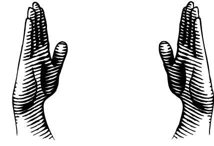


Size does matter

Anti-Trust Thresholds Increased for DOJ/FTC Review of Transactions



By R.J. Quianzon
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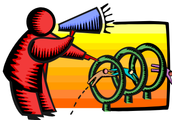
Under federal antitrust law, certain mergers or acquisitions which exceed specified thresholds must first be submitted to the Federal Trade Commission (FTC) and the U.S. Department of Justice for their review before the transaction is consummated. The FTC recently adjusted those thresholds for inflation. As the prices of broadcast properties increase, some broadcasters are finding that the values of their proposed deals are exceeding these thresholds, thereby triggering antitrust inquiries (with all the additional hassle, expense and delay that such inquiries entail).

For reference, certain new thresholds follow:

1. $65,200,000 voting securities and assets threshold for transactions in which:
   - ☑ a non-manufacturing acquisition target has $13 million or more in assets and the acquiring company has $130.3 million or more in assets or net sales; or
   - ☑ a manufacturing acquisition target has $13 million or more in assets and the acquiring company has $130.3 million or more in assets or net sales; or
   - ☑ a target company has $130.3 million or more in assets or net sales and the acquiring company has $13 million or more in assets and net sales.
2. $260,700,000 threshold for voting securities and assets.

In negotiating deals, it is prudent to bear these thresholds in mind. Once they are crossed, additional time and expense to assure compliance with the preliminary review process are virtual certainties.



(Continued from page 6)
sion said that a monetary forfeiture would have been in order. But, oops, the statute of limitations had already tolled, leaving the Division powerless to impose such a forfeiture. So the applicant got its applications granted, and it didn't get fined – but it did get a stern talking-to by the Division, and the grants of its applications (filed in mid-2007 and early 2008) were delayed. Perhaps that was punishment enough.

The take-home message of this case is simple: the Commission remains very serious about compliance with the NPA, and it stands ready to enforce the NPA. And now that the Division has had the chance to alert the industry through this recent decision, the next applicant who tries to get away with less-than-complete environmental compliance can likely expect to suffer a considerably harsher fate than the Wyoming applicant here.

We at FHH can help guide CP applicants through the various steps to avoid such a harsher fate.

WE REALLY MEAN IT: Come APRIL, 2009, the paper edition of The Memo to Clients Digital Transition will be HISTORY

As previously announced, **we are going to stop distributing the *Memo* in a paper edition**. We ***will*** distribute it electronically ***starting with next month's issue***. (Since we have been warning you about this for months already, this should not be a surprise to you at this point.) If you want to be sure that you continue to receive the *Memo* uninterrupted after this month, 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 1,000 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**".*

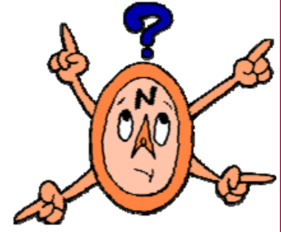
There are still more than 1,000 of you out there who will be *Memo*-less when we make the transition ***unless*** you get us your preferred e-mail address(es) (Yes, you can list as many separate addresses, and addressees, as you want.) Again, the March, 2009, issue is the last of the paper editions. You have been warned.

And never the twain shall meet . . .

No Latitude for Wrong Longitude

Text box error ruled irreparable

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



For years construction permit applicants (and their consulting engineers and attorneys) have taken comfort in the knowledge that, if a technical error is made in the construction permit application, the applicant has the opportunity to correct it. But watch out: that comfort zone just got a bit smaller. The FCC recently declined to allow an NCE-FM applicant a chance to correct an error in its application's Tech Box error. According to the Audio Division, allowing the amendment would have been tantamount to a major change, and major changes in such situations are a non-starter.

The application proposed a new NCE-FM station in beautiful Coggon, Iowa. Unfortunately for the applicant, in the Tech Box of the original application filed in the 2007 window, the application inadvertently checked the east, rather than west, longitude radio button. As a result, the proposed transmitter site wasn't in Iowa, but rather on the edge of the Takla Makan Desert in central China, just south of Mongolia. The folks in the Audio Division quickly noticed that the proposed contour "failed to provide adequate community coverage as required by Section 73.515 of the Rules" and dismissed the application for that flaw.

The applicant sought reconsideration and tendered a curative amendment along with a request that its application be reinstated *nunc pro tunc*. It argued that every other aspect of the original application made crystal clear that this was an obvious, and obviously inadvertent, error. The detailed engineering exhibit indicated the correct geographic coordinates, and every indication in that exhibit (including spacing studies, Channel 6 analyses, etc., etc.) all plainly established that the applicant was looking to serve Coggon, not Shanshan or Qijiaojing.

Ordinarily, "minor" curative amendments are accepted without hesitation. But not so here. As the Division pointed out in rejecting the amendment and denying reconsideration, the instructions to the application form specify that, when information in the Tech Box conflicts with information in the rest of an application, the Tech Box wins. Moreover, the staff emphasized, the proffered amendment "describe[d] a fundamentally different location than that specified in the Tech Box." Because of that, the Division was unwilling to let the hapless applicant back in the door.

This decision underscores the importance of carefully proofreading an application ***before*** it gets filed. And of all sections, the Tech Box is the most important to review, review, and review again. The Tech Box contains very limited information, but what's in there is – as we see from the Division's decision – extremely important.

(Continued from page 7)

ficient to get around the "bare license" problem.

Before anyone gets too excited about exactly how little must accompany a license, it should also be noted that the Commission emphasized that the creditor/buyer claimed (in the asset purchase agreement filed with its application) that it already had acquired, through other transactions, the technical facilities necessary to operate the station. In other words, the creditor/buyer's story was that acquisition of the license would simply be the last piece of the puzzle necessary to return the station to operation.

The licensee/debtor also argued that it had been enjoined by a Federal court from selling the station until a judgment in a copyright infringement matter had been satisfied. The Commission was not impressed. As the FCC saw it, a Commission grant of an assignment application merely allows the parties to a transaction to close the transaction, but it does not compel them to do so. Other civil remedies may still go forward. The Commission suggested if the licensee/debtor believed that there was a problem with the Federal court order, it should seek relief from the court which issued the order.

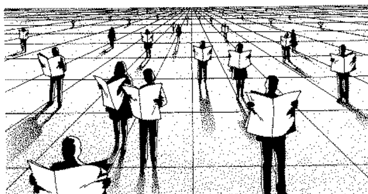
The Commission's decision sends decidedly mixed messages. On the one hand, it seems to re-assert a clear rule that even state courts cannot authorize the sale of licenses without prior FCC approval – and yet, the Commission still okays the sale which the state court authorized without that prior approval. And the decision re-asserts the vitality of the "bare license" policy, but still finds that it takes next to nothing in addition to a "bare license" (in this case, a public file and a list of advertisers) to satisfy that policy.

The Commission's problem here may be that it wants to accommodate state courts even though it doesn't have to (and even though, if some of its statements were to be believed, its authority to do so is at least somewhat limited). While it's nice that the Commission may want to cooperate with state courts, it would be nicer if the Commission would make clear, up front, exactly how such cooperation is supposed to function: strained, after-the-fact attempts to provide an agency *imprimatur* on state court actions that plainly fall short of the Commission's requirements tend to undermine, rather than reinforce, those requirements.

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

Updates on the News

"I want my DTV (update)" – Alert readers may have noticed that, for the first time in months, we have not included a DTV Updates article. That's mainly because the Big News on the DTV front came, and went, in mid-month. On March 13 (another Friday the 13th fright-fest), the DTV transition process took the latest zig – or maybe it was a zag (it's getting hard to keep track) – in its long-running, recently extended, course. The Commission imposed considerable new burdens on stations (especially major network affiliates) who intended to terminate analog operation prior to June 12 – and it stuck to the March 17 election date which it had previously announced. That meant that affected licensees had to review and digest the FCC's handiwork (all 46 single-spaced, bureaucratically-crafted pages of it) and then decide if they could still proceed as they had previously planned. In many instances, early analog termination required coordination with other licensees in the market (since early terminators had to certify that the market would continue to receive certain levels of analog service through June 12), which complicated matters considerably. Perhaps as a result of the roadblocks which the Commission's latest decision imposed, the vast majority of stations (927 out of 1,085) which had not already shut down their analogs indicated that they'd continue to plug away on the analog side until June 12. (Any masochist who might want to re-visit all this can find a number of relevant posts on our blog at www.commlawblog.com.)



So for the time being, we're all sitting around as the clock runs down to June 12. The Commission, with its regulatory knickers still in a twist about the End-of-theWorld-As-We Know-It scenario that they expect to occur when June 12 finally arrives, has solicited proposals for "transition assistance". The services the FCC is looking for include "Basic In-Home Installation Services" and "DTV Walk-in Help Centers". The Commission's continued hyperventilation about potential cataclysms is a bit odd at this point. Immediately after more than 640 stations turned off their analogs on February 17 (the original, much-publicized, national termination date), the Commission released a report indicating that its own help-line (1-888-CALLFCC) had received fewer than 75,000 calls, total, from February 17-19. Since then the Commission hasn't issued any more tallies of incoming calls. That could mean, of course, that the number of calls has skyrocketed so much that they have swamped the available facilities, overwhelming the Commission's ability to keep track of them, much less report them to public. On the other hand, fans of Occam's Razor might conclude otherwise, since it seems much more likely that the number of calls has dropped radically since the February termination date. The Commission may clarify this eventually. We'll let you know.

One interesting aspect of the FCC's solicitation for proposals is the fact those solicitations were set out in "Statements of Work (SOW)" issued by the Commission. Presumably, it takes a SOW to generate PORK.

Rules for sale – The Commission has announced that the latest hard-bound version of its rules is now available is an attractive five-volume set, perfect for your coffee table or decorative bookshelf. Economy-minded broadcasters might favor just Volumes 1 (containing Parts 0-19) and 4 (Parts 70-79), which include the majority of rules they will need to worry about. But heads up – even though the books are the latest and greatest print copies available from the government, they reflect the rules as they were back in October, 2008. That means that they're *already* more than five months out of date, and that's only going to get worse rather than better as you wait for your order to be processed. As a cheap alternative, you might want to create a bookmark on your Internet browser for http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?sid=6718cde20def94049f0b5cc5441b48b9&c=ecfr&tpl=/ecfrbrowse/Title47/47tab_02.tpl. That'll take you to an on-line site, maintained by the Government Printing Office (so you know it's official), which provides access to the FCC's rules as revised no more than two business days previously. So it's more current than the print version, and it's free. Is there really any choice here? (And if you don't want to set up a bookmark for a site with that incredibly long URL, no problem – you can access the GPO site from a link which we have conveniently placed on our blog at www.commlawblog.com.)

They're baaaaaack . . . – If it's March, it must be time for random EEO audits. And sure enough, the FCC spun the Wheel O' Stations and came up with a couple of lists of radio and TV stations to which the Commission sent audit letters. If you're one of the 200-300 stations so honored, you have until May 4 to respond.

Do not forsake me, O my (media) darlin' – Who's the *Media Darling of the Month*? As you will see, the standard notice has been omitted from its usual spot in the "*On the Job, On the Go*" box. But that's only because of space limitations on that particular page this month. We'll pick up the slack here to recognize a number of ink-getters this month: **Peter Tannenwald**, **Frank J**, **Anne Goodwin Crump** and **Harry Cole** all managed to get themselves quoted. Maybe we should start setting the bar higher. . .

FM ALLOTMENTS ADOPTED – 2/20/09-3/19/09

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
SC	Williston	35 miles E of Augusta, GA	260A	08-201	TBA
MI	Evart	89 miles NW of Saginaw, MI	274A	08-26	TBA
MI	Ludington	95 miles N of Grand Rapids, MI	249A	08-26	Accommodation Substitution

FM ALLOTMENTS PROPOSED – 2/20/09-3/19/09

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (*i.e.*, Drop-in, Section 1.420, Counterproposal)
LA	Dulac	76 miles S of New Orleans, LA	230A	09-18	Cmnts Due: 4/20/09 Reply Due: 5/5/09	Accommodation Substitution

Notice Concerning Listings of FM Allotments

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

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