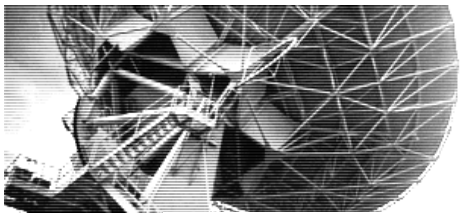


FLETCHER, HEALD & HILDRETH
Communications Law & Regulation

MEMORANDUM TO CLIENTS

News and Analysis of Recent Events in the Field of Communications

Move-ins out, move-outs in

Extreme Makeover - Radio Edition

Overhaul of AM/FM Allocations Standards Proposed

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

In a sweeping notice of proposed rulemaking (NPRM), the FCC has proposed a major re-vamp of the AM and FM allocations process. The wide-ranging NPRM covers a vast array of allotment-related elements, including 307(b) analyses, auction niceties, translator band-hopping and codification of terrain roughness policies, among others. Acting Chairman Copps and Commissioner Adelstein, longtime cheerleaders for small community and rural radio (and equally longtime critics of the process by which rural stations have tended to gravitate into larger markets), both issued gushing statements in support of the proposals. Commissioner McDowell's supporting statement, on the other hand, reflected considerable reservation.

One apparent purpose of the NPRM is to arrest, and reverse, the allocation of channels and stations to larger markets. Another is to drive contested applications to auction.

The backstory on this should be familiar.

Section 307(b) of the Communications Act requires that the Commission "provide a fair, efficient, and equitable distribution" of broadcast channels among the "several States and communities." Since 1982 the FCC has used a set of four "priorities" to assay the relative 307(b) merits of various AM and FM proposals. A proposal which would provide the first fulltime reception (a/k/a "white area") service gets the highest priority; a proposal providing the second fulltime reception (a/k/a "gray area") service falls under Priority 2. Because of the proliferation of radio stations across the country, very few current proposals trigger either of those two.

As a result, the majority of new AM and FM proposals end up being assessed under Priority 3 (*i.e.*, whether the station or channel in question would be the first service allotted to the particular community proposed) or Priority 4, a catch-all hodge-podge of "other public interest matters" (including, among others, the total population to be served – the bigger the population, the greater the 307(b) preference).

The last decade or so has seen a trend toward moving stations in from the boonies toward larger, established population centers. Many such proposals have involved allotting a channel or station to a station-less community in or near an already well-served Urbanized Area – thereby triggering Priority 3. Other proposals lacking such a convenient station-less community have still utilized significant population increases under Priority 4 – because, after all, the bigger the proposed market, the more people there are to serve.

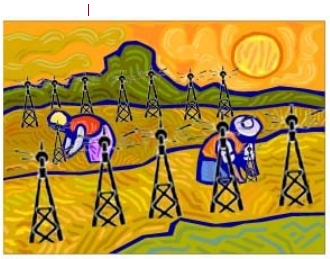
One apparent purpose of the NPRM is to arrest, and reverse, the allocation of channels and stations to larger markets. Another purpose seems to be to tighten up certain aspects of the broadcast auction system to drive contested applications to auction and encourage applicants entitled to "bidding credits" to participate. A third purpose – actually, a combination of the first two – is to facilitate the allocation of broadcast spectrum to Native American Tribal Groups serving tribal lands.

(Continued on page 8)

April, 2009 **No. 09-04**

Inside this issue . . .

40+ Years And Counting 2
Focus on FCC Fines 3
Content Redaction Patent Action 4
Six Fix Nixed, Again 5
FCC Sets Date, Procedures for Auction 79 6
Spectrum Auction Bidders In Qui Tam Scam Jam 7
Winning Bidder Seeks Refund for Unbuildable Permit 7
New Ownership Reporting Rules Adopted As Commissioners Seek "Diversity" 11
Dialogue: Frank Montero 12
LPTV Station To Be Arbitron-Rated 13
Deadlines 14
Tom Dougherty—Back in the FHH Fold 15
Updates on the News 18
Allotments 19



Audio Division knows them when it sees them . . .

40+ Years And Counting

"Antenna Farm" still undefined

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

Do you know what constitutes an antenna farm?

Nobody else does, either. Except maybe the FCC. But, for reasons that aren't exactly clear, they're not telling.

The question came up recently when a CP applicant mistakenly thought it knew, but it didn't, and but for a legal technicality (let's hear it for statutes of limitations!) it would have been socked with a fine from the FCC's Audio Division.

The recent case was described, in a different context, in last month's *Memo to Clients*. It involved the folks who had failed to jump through the various pre-application environmental hoops established in the Commission's National Programmatic Agreement. One reason they relied on for not doing so: their proposed tower was to be built in an "antenna farm", and the Commission's rules specifically state that a proposal for a new tower in an established antenna farm is categorically excluded from environmental processing. Since the proposed site already included two existing towers reasonably close together, it seemed reasonable to conclude that that site could be deemed an "antenna farm", thus relieving them of the environmental homework.

Wrong. The Division concluded that their site was neither an officially designated antenna farm nor a *de facto* antenna farm.

Let's take a step back here. For openers, what exactly is an antenna farm? More than 40 years ago, the Commission added Section 17.9, entitled "Designated Antenna Farm Areas", to its rules. That section currently reads, *in its entirety* (including the bracketed language quoted below, which is exactly as it appears in the rule), as follows:

> The areas described in the following paragraphs of this section are established as antenna farm areas [appropriate paragraphs will be added as necessary].

As it turns out, the Commission has *never* actually designated any site as an official antenna farm. Nor, for that matter, has the Commission ever bothered to articulate exactly what factors it would consider if it ever got around to gracing any site with that designation. So the site that was recently touted, by the applicant, as an "antenna farm" had not been officially so designated, at least not by the FCC.

No problem. The categorical exclusion from environmental processing includes, in addition to officially designated antenna farms, "*de facto*" antenna farms. The environmental rule refers to antenna farms as areas "in which similar antenna towers are clustered, whether or not such area has been officially designated as an antenna farm." Certainly a site featuring two existing towers would satisfy *that* definition.

Uh, no, not really, according to the Division.

The Audio Division acknowledged that no threshold requirements have been specified in determining what a *de facto* antenna farm is, but the Division was nevertheless able to determine that the site in question was not a *de facto* antenna farm.

The site consisted of two towers, both located within about 1,000 feet of the proposed third tower. The applicant reasonably argued that the close proximity of two

(Continued on page 16)

FLETCHER, HEALD & HILDRETH P.L.C.

1300 N. 17th Street - 11th Floor
Arlington, Virginia 22209
***Tel*:** (703) 812-0400
***Fax*:** (703) 812-0486
***E-Mail*:** Office@fhhlaw.com
***Web Site*:** fhhlaw.com
Blog site: www.commlawblog.com

Supervisory Member
Vincent J. Curtis, Jr.

Co-Editors
Howard M. Weiss
Harry F. Cole

Contributing Writers
Denise Branson,
Anne Goodwin Crump,
Kevin M. Goldberg, Steve Lovelady,
Patrick Murck, R.J. Quianzon,
Davina Sashkin and Howard Weiss

Memorandum to Clients is published on a regular basis by Fletcher, Heald & Hildreth, P.L.C. This publication contains general legal information which is not intended to be deemed legal advice or solicitation of clients. Readers should not act upon information presented herein without professional legal counseling addressing the facts and circumstances specific to them.

Distribution of this publication does not create or extend an attorney-client relationship.

Copyright © 2009 Fletcher, Heald & Hildreth, P.L.C.
All rights reserved
Copying is permitted for internal distribution.

Focus on FCC Fines

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

Contests: Winning a car lease is not the same as winning a car – A Boston FM station found out that the FCC doesn't like it when licensees are less then forthcoming with their listeners. In this case, a listener was revved-up when he became a finalist in a contest for a car, only to discover that the prize was *not* ownership of a car, but merely a two-year car lease. Despite the station's offer of several excuses, the FCC pulled out its ticket book and wrote the station a $4,000 violation. The station has 30 days to try to argue its way out of the fine.

The station promoted its contest as featuring a grand prize of a Mercedes Benz, an Audi or a Toyota. Apparently leaving no room for misunderstanding, the station (according to the Commission) consistently advertised the top prize with a tag line of "no fine print gimmicks". As it turned out, though, there was some fine print, and the fine print mattered, big time. When one of the station's listeners qualified for a chance to participate in the contest, he went on-line to read the contest rules. Despite the fact that the station had promoted the contest as a chance to win one of the three cars, the fine print actually provided the winner with only a two-year lease of the car. In addition, the winner had to have an acceptable credit rating to qualify for the lease. The listener fired off a letter to the FCC to complain about the contest.

Federal regulations prohibit broadcasting a contest announcement "if the net impression of the announcement has a tendency to mislead the public." In this case, the station's promotions highlighted that the winner would have a choice of three cars. However, the broadcasts never referred listeners to the contest rules, which were available only on the station's web site. The FCC made short order of the licensee's attempted arguments in support of its misleading contest.

Station demonstrates STL to FCC agent but, hey, where's the license? – A Florida low-power television station cooperated with a recent FCC inspection, providing the agent a tour of both its studio and its transmitter. As part of the inspection, the FCC agent observed that the studio was in a different location than the station's transmitter. The station's general manager and chief engineer both explained to the FCC that they were able to deliver the signal from studio to transmitter by using a studio-transmitter link at 950 MHz operating at 2.8 watts of output power. No problem there – until, that is, the FCC agent asked to see the license for the STL. Both the GM and engineer came up empty-handed. The station had the gear but had never followed through with licensing it. Although the Commission's rules provide broadcasters with automatic "special temporary authority" (STA) to use certain auxiliary frequencies for a very limited amount of time each year, the station admitted to having exceeded the permitted amount. The station was hit with a $4,000 fine.

While the FCC agent was looking around, he also noticed that the station had no EAS equipment. Although the station had purchased unlicensed STL gear, it had never acquired its EAS equipment. When the agent asked the GM and engineer where the equipment was, the worst situation arose. The General Manager told the FCC agent that he did not believe that EAS equipment was needed for the station. In contrast, the chief engineer told the FCC agent that not only was he aware that the equipment necessary but that he had been hounding the manager repeatedly to buy the EAS gear. The FCC spanked the station for an additional $5,600 fine for failing to maintain EAS equipment.

Nationwide radio programmer fined for letting license expire – Saga Radio Network has been fined $5,200 for allowing its satellite earth station license to expire. The network had to turn itself in so that it could renew its license and the FCC responded by issuing the fine. The license for the earth station expired in 2007 and the network did not notice it until nine months later. In order to continue operating, the network had to apply for immediate special authority from the FCC and submit a standard renewal application. As part of the application for special authority, the network faced the FCC's Catch-22 regulation: in order to explain why it needed special authority to operate, the network had to disclose that it was operating without the license that it needed. Armed with the network's admission, the FCC rapidly issued the special authority, followed in quick succession by the fine.

Readers are reminded that periodic review of their FCC authorizations and expiration dates is a good idea. It is important also to remember that you should review, in addition to your main broadcast licenses, the host of other FCC authorizations necessary for your operation. Those include licenses for STLs, satellite stations, walkie-talkie, choppers, vans and trucks and other gear.

The seller kept the studio – The buyer of an Indiana television station faces a $9,000 fine for operating the station without a main studio. The buyer purchased a TV license and transmitter from a local college. The college kept its studio and allowed the buyer to lease space on its antenna. The buyer continued to program

(Continued on page 15)

Attention streaming broadcasters!

Content Redaction Patent Action

Aldav, LLC claims big radio companies infringed patented content-substitution methods

By Kevin M. Goldberg
goldberg@fhhlaw.com
703-812-0462

Radio stations that stream their content onto the Internet will want to keep an eye on a patent lawsuit filed in the United States District Court for the Eastern District of Texas. Several major radio companies have been accused of patent infringement by engaging in "content replacement" – that is, they substituted Internet-friendly content in place of more locally-oriented content that went out in their over-the-air broadcasts. While the complaint provides no details, it suggests that the local content which was removed consisted, at least in part, of commercials.

The suit, filed April 16, pits Plaintiff Aldav, LLC, against a list of defendants comprising a virtual who's who of Big Name National Radio Operators: Clear Channel, CBS Radio, Citadel, Cox Radio, Cumulus, Entercom, Gap Broadcasting, Radio One, Regent, Saga, Univision and the Aloha Station Trust (which is operating some Clear Channel stations).

At issue is a patent (No. 6,577,716, if you're into that kind of thing) which covers methods for (a) "replacing a portion of the content of a radio broadcast that is to be distributed over the Internet" and (b) "distributing a portion of the content of a radio station broadcast over the Internet." To folks not steeped in the technical intricacies of patent descriptions (*i.e.*, us), the overall description of the "methods" is not a model of specificity and detail. It refers, without much elaboration, to the use of content-related "markers" to trigger the identification of "local" programming (*e.g.*, ads, news, weather, sports, traffic) and the replacement of such programming with programming "applicable to individuals located outside the geographical range of the radio broadcast".

Exactly what (if any) specific hardware and/or software might be necessary to implement these "methods" does not appear to be identified in the patent itself.

If successful, Aldav could potentially receive millions in both "actual" and "enhanced" damages, and could obtain a permanent injunction preventing these stations from using the patented process without Aldav's permission.

Of course, it is understandable that broadcasters might want to yank local programming from their Internet stream and replace it with wider-interest material. There are a number of reasons for doing so. Replacement of local spots often makes sense, since the advertiser presumably is not expecting business from a global audience, and, conversely, a global audience presumably isn't interested in hearing about some local business. Also, a station's right to transmit some content, including locally-produced spots and even some music, may not include Internet transmission – in which case the station could subject itself to claims by the content's producer, talent and/or copyright holder for additional compensation if that content were to be included in the Internet stream. (While the station may be indemnified by the commercial producer or broker in the event that the talent sues to recoup the extra compensation he or she believes is owed for this extra performance of the commercial, the station and the station alone will be on the hook for the sound recordings performed but not reported to SoundExchange.)

Kevin's Copyright Corner

So it's no surprise that content substitution may be standard operating procedure among many, if not most, streamers.

The big question raised by the Aldav suit is whether Aldav's patent really does give it a monopolistic (or near-monopolistic) lock on any such program-replacement activity. Presumably Aldav thinks so, and is looking to establish that principle by dipping into some of the deepest pockets in the business. In view of the potentially astronomical stakes on the table, though, it is not likely that anybody's going to be conceding liability in the early rounds.

Meanwhile, streaming stations not targeted by Aldav's suit should take a close look at their own program-substitution practices, with an eye to trying to dodge any litigation bullets that might get shot in their direction as this situation develops.

Inevitable video migration? Sez who?

Six Fix Nixed, Again

Media Bureau puts kibosh on NCE applications with Channel 6 contingencies

By Howard M. Weiss
weiss@fhhlaw.com
703-812-0414

Sometimes it doesn't pay to get creative, especially where the FCC's rules are concerned. This was apparent in an April 1 Public Notice which supposedly "provided guidance" to noncommercial educational (NCE) FM stations with regard to television Channel 6 protection requirements. Significantly, the Notice was issued by the Media Bureau, *not* the Audio Division.

Because NCE FM channels are close neighbors to Channel 6 on the spectrum, NCE FM stations (and related applications) must protect nearby Channel 6 stations. A couple of very narrow exceptions are available, one of which involves submission of an unconditional agreement between the NCE and the Channel 6 station in which the latter "concur[s] with the proposed NCE facilities."

The Channel 6 protection requirement cropped up big time in the run-up to the October, 2007, NCE FM filing window. Channel 6 problems would ordinarily have prevented the filing of many applications. But several NCE applicants came up with a work-around. They noted first that, after the DTV transition (then scheduled for February 17, 2009), a lot of Channel 6 operations would simply disappear, as the stations in question abandon their analog Channel 6 facilities for digital facilities elsewhere on the TV band. The would-be applicants then calculated, correctly, that the NCE FM permits they were filing for wouldn't be granted for at least a year or two – which meant that their three-year construction periods would run well past the DTV transition.

The Bureau's April 1, 2009 Notice conclusively slams the door by barring reliance on anticipated abandonment of Channel 6 facilities.

So, they reasoned, if there would be no Channel 6 operation to worry about when construction time actually rolls around, shouldn't they be able to ignore Channel 6 at the application stage?

Thinking along these lines, a number of applicants either sought waivers of the protection rules or entered into, and submitted, contingent agreements with the nearby Channel 6 station. (The contingent agreements reflected the Channel 6 licensee's consent to the filing of the NCE FM application, generally with the proviso that the FM wouldn't crank up – and thus potentially cause interference – until the TV station had vacated the Channel 6 premises, thereby eliminating the practical possibility of interference entirely.)

As far as we can tell, neither the full Commission nor the Bureau nor the Audio Division had opined as to the acceptability of that approach prior to the October, 2007, window. Since then the Division has indicated in one or two decisions that it was not inclined to accept such applications. (*See* the related article on page 5 of the April, 2008 *Memo to Clients*.) But the Bureau's April 1, 2009 Notice – issued a mere 18 months *after* the applications were filed – conclusively slams the door by barring such creative solutions. The Notice states unequivocally that the Bureau will dismiss any NCE application that conflicts with the interference rules and fails to include either: (a) a showing that no more than 3,000 people would be subject to the predicted interference; or (b) an "unconditional consent letter" from the Channel 6 licensee. To make itself *perfectly clear*, the Notice warns that that consent "cannot contain any contingencies, conditions, qualifications or restrictions." (We get it; we really do.)

Applications filed in the October, 2007, window are subject to the terms of the Notice, which means that any such application that doesn't satisfy the Notice is toast, since the Bureau emphasized that any attempt to revive the application through an amendment or a petition for reconsideration (even after the Channel 6 station goes away) will be unceremoniously rejected. Further, with regard to currently pending mutually-exclusive NCE applications for new stations, the Bureau notes it will dismiss the applications of NCE FM "tentative selectees" who have attempted the end run described above.

The Notice does magnanimously indicate that, after the June 12 DTV transition, the Bureau will open a filing window for NCE stations to permit them to take advantage of the Channel 6 migration. (The Notice refers only to "stations", which suggests that the window may be limited to licensees seeking to modify their facilities – that is, the window would appear not to be available for new applications. Time will tell.) But applicants for minor changes who attempt to do so *before* the window opens will in any event be shown the door. And, oh, by the way, the Commission will start a rulemaking to evaluate the "continued viability" of the Channel 6 protection requirements after completion of the digital TV changeover.

The Bureau's position is not inherently irrational. To a significant degree, the Bureau appears to be trying to keep the playing field level by not rewarding creative folks who thought "outside the box" – well, not really

(Continued on page 15)

SPECIAL TWO-PAGE AUCTION SPREAD

122 FM channels on the block

FCC Sets Dates, Procedures for Auction 79

The Commission is hustling to get Auction 79 ready to roll – the agency has already followed up its preliminary request for comments (issued at the end of February) with the issuance of a formal "Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 79" (Auction 79 Notice). With the Auction 79 Notice the auction process shifts into high gear.

The Auction 79 Notice contains few surprises. It addresses and resolves a small number of proposed tweaks to its auction processes, but for the most part adheres to the procedures which have been used for broadcast auctions over the years. If you (a) are interested in participating in the auction but (b) are not familiar with those procedures, you should start now to get a handle on how FCC broadcast auctions work. The system is not always intuitively obvious, and unwary (and unknowing) bidders are at a very distinct disadvantage when the action starts.

There are at least two notable changes from the past.

With respect to the interaction of the Commission's standard ownership attribution rules and eligibility for bidding credit (as an "eligible entity"), the Auction 79 Notice reminds would-be participants that the definition of "eligible entity" was revised in the Commission's 2008 Diversity Order. Under the revised "equity-debt plus" aspect of that definition,

> the holder of an equity or debt interest in the applicant [is permitted] to exceed the . . . 33 percent threshold without triggering attribution provided (1) the combined equity and debt in the "eligible entity" is less than 50 percent; or (2) the total debt in the "eligible entity" does not exceed 80 percent of the asset value, and the interest holder does not hold any equity interest, option, or promise to acquire an equity interest in the "eligible entity" or any related entity.

This may give rise to some additional opportunities for some applicants and investors.

On the purely procedural side, the Wireless Telecommunications and Media Bureaus (who administer auctions) have given themselves the power to impose alternative "stopping rules" if they deem such rules to be appropriate. Historically, the Bureaus have used a "simultaneous stopping rule" approach under which all CPs would remain available for bidding until bidding closes on all CPs simultaneously. As a practical matter, that meant that, even after the vast majority of bidding battles had been wrapped up, bidding was still technically "open" as long as even one CP was still being actively contested. While the Bureaus intend to adhere to this standard "simultaneous stopping rule" to start out with in Auction 79, they indicate in the Auction 79 Notice that they may opt to use alternative versions of the stopping rule, with or without prior announcement during the auction, if they think that doing so is appropriate.

The FCC is ruthless in enforcing its anti-collusion rules, which impose an iron-clad Cone of Silence between competing applicants from the filing of their Form 175's until the deadline for down payments by successful bidders.

And one other auction-related policy that *always* warrants a reminder: the anti-collusion rules. The Commission is ruthless in enforcing those rules, which impose an iron-clad Cone of Silence between competing applicants from the filing of their respective short-form Form 175 applications until the deadline for down payments by successful bidders. Note that the prohibition on ***any*** auction-related communications with potential competing bidders applies to you even if, after you file a Form 175, you decide not to participate in the auction at all. And "auction-related communications" can include a host of matters that you might not ordinarily think to be prohibited. Extreme caution is in order.

Anyone who has any potential interest in participating in Auction 79 should review the notice in detail. Time is running short. Here are the important dates established in the notice:

June 16, 2009 – 12:00 noon ET - Short-Form Application (FCC Form 175) Filing Window Opens

June 25, 2009 – prior to 6:00 p.m. ET - Short-Form Application (FCC Form 175) Filing Window Deadline

July 31, 2009 – 6:00 p.m. ET - Upfront Payments (via wire transfer)

September 1, 2009 - Auction Begins

The Commission is also offering an auction seminar on June 16, 2009, for newbies or folks who want to re-gain their auction chops. Additionally, the Commission will conduct a "mock auction" on August 28, 2009, again to permit folks to dust off any cobwebs and be ready to jump right in when the bidding starts for real on September 1.

Bidders' plight, whistleblowers' delight

Spectrum Auction Bidders In Qui Tam Scam Jam

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

With the public issuance of letters to certain winners in Auctions 58 (PCS licenses), 66 (AWS licenses) and 73 (700 MHz licenses), the Commission has lifted the curtain ever so slightly on a melodrama that has been playing out in the Federal District Court since 2007. While we still don't know the entire cast of players, much less how the melodrama will be resolved, we can say one thing for sure: it is ***NOT*** a good idea to try to play cute with the FCC's bidding rules in an effort to secure undeserved bidding credits. Even if the FCC doesn't catch you, a little-known provision of Federal law provides private parties both a major league financial incentive to blow the whistle on such misconduct ***and*** a non-FCC forum in which to blow that whistle.

Two cautionary tales for spectrum bidders

The source of the somewhat obscure process is the False Claims Act. Usually invoked by "whistleblowers" eager to call attention to waste in the government procurement process (think hammers bought by Uncle Sam for $5,000 a pop), the FCA permits anyone to file a complaint "on behalf of the U.S. Government" to recover ill-gotten gains. (The *cognoscenti* refer to such actions as "*qui tam*" suits – don't ask why.) To sweeten the deal, another provision of the law also permits the person making the claim to skim off up to 30% of any settlement or damages award that might result. And since the Act *also* provides for *treble damages*, the whistleblower's potential payday can easily reach into the eight digits.

The FCA first snuck into the FCC's back yard several years ago, when allegations of misconduct were directed against a number of bidders in FCC auctions. The claim was that all of the targeted bidders – who had claimed entitlement to bidding credits – were in fact fronts for other real parties in interest who would not have been entitled to such credits. As a result, according to the allegations, the government was underpaid for the spectrum to the tune of tens of millions of dollars. The case was litigated over several years. It was finally resolved in a settlement in which the accused party did *not* admit any guilt, but still coughed up about $130 million to put the whole thing behind him. Mr. Whistleblower, *i.e.*, the guy who initially invoked the False Claims Act, took home more than $30 million.

Very shortly after that settlement was reached in 2006, two more cases were brought. They targeted completely different parties and deals, but the litigation approach

(Continued on page 13)

Caveat bidder!

Winning Bidder Seeks Refund for Unbuildable Permit

By Steve Lovelady
lovelady@fhhlaw.com
703-812-0517

If you are thinking about participating in the FCC's upcoming FM Auction 79 (*see* related article on page 6), you should pay attention to what happened to the "winning" high bidder in a similar FCC auction in 2004. That bidder recently petitioned the FCC for a refund of the nearly $4.4 million it paid to the FCC for an FM construction permit in Auction 37. The reason? Supposedly unsolvable interference problems with frequencies used by the FAA to guide planes making instrument landings at airports. Because of those problems, the station can't be built out – not, at least, consistently with its CP.

The bidder in question was a big player in Auction 37, winning 10 CP's with bids totaling over $15 million. Its highest bid (and the third highest bid in the entire auction of over 250 permits) was $4.4 million for a permit to build a Class A station serving beautiful downtown Pacific Junction, Iowa. Located about 20 miles south of Omaha, Pacific Junction may have been the bidder's ticket into the Omaha, Nebraska/Council Bluffs, Iowa market. There certainly appears to have been some method to the bidder's madness, as it subsequently upgraded the permit to Class C2 (increasing the power about 20-fold) and paid to move another station in the market so that its new-and-improved facilities could be built out. It signed a lease for its designated tower, started paying rent for the tower, and even started buying equipment to build the station. Life was good.

The fatal arrow that pierced the bidder's heel, however, was a technical requirement involving the tower it was planning to use. The tower was already built (with another radio station up and running on it) and no increase in tower height was needed, so normally no FAA clearance would have been required. But what the bidder apparently didn't know and hadn't counted on was the fact that the tower's original FAA clearance contained a condition that any new radio station added to the tower would require frequency coordination with the FAA. The tower owner (not the bidder, since it wasn't the bidder's responsibility) dutifully complied with this requirement, notifying the FAA in late 2007 that it intended to install the bidder's FM broadcast antenna on the tower.

The FAA responded with a "Notice of Presumed Hazard". Bad news indeed. The FCC won't let you operate if you're going to endanger air traffic. Good if you are flying in an

(Continued on page 17)

(Continued from page 1)

The specific proposals include the following:

307(b) Analysis Modifications

Allotment Priorities

The Commission proposes that:

- no Priority 3 preference should be awarded to proposed AM or FM facilities which would ***or could*** be modified to place a principal community signal over the majority of an Urbanized Area. Instead, the Commission would adopt a rebuttable presumption that the proposal is for the Urbanized Area, and not for the station-less proposed community of license. This would likely put the kibosh on many "move-ins" of the kind that the Commission has routinely approved up to now. The NPRM solicits comments on what kind of showing might rebut the presumption the FCC is proposing.

- no dispositive Section 307(b) preferences under Priority 4 should be awarded to new or major change AM applications. In the alternative, Priority 4 preferences would normally be denied to AM applications when 75% or more of the population within the proposed city-grade contour (*i.e.*, 5 mV/m) receives more than five aural services ***and*** the proposed community of license has more than five transmission services. Applications falling under those "floors" might still gain a Priority 4 preference, but only if they have a "service value index differential" (SVI) of at least 50%. (SVI is a relatively arcane and byzantine method, originally utilized in the FM context, of discounting raw population totals based on the number of services received.) Either of these approaches would likely result in fewer dispositive 307(b) awards, meaning that more AM applications would end up in auctions (since an application with a 307(b) preference otherwise beats out mutually exclusive applications, making an auction unnecessary).

- a new "underserved listeners" priority – which would be co-equal with Priorities 2 and 3 – should be created for any AM auction and FM allotment proposal that would provide a third, fourth, or fifth aural reception service to a substantial portion of the proposed service population. How much is "a substantial portion"? That's open for comment. The NPRM asks whether this new priority should be limited to proposals providing such service to "at least 15, 25, 35, or 50 percent of the proposed service population".

*The FCC proposes an **absolute** prohibition on city-of-license changes that create white or gray areas (i.e., areas with no or one reception service, respectively).*

Community of License Changes

To address what it sees as the unfettered migration of stations from small communities to metropolitan areas, the FCC proposes an ***absolute*** prohibition on city-of-license changes that create white or gray areas (*i.e.*, areas with no or one reception service, respectively). Furthermore, consistently with the presumption proposed in connection with the Priorities (discussed above), any move-in application proposing a first local service to a community would be treated as if it were proposing service to the Urbanized Area if the new station would *or could* place a daytime principal community signal over 50% or more of the Urbanized Area. (Note: if that presumption were to be adopted, the traditional *Tuck* analysis used to determine whether a proposed community of license located in an Urbanized Area is or is not really a separate community for 307(b) purposes would be relegated to the scrapheap.)

Native American Tribal Preference

The Commission proposes to establish a new 307(b) priority – to be applied to FM allotments, AM filing window applications, and NCE filing window applications – for federally recognized Tribes. The priority would be sandwiched in between Priority 1 and the co-equal Priorities 2 and 3 – sort of Priority 1.5.

To qualify for that preference:

- ☑ the applicant would have to be either a federally recognized Tribe or tribal consortium, a member of a Tribe, or an entity more than 70 percent owned or controlled by members of a Tribe or Tribes; ***and***

- ☑ at least 50 percent of the daytime principal community contour of the proposed facilities would have to cover tribal lands, in addition to meeting all other Commission technical standards; ***and***

- ☑ the applicant would have to propose at least first local transmission service to the proposed community of license, which would have to be located on tribal lands.

Any authorization awarded as a result of a dispositive tribal priority would be subject to certain holding period limitations relating both to ownership and technical changes.

No Downgrades for 307(b)-Preferred Facilities

The NPRM proposes an absolute prohibition on any downgrade of AM facilities awarded pursuant to a dis-

(Continued on page 9)

(Continued from page 8)

positive 307(b) preference if the downgrade would result in service to a smaller population or would otherwise negate the factors that led to the award of a dispositive preference. In other words, AM licensees or permittees awarded a 307(b) preference will be required to provide service substantially as proposed in their short-form tech boxes. The FCC suggests that that bar should be effective for four years.

Auction Changes

AM Filing Criteria Tightened Up

According to the NPRM, the Commission has encountered an "unacceptably high percentage of defective" AM applications – both new and major mods – in recent years. So no more Mr. Nice Guy: the FCC proposes that applicants in future AM broadcast auctions must *at the time of filing* meet basic technical eligibility criteria, including community of license coverage (day and night), and protection of co- and adjacent-channel stations and prior-filed applications (day and night). The proposal would also prohibit the corrective amendment of any Form 175 or tech box data that rendered the application technically ineligible at the time of filing. This prohibition would also extend to community of license change proposals before a CP is awarded.

The Commission's policy on unjust enrichment applies to pro forma transfers and assignments filed on Form 316.

Additionally, the Commission suspects that many AM auction applications are lobbed in by speculators looking for a simple singleton grant (thus avoiding actually having to participate in the pricey auction process). Accordingly, it's looking at possible caps on AM auction applications – perhaps a maximum limit of five applications per applicant. In addition, the Commission wants to know if it would be a good idea to apply special attribution rules to root out the use of affiliate entities (or stalking horses or fronts, etc.) to avoid the cap limits.

The NPRM would also codify the 2003 *Nelson Enterprises* decision, making explicit that, under Section 73.182(k), two AM applications are mutually exclusive if either application would enter the 25% limit of the other.

No More FM Translator Band Hopping Across the NCE Border

Historically, FM translator CP holders have been able to snag a permit during an auction window for commercial band translators and then modify that permit to "hop" over to the reserved, noncommercial (NCE) band with ease. This is desirable because of the less restrictive NCE rules regarding satellite and microwave signal delivery. (Hops could also go the other way – from NCE band to commercial – a process which enables applicants to get into the commercial band even though the Commission hasn't opened a window for commercial translators.) The FCC views all such "hops" as undesirable, and so is proposing to prohibit such trans-band moves unless and until the translator to be moved has been built and operating (either licensed or with a license application pending) for at least two years.

Other Auction Arcana

Non-universal settlements. Applicants filing during auction windows are, of course, subject to very strict anti-collusion rules. However, the Bureau has historically relaxed those rules for the purpose of encouraging and facilitating pre-auction settlements during specially-announced designated windows. The Commission thinks that such relaxations have been useful, so it is proposing to formalize the Bureau's authority to permit non-universal technical amendments and settlements. But be careful: to be acceptable, a technical amendment would have to resolve all mutual exclusivities between the amending application and all other applications in the MX group.

Deadlines for long-form applications. The rules presently specify that long-form applications from auction winners must be filed within 30 days of the close of bidding. That has caused some heartburn in the past, particularly when the bidding wrapped up in mid - to late-November, since that meant that long -forms had to be filed right in the middle of the December holidays. But the Commission is no Grinch – it cares, it really cares! As a result, it is proposing to soften its rule to allow for some flexibility in the long-form deadline, "as circumstances warrant".

"New entrant bidding credits" and unjust enrichment. A winning bidder is not eligible for a "new entrant bidding credit" (NEBC) if it, or any party with an attributable interest in the winning bidder, has an attributable interest in any existing mass media facility in the "same area" as the proposed new facility. The existing and proposed facilities are in the "same area" if the principal community contours of the two facilities would overlap. For purposes of the NEBC, the contour of a proposed new FM broadcast facility would be defined by the maximum class facilities at the allotment site.

The FCC also wants to be clear about unjust enrichment payments when a permit acquired with NEBC is sold. If the buyer would not have been entitled to the same NEBC, then the FCC has to be reimbursed for the credits for which the buyer was not eligible. The Commission now wants to clarify that that policy should also apply to *pro forma* transfers and assignments filed on Form 316. Supposedly the existing rule is already clear as day on this point, but the FCC figures it should clarify because the staff has still received a boatload of questions about it.

(Continued on page 10)

(Continued from page 9)

And noting yet another supposedly crystal clear policy apparently in need of further clarification, the FCC proposes to amend the rules to state unequivocally that while your maximum NEBC eligibility is set when you file your Form 175, it will be diminished by post-filing changes such as the acquisition of additional attributable interests. The final determination of NEBC eligibility will be made when the post-auction long-form application is processed.

Supplemental Terrain Roughness Showings

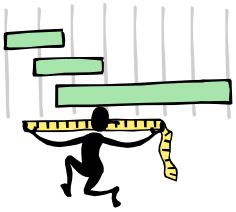
The NPRM proposes to codify the terrain roughness standards which the Bureau staff has been informally using since 2001. Those standards come into play when the terrain in one or more directions from a proposed antenna site "departs widely" from the average elevation used by the staff to predict contours; in such cases, applicants may be able to use alternate coverage prediction methods. The trouble is that the Commission has declined to define the term "departs widely" in its rules, leaving applicants (and their engineers) in the dark. The staff has developed some informal parameters governing the use of alternate contour prediction methods. Those parameters are described in a convenient clip-'n'-save sidebar below. The FCC now proposes to formally codify those parameters in the rules.

It is difficult to overstate the extraordinary importance of all the changes which the NPRM proposes to make to the processes by which new radio authorizations are sought and granted. While both AM and FM are mature, widely-dispersed radio services with nationwide reach, interest – both in new stations and in modifications of existing stations – continues to run high. Acting Chairman Copps and Commissioner Adelstein believe that that interest can and should be channeled in particular directions, but one may justifiably wonder whether governmental fiat will be more effective than marketplace forces in assuring fair and efficient deployment of radio service.

It is difficult to overstate the extraordinary importance of the changes which the NPRM proposes to make.

The NPRM raises a host of complex technical, regulatory and constitutional issues. Among those is the question of whether the government can constitutionally favor one or more particular racial or ethnic groups in the licensing process. The newly-proposed "priority" for Native Americans appears to be just the kind of "reverse discrimination" approach – favoring one racial/ethnic group over others – that the Supreme Court has indicated may violate the Equal Protection Clause of the Constitution. (The Commission's questionable favoritism is not likely to be restricted to Native Americans. As indicated in the article on Page 11 of this issue, the FCC's proposed revision of its ownership reporting system hints at a much wider race/ethnicity/gender-based approach to licensing.) Look for this point to be litigated if the Commission does indeed move toward race-based (or other constitutionally dubious) licensing preferences.

Anyone with an interest in AM and FM radio would do well to review the NPRM with care and consider filing responsive comments. (The deadlines for comments and reply comments have not yet been established; check back to www.commlawblog.com for updates.)



Another MTC clip'n'save sidebar!!!

How the FCC Tells Whether Terrain "Departs Widely"

[Editor's Note: Are you unclear about when an alternate contour prediction method can be used because the terrain around your transmitter site "departs widely" (to use the FCC's felicitous phrase)? No problem – here's the Commission's own summary (from Paragraph 49 of FCC 09-30, released April 20, 2009). Just clip and save it for future reference!]

First, terrain has been considered to depart widely when the antenna height above average terrain ("HAAT") along a single radial in the direction of a community's center, from three to 16 kilometers from the antenna site (*i.e.*, the Commission's standard measurement methodology), varies by more than 30 percent from the HAAT along the same radial, measured from three kilometers from the antenna site to the community's outer boundary. Second, when there is line of sight coverage from the antenna to the community of license, the staff has found terrain to depart widely when the actual terrain roughness factor, measured along the radial running from the antenna site to the community center from a distance of 10 to 50 kilometers from the antenna site, is less than or equal to 20 meters or greater than or equal to 100 meters (known as "delta-h"). [1] If one of these two conditions is met, the staff will allow a contour showing using an alternate prediction method, provided that (a) the contour predicted by the alternate method is at least ten percent greater than that predicted by the standard methodology, and (b) for stations in the non-reserved FM band, the 70 dBμ principal community contour predicted by the alternate method is not greater than the 60 dBμ contour predicted by the standard methodology.

[1] [47 C.F.R. § 73.313(e). *See, e.g.*, § 73.313(h)(1), §§ 73.24(i), 73.315(a).] § 73.333 Figure 4.

Different strokes for different folks?

New Ownership Reporting Rules Adopted As Commissioners Seek "Diversity"

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

In an ambitious action that signals the re-awakening of race- and gender-based government regulation of broadcast ownership, the Commission has re-vamped its rules and related forms for reporting the ownership of commercial broadcast stations. That means ***all*** commercial broadcast stations – not only full-service radio and TV's, but also LPTV and Class A stations previously exempt from ownership reporting. And noncommercial (NCE) stations did not escape the FCC's critical gaze: the Commission has proposed changes in the way "ownership" of those stations is reported as well.

While the full text of the FCC's action has not yet been released, the Public Notice discloses at least the following changes:

- All ownership reports for commercial licensees will now be filed by a single filing deadline – November 1 – and will reflect data as of October 1. This abandons the longstanding policy requiring the "staggered" filing of ownership reports on the anniversary of the reporting stations' respective renewal application deadlines.

- All commercial licensees will be required to file ownership reports. This means that LPTV, Class A, single individuals and partnerships composed exclusively of individuals – all groups previously exempted from ownership reporting requirements – are now subject to the requirement.

- Certain less-than-controlling interests previously deemed unreportable will now be required to be included.

- The Media Bureau is now authorized to perform random audits "to ensure the accuracy of reports".

On the NCE side, the Commission has proposed that NCE licensees be compelled to include "gender and racial/ethnic" information in their ownership reports. Additionally, LPFM licensees, historically exempt from ownership reporting, would lose that exemption. Recognizing that many NCE stations are licensed to non-profit, non-stock organizations that don't entail the conventional notion of "ownership", the Commission acknowledges that it will have to come up with a workable definition of "ownership" in the NCE context.

The Commission's goal underlying these changes is clear: the agency wants to "be able to more accurately assess and effectively promote diversity of ownership in the broadcast industry." According to Acting Chairman Copps, the state of broadcast ownership is "shameful" because the media "are still deficient when it comes to reflecting the diversity of America." And that "shameful state of affairs" will "continue until more women and minorities actually own stations and set their own policies." His sentiments were echoed by Commissioner Adelstein. In a considerably more restrained statement, Commissioner McDowell expressed cautious support for the concept of obtaining "more precise and reliable" ownership statistics while making clear that he did "not entirely agree with every word" in the Commission's order.

The issue of race-based (and, secondarily, gender-based) governmental decision-making is among the most constitutionally sensitive issues imaginable.

The push for increased racial/ethnic/gender "diversity" in broadcast ownership re-opens multiple cans of worms that have been largely untouched for 15-20 years.

In the late 1970s, the Commission – in language remarkably similar to that of Copps and Adelstein – expressed concern about the "underrepresentation" of women and minorities in the ranks of broadcast owners. A number of policies were adopted to spur increases minority/female ownership. The efficacy of those policies was, however, questioned and questionable. Entities claiming to be owned or controlled by "minorities" or females often turned out, upon closer inspection, to be shams created by people who would not themselves have been eligible. And even when legitimately qualified entities obtained broadcast authorizations, the FCC did not – and probably could not – compel them to retain those authorizations in perpetuity: once a "minority" or female got a station, nothing stopped that person from selling it. So unless the Commission were prepared to restrict the alienability of particular licenses – *i.e.*, defining them somehow as "minority" or "female" licenses which could not be owned by non-minority men – the best the Commission could hope for would be to facilitate the entry, but not the permanent installation, of some "minorities" and women into broadcast ownership.

The issue of race-based (and, secondarily, gender-based) governmental decision-making is among the most constitutionally sensitive issues imaginable. As a general rule, the Constitution forbids the government from discriminating among citizens on the basis of race – a principle established with inspirational clarity in *Brown v. Board of Education*. In his presentation to the Supreme Court

(Continued on page 16)

Dialogue: Frank Montero

[*Editor's Note: The following interview appeared in the April 20, 2009, issue of Radio Ink. Radio Ink has kindly granted us permission to reproduce it here.*]

In this edition of "Dialogue," Fletcher, Heald & Hildreth co-managing partner Frank Montero and [*Radio Ink* Vice President and General Manager, Deborah Parenti] discuss areas of growth for Hispanic radio in today's economic and demographic world, ideas that can bring more capital into minority ownership, and much more.

How many Hispanic stations are broadcasting in America today? What are your growth estimates for the next 5-10 years?

If we focus on AMs and FMs in the 50 states and DC, I'd say over 600 full-power, licensed, commercial stations are predominantly programmed in Spanish. Growth is difficult to project because the economic downturn has thrown most projections out the window. In the past 5-10 years, much of the growth has been in the southeast, northwest, and midwest. Much of that growth was a reflection of job availability. It remains to be seen if there will be new demographic shifts as those job markets dry up.

I don't think growth in the Spanish radio markets will necessarily be what it has been in the past 10 years. Still, there are many underserved Spanish radio markets, and we will continue to see radio broadcasters and advertisers looking to tap that market.

Outside large metros where population obviously is a major factor, what drives the format in smaller markets?

In the smaller emerging markets, you frequently see small religious, evangelical AMs emerge as the Latino population begins to grow. Music stations will begin to cater to the tastes of the newly arrived population. Later, as the market matures, you may see an FM with syndicated programming and more progressive Spanish formats focused on a younger audience.

Are Hispanic formats growing outside their traditional listener base?

The U.S. Latino population is young and we are seeing crossover Spanish formats that appeal to this younger audience who may like Hip Hop or Urban formats, in addition to more traditional Spanish formats. These cross-over formats – such as Hurban or Rock en Espanol or Reggaeton – are fast-paced, with announcers that speak in both English and Spanish and frequently play music in both languages.

In terms of programming, are there different social mores within the Hispanic audience? Do programmers need to draw a different line at Hispanic stations?

I believe so. Some communities are more conservative than others and some have different tastes and preferences. Spanish is a language, not a format. Any programmer in Spanish radio has to know his or her audience, the social mores of the community, and the geographic distribution of that audience.

Do you favor the minority tax certificate? Why? What form would you want it to take?

I do. In fact, I testified before the House Ways and Means Committee in 1995 to support the old tax certificate. In its day, it was an amazingly elegant mechanism for putting broadcast stations into the hands of minorities. However, I think the biggest mistake these days is to assume that a return of the tax certificate will be a silver bullet to help promote minority ownership in broadcasting. While I greatly promote its return, we should remember that the tax certificate gets its strength from the prospect of deferring capital gains tax. Very few station owners have capital gains to shelter these days.

What are your suggestions for boosting minority ownership in broadcasting?

The biggest obstacles for minority ownership have traditionally been access to capital and access to deal flow. With the current economic slump, the capital access problem is worse than ever. Ironically, however, the deal flow problem may be somewhat less of an issue because there's so much underpriced inventory on the market. As result, you're seeing an increase in seller financing to make up for the capital shortfall.

I've been a proponent of a measured relaxation in the foreign ownership rules to allow more offshore capital to finance domestic broadcast acquisitions. This would be especially helpful for Spanish-language broadcasters because there are many Spanish and Latin American financial concerns and program suppliers that would welcome the opportunity to team with U.S. broadcasters to capitalize on the growing U.S. Latino market.

A relaxation of the prohibition on collateralizing spectrum would improve the flow of capital into the market, especially from smaller regional lenders that may be frightened by the overleveraged nature of broadcasting and the inability to effectively collateralize the debt.

I believe other legislative and regulatory changes need to be explored to promote capital into the market and assist minority ownership and funding, including a lifting or relaxation of the FCC's foreign ownership restrictions and a re-examination of the FCC's prohibition on allowing lenders and investors to collateralize loans with the spectrum and the FCC license.

It's like TV, but without the screen . . .

LPTV Station To Be Arbitron-Rated

Pseudo-FM eligible for PPM ratings

By Denise Branson, Legal Assistant
branson@fhhlaw.com
703-812-0425

When a broadcast service looks like an FM station, talks like an FM station and walks like an FM station, it must be an FM station, right? Perhaps, but what if the station's FCC license says that it's a low power *television* station?

The frequency range for Channel 6 TV (and, of course, LPTV) stations ranges from 82-88 MHz, which is right next door, spectrum-wise, to the bottom end, or "reserved" portion, of the FM band. The vast majority of the 139 LPTV stations currently operating on Channel 6 broadcast at 82 MHz. but a few Channel 6 LPTV stations operate at 87.7 MHz – a frequency which can be picked up on the very low end of most standard FM tuners. If these stations promote themselves and operate as FM radio stations, they may become eligible to receive ratings through Arbitron's Personal People Meter (PPM) system.

The first such station to receive Arbitron ratings is WNYZ-LP (Pulse 87 New York). Beginning with the April, 2009 reporting period, Arbitron's PPM system will generate a custom report for this station, which has an estimated half million plus audience in the New York area. You heard that right: New York City – the metropolis which "tried to get people not to use the PPM" (*see* the related article in the October, 2008 *Memo to Clients*) and wound up fighting legal battles with Arbitron – will be home to the first LPTV/FM station to receive Arbitron PPM ratings.

To be eligible for PPM reporting, LPTV stations must be receivable on FM radio receivers, be lawfully transmitting under FCC authority, be marketed exclusively to radio listeners, and have audio-only programming. If these criteria are met, the station will have customized PPM report generated and the results will be reported with an "alias" call sign beginning with the letter X and ending in "-FM". Of course, TV stations are permitted to operate their visual and aural transmitters separately, with "different and unrelated" content on each, according to Section 73.653 — but the FCC still expects them to broadcast some video content, even if it's unrelated to the audio. It's not clear how that expectation can and will be met if, in order to satisfy Arbitron, the station is providing "audio-only programming", but presumably the folks involved have figured something out.

(Continued from page 7)

was strikingly similar: the plaintiffs alleged that successful bidders in certain FCC auctions had improperly claimed to be entitled to bidding credits and had, thus, cheated the Feds out of a bunch of money.

These most recent cases were placed "under seal" by the courts, meaning that the proceedings have been withheld from the public eye. But a couple of months ago, the presiding judges agreed to lift the seal just enough to permit the FCC, on behalf of the government, to publicly disclose the complaints and to request the targeted applicants to respond to the allegations. In the letters recently released by the Commission, it did just that.

At this point it is impossible to say what will come of these cases. It is entirely possible that the bidders are being wrongly accused, and that they will ultimately be vindicated. It is also possible that they are guilty as charged. And, as was the case in the earlier *qui tam* case, it is possible that the case will be settled without any admission of guilt, but with a sizable payment to make it all go away.

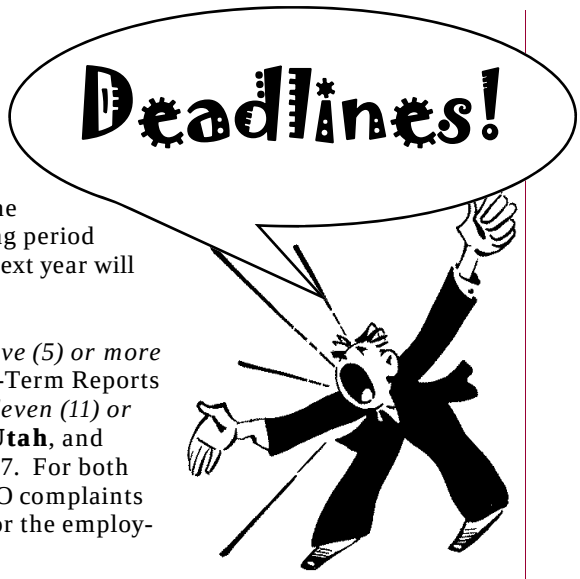
But however these cases shake out, one thing is clear: the availability and potential profitability of *qui tam* actions are no longer hidden secrets. Word has obviously started to get around, doubtless in large measure because of the impressive pay-outs that await successful plaintiffs.

Because of this development, anyone claiming bidding credits in a spectrum auction should take special care to avoid any circumstances which could trigger suspicions and accusations of impropriety. Even if your deal is squeaky clean, the filing of a *qui tam* suit can drag you into long, stressful and expensive litigation. Remember, in the 2006 settlement, the alleged wrong-doer admitted no guilt, but still had to suffer through several years of litigation and still ended up paying more than $100 million in settlement.

Remember, too, that *qui tam* suits can be brought by pretty much anybody, including former spouses, disgruntled former employees, disappointed former business associates, etc., etc. You get the point. Anybody with a big grudge and a little knowledge can cause major problems even if the grudge is unjustified and the "knowledge" turns out to be completely inaccurate.

So if you plan to claim bidding credits in a spectrum auction, proceed with caution.

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.

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. Please note, however, that this requirement may be subject to change, as the Commission has adopted a new, universal filing date (November 1) for all broadcast ownership reports, regardless of the state in which the reporting station is licensed. (*See* related article on page 11.) However, the Commission has not yet announced when the new rule will go into effect or what should be done with regard to reports due in the interim pursuant to the old rule.

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. Please note, however, that this requirement may be subject to change, as the Commission has adopted a new, universal filing date (November 1) for all broadcast ownership reports, regardless of the state in which the reporting station is licensed. (*See* related article on page 11.) However, the Commission has not yet announced when the new rule will go into effect or what should be done with regard to reports due in the interim pursuant to the old rule.

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 revised 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 12, 2009 for stations completing transition by June 12. As with previous reports, the second 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.

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.

Welcome back, welcome back, welcome back . . .

Tom Dougherty - Back in the FHH Fold

Thomas J. (Tom) Dougherty, Jr., has returned to Fletcher, Heald & Hildreth after a 15-year hiatus during which he practiced in the communications, transactions and outsourcing teams of Kilpatrick Stockton and Gardner, Carton & Douglas. A communications law veteran with more than 25 years' experience, Tom may not have done it all, but he's done most of it. Secondary market licenses? He's negotiated many, including EAS lease agreements for both EBS licensees and Sprint Nextel. Buying and selling all manner of communications properties? Done that, too, often using tax-minimizing structures. Franchise and telecom right-of-way agreements on the cable side? Sure enough. On the telecom side, he's represented both carriers and enterprise users in the procurement of telecommunications services and associated products. And Tom has also represented companies in sophisticated outsourcing and technology procurement transactions.

Tom is a Denison University graduate. He received his law degree from Catholic University, where he served on the editorial board of the law review.

FHH welcomes Tom back!

(Continued from page 5)

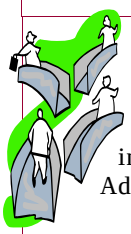
outside the box, since the statutorily-mandated transition to DTV has been on the books for years, and the consequences of that transition, including the imminent abandonment of Channel 6 facilities by many stations, have been a well-known matter of regulatory imperative for about as long. Still, the Bureau apparently did not want to disadvantage applicants who elected to play by the rules as they stood when their applications were filed.

While we appreciate the considerations of fairness and efficient processing that underlie the Bureau's approach, that approach may elevate form over substance in view of the imminent departure of most full-power Channel 6 stations.

(Continued from page 3)

the station but did not acquire a replacement studio. FCC agents – aware of the sale – tried to inspect the station. The agents could find no studio, no telephone number listing and no personnel.

After visiting the transmitter site, FCC agents found a faculty member at the college who had a phone number for one of the new owner's employees. The employee claimed that a windowless utility shed at the base of the transmitter was the new main studio. The FCC did not buy it and fined the station for failing to maintain a studio and for failing to staff the studio.



FHH - On the Job, On the Go

On March 30-April 1, **Frank Jazzo**, **Scott Johnson** and **Howard Weiss** attended the NAB State Leadership Conference in Washington.

On April 6, **Ron Whitworth** appeared on an FCBA panel about law school internships and networking (along with other members of the bar and a representative from Commissioner Adelstein's office) at the Catholic University of America's Columbus School of Law.

On April 30, **Harry Cole** will appear on a panel on "The Television Decency Cases: Are F-words and Fleeting Expletives Sanctionable" at the ABA Section of Litigation Annual Conference in Atlanta.

On May 2, **Joe Di Scipio**, Co-Chair of the FCBA Annual Seminar Committee, will moderate a panel on "The Public Interest in a Down Economy" at the FCBA Annual Seminar in Williamsburg, Virginia.

On May 14, **Frank J** will be a panelist at the "Legal and Regulatory" session at the Louisiana Association of Broadcasters 2009 Annual Convention in Lake Charles.

On May 14, **Kevin Goldberg** will make a presentation on the basics of copyright and fair use at a class on Copyright in the Online World sponsored by the National Press Club's Freedom of the Press Committee and the Reporters Committee for Freedom of the Press.

On May 15-17, **Peter Tannenwald** will be attending (and appearing twice) at the National Translator Association's annual meeting in Denver.

And let's hear it for **Paul Feldman**, who was quoted in both *Comm Daily* and the *National Law Journal*. OK, but **Harry C** managed to get quoted in *Comm Daily* not once, but twice, on consecutive days. Not bad, but *Comm Daily* doesn't run pictures, so it's close but no cigar for **Harry** and **Paul**, as the Other Frank, **Frank Montero,** not only got quoted, but also got a full color head shot spread across the pages of *Radio Ink* this month (*see* his interview, reproduced on Page 12). A picture is worth a thousand words, **Frank M**, and you are our *Media Darling of the Month*!

(Continued from page 2)

existing towers qualified the site as a *de facto* antenna farm. But the Division thought this analysis was overly simple, even though the applicant had made considerable efforts to research every situation in which the Commission had addressed, directly or otherwise, sites that might be deemed "*de facto* antenna farms".

The Division duly considered each of the cases cited by the applicant, noting the factors (over and above the number of towers and their relative proximity) that might be relevant to a site's status as a *de facto* antenna farm. Among those factors, according to the Bureau:

- the size and purpose of the towers (although this seems to contradict the designated antenna farm implementation order where the FCC, way back in 1967, specifically addressed the inclusion of all communications towers and not merely broadcast towers; this factor came into play here because the two other, existing, towers are not used by broadcast stations);
- any agreement, by communities and licensees, to utilize one site for antenna siting (such as the Empire State building in New York or Mount Wilson in Los Angeles);
- whether there are a number of tall (over 1,000 feet) towers on the site;
- whether the FAA has approved additional tall towers in a given site;
- whether the proposed tower is similar to other existing towers at the proposed site.

Despite its lengthy discussion of these other situations, the Bureau stopped short of providing any useful guidance concerning what, exactly, a site has to have to be deemed an antenna farm. Instead, the Bureau told the applicant that, whatever an antenna farm might be, the applicant's site didn't fit the bill – not an especially helpful approach, either for the applicant or for anybody else who might find himself or herself in a similar situation in the future.

Exactly why the Commission has declined, for more than four decades, to provide some useful definition for a term which the Commission itself chose to stick in its own rules is a complete mystery. But it certainly seems clear from the Bureau's recent decision that that failure is a conscious choice and not some mere inadvertent oversight.

In light of the Bureau's decision, though, applicants would be wise *not* to assert that their proposals are exempt from environmental processing under the antenna farm exemption unless they have very conclusive evidence that their sites do, indeed, constitute antenna farms. But based on the Bureau's obvious reluctance to give any sites that designation, formally or otherwise, we suspect that such conclusive evidence will be extremely hard to find.

(Continued from page 11)

on behalf of the petitioners in that case, Thurgood Marshall (then still in private practice) argued that "race is a constitutional irrelevancy". In other words, the Constitution dictates that, in the design and implementation of its policies, the government must be color-blind. Any regulatory scheme that demands racial/ethnic information (such as the new ownership reporting requirements) – and especially any regulatory scheme that would limit governmental approvals based, at least in part, on the racial/ethnic composition of applicants (as Copps's statement suggests he, at least, has in mind) – must be approached with the utmost caution.

If the Commission is going to adopt some race/ethnic/gender-based system of regulation of broadcast ownership, it will have to confront thorny issues, from the practical to the conceptual. Practically speaking, for example, how is the term "minority" (or whatever other equivalent qualifying terms the Commission may use) to be defined? This has never been an idle question, and as the number of multi-racial individuals in our society increases, it will become increasingly difficult to answer. And while some may justify race-based regulation as necessary to address a perceived problem of "underrepresentation", what exactly does "underrepresentation" mean? If the government is setting out to eliminate "underrepresentation", how will the government know that its job has been completed?

Conceptually, the Commission will have to look long and hard at the concept of "diversity" which, according to Copps and Adelstein (and other proponents of race/ethnic/gender-based regulations), is a matter of urgent concern. What do they mean by "diversity"? How is it defined? How can a governmental agency identify it? How can a governmental agency determine what level of "diversity" is "enough"? And, perhaps most importantly, how does that governmental agency propose to monitor and maintain the level of "diversity" which it believes desirable?

An obvious potential problem here is that regulation in the name of "diversity" is likely to immerse the Commission ultimately in content regulation. And that raises a whole separate universe of constitutional questions involving the First Amendment.

Two decades ago, a Jonathan Swift-like "modest pro-

(Continued on page 17)

(Continued from page 7)

airplane – bad if you've just sunk millions of dollars into a construction permit for a station that can't be built.

Our bidder hired all sorts of well-connected FAA and FCC frequency coordination consultants to work directly with the FAA to resolve the interference problem, but they ultimately concluded that even if the station's power were reduced to as low as 100 watts, there was simply no location anywhere within the area in the station could be built consistent with FCC rules that wouldn't create FAA frequency interference problems. At this point, the tab for the permit, consultant and legal fees, equipment and other costs exceeded $5.5 million according to the bidder.

This past March, over four years after it "won" the auction for the Pacific Junction CP, the bidder effectively threw in the towel, filing a petition for a refund of its bid payment, plus interest since 2004. The reason? The FCC breached its implied contract with the auction's winning bidders to deliver permits for stations that could actually be built.

The petition cites a recent federal court of appeals ruling supposedly recognizing the existence of a contract between the FCC and successful bidders in spectrum auctions, as well as the landmark NextWave case, in which the FCC returned bids to winning PCS spectrum bidders in a convoluted bankruptcy proceeding. The Pacific Junction bidder states that it "stands ready, willing and able" to build the station, but for the fact that the FCC's rules are preventing construction – invoking classic legal wording for breach of contract cases.

So the bidder wants its $4+ mil back. Likelihood of success? Limited.

In the public notice announcing Auction 37, the FCC included **bold-faced** wording to the effect that each bidder would be solely responsible for evaluating all technical and market factors bearing upon the value of the permits available in the auction. This disclaimer is standard operating procedure in FCC auction notices, which routinely exhort would-be auction participants to conduct their own due diligence before bidding. Expect to see the FCC cite those disclaimers when it addresses the bidder's request.

On the other hand, the bidder does point out that the FAA's navigation frequency databases are not publicly available, and the FCC does not make them available either. As a result, says our bidder, the frequency interference problems that prevented construction were known only to a select few who either worked for or with the FAA – and secret rules cannot be permitted to cost it millions of dollars.

Perhaps, but what about that original FAA determination of no hazard issued to the tower? If that determination contained the condition, and if that determination is publicly accessible, might that not have tipped the bidder off to the potential problem? That's unclear at this point, but if those "ifs" turn out to be the case, that would not be helpful to the bidder's case.

In a footnote to its petition for a refund, the bidder states that it is contemplating a Court of Claims action to recover its funds. Given that the one federal court case cited by the bidder with respect to the contractual nature of FCC auctions has dragged on for years – achieving Jarndyce v. Jarndyce status in communications jurisprudence – it may be a long time before our bidding friend sees its money, even if its litigation strategy pans out.

So, if you are thinking about participating in the upcoming FM Auction 79, when you read the Public Notice setting forth the bidding procedures, deadlines, etc., and get to page 10 with the section titled "Due Diligence", please remember the plight of the guy with the Pacific Junction CP and do your homework *before* you decide to bid (then do it again, just to make sure).

(Continued from page 16)

posal" was advanced. If the Commission really wants to assure "diversity" without running afoul of ***any*** constitutional questions, it can do so easily. All it has to do is to limit to one, and one only, the number of broadcast licenses that any individual can hold an interest in, directly or through any type of business organization or relationship. One station – no more, no less. By doing that, the Commission would automatically and irrefutably achieve the goal of absolutely maximizing broadcast diversity, and without having to address and resolve any thorny constitutional questions.

The Commission is not likely to adopt that aproach. But at some point it should consider why any alternative it might propose is preferable to that approach.

One other potentially important consideration: the Commission that adopted the new ownership reporting requirement is most certainly not the Commission that will be in place several years from now. The current Commission consists of only three individuals, one of whom (Adelstein) is already on his way out the door. With three new members yet to take their seats (and possibly more), it's very hard to say with any confidence where this journey will finally lead.

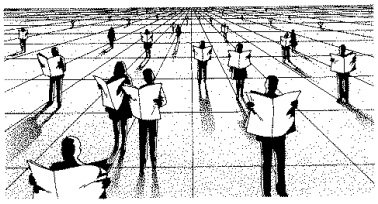
So strap yourselves in for an interesting ride over the next couple of years.

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

Updates on the News

Fleeting expletives update – Stop the presses!! Just as we were putting this issue of the *Memo to Clients* to bed, the Supreme Court issued its long-awaited decision in the *Fox* indecency case. We have not yet had a chance to digest the the 70+ pages of opinions (majority, concurrences, dissents), but from a quick skim it appears that this is *still* not the final round in the slugfest.

As you will recall, this case involves two live broadcasts of awards shows. In one, Cher used the expression "fuck 'em" to express her disdain for certain of her critics, and in the other, Nicole Richie used "fuck" and "shit" once each. In its post-Janet Jackson hypersensitivity to this kind of thing, the FCC declared both broadcasts to be violations of its indecency policy. Fox (which broadcast both shows) appealed to the U.S. Court of Appeals for the Second Circuit in New York, which resoundingly reversed the FCC's decision in 2008. The FCC then asked the Supremes to review the Second Circuit's decision, and the Supremes have obliged.



The Second Circuit's opinion was interesting because it threw out the FCC's actions based on principles of administrative law, not constitutional law. That is, the court concluded that the FCC's actions were arbitrary and capricious. Since Federal agencies are required by statute (not to mention common sense) *not* to act arbitrarily or capriciously, the court tossed the actions. ***But*** the Second Circuit then tacked on an extended discussion of constitutional law in which the court made clear that it believes that the actions were unconstitutional as well – but, since the court didn't have to reach issues of constitutionality (the FCC's actions having fallen short of the statutory "arbitrary and capricious" standard), that discussion was "dicta", *i.e.*, interesting but essentially irrelevant to the final decision.

When the Supremes agreed to review the Second Circuit's decision, it was not clear whether the Supremes would be looking only at the statutory argument or whether they would also consider the constitutional points. We now know: the majority has chosen to look at only the statutory ground, and has concluded that the FCC's actions were not arbitrary and capricious. Four justices disagreed with that conclusion. Since the majority opinion addressed only the statutory arguments, though, the path has presumably been cleared for Fox to go back to the Second Circuit to present its constitutional arguments – and the Second Circuit's earlier decision provides a strong suggestion of how the Second Circuit is likely to rule on those arguments. If the Second Circuit does again toss the FCC's actions – but on constitutional, rather than statutory, grounds, we can probably look for yet another trip to the Supremes for this case.

We will be posting a blog (at www.commlawblog.com) analyzing the opinions in more detail, and will include more comprehensive coverage in next month's *Memo to Clients*.

Ask not for how long the FCC tolls -- Long-time readers will recall that, a couple of years ago, the FCC started entering into "tolling agreements" with broadcasters subject to complaints (particularly indecency complaints). A broadcaster entering into such an agreement effectively waived the statute of limitations during which the FCC could issue a notice of apparent liability (NAL) for the alleged violation, and the FCC in turn usually agreed to lift any "enforcement hold" on the licensee. (An "enforcement hold" means that, because of the pending allegation, the Media Bureau will not grant the any renewal or long-form assignment/transfer applications, so lifting the hold meant that business could go forward – a win-win situation.) In the early days of tolling agreements, the Commission was agreeable to limiting the extent of the tolling to two-three years. That is, the licensee/alleged wrong-doer would be extending its potential liability only for two or three years, after which (if the FCC didn't issue an NAL), the licensee would be free as a bird. But soon the Commission realized that, given the slowness of the FCC's processes, two-three years might not do the FCC any good. As a result, the Commission started insisting on indefinite tolling, meaning that the sword of a potential fine would forever be dangling over the licensee/alleged wrong-doer. Recently, however, we have heard that the Commission's staff may have had yet another change of heart. As a result, word is that the staff may now be agreeable to two-three year tolling terms. None of this is official and etched in stone, but if you are negotiating a tolling agreement, you might want to keep it in mind. They may really mean it this time, but you never can tell.

Application fees increased, finally – Last September the Commission announced that it would be adjusting its schedules of applications fees upwards consistently with the cost of living. The new fees would be effective 90 days after the Commission notified Congress of the increase, which would have made the new fees effective on December 30. But time always flies when you're having fun, and despite a couple of false starts (chronicled on our blog — go to www.commlawblog.com and search for "pursestrings") , it wasn't until March that the Commission announced that the new fees would finally becomes effective as of April 28.

FM ALLOTMENTS ADOPTED – 3/20/09-4/21/09

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
TX	Marquez	65 miles SE of Waco, TX	296A	08-196	TBA
IL	Cuba	48 miles SW of Peoria, IL	252A	07-175	TBA (Accommodation Substitution)
HI	Kihei	Maui Island	264C2	08-217	TBA
IN	Worthington	36 miles W of Bloomington, IN	231A	07-125	TBA

FM ALLOTMENTS PROPOSED – 3/20/09-4/21/09

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (*i.e.*, Drop-in, Section 1.420, Counterproposal)
AL	Waverly	99 miles SE of Birmingham, AL	262A	09-54	Cmnts: 06/08/09 Reply: 06/23/09	Accommodation Substitution
MT	Cut Bank	106 miles N of Great Falls, MT	265C1	09-50	Cmnts: 06/08/09 Reply: 06/23/09	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.

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

First Class