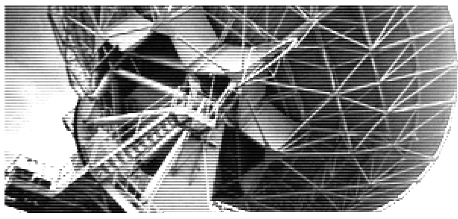

FLETCHER, HEALD & HILDRETH
Communications Law & Regulation

MEMORANDUM TO CLIENTS

News and Analysis of Recent Events in the Field of Communications

Meet the new boss(es) . . .

The Genachowski Commission Takes Shape

Senate confirms all FCC appointments, Chairman names new Bureau heads

By Lee G. Petro
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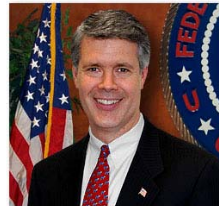
Ahh, mid-summer – and, with Fall already on the way, change is in the air. Like college campuses welcoming hordes of beanie-wearing fresh-faced frosh, the Portals is experiencing its own influx of new blood.

In the past month, the Senate has reviewed and passed on 80% of the Eighth Floor, confirming two new Commissioners, re-confirming one, and (finally) putting its imprimatur on the new Chairman. At the same time, we bid a hearty farewell to the harmonica-jamming Jonathan Adelstein, who is taking his show on the road over to the Rural Utility Services at the USDA.

Chairman Julius Genachowski

Here's a quick program to help you recognize the players.

First and most obviously, we have the new Chairman, Julius Genachowski. No stranger to the FCC, he served as Chief Counsel to Chairman Reed Hundt and Special Counsel to then General Counsel (but soon-to-be Chairman) Bill Kennard back in the mid-1990s. A Harvard Law classmate of President Obama – he served as the Chairman of then-candidate Obama's Technology, Media and Telecommunications Working Group, which helped shape the President's telecommunications policies during the campaign – he clerked for two Supreme Court Justices (and a D.C. Circuit judge, to boot), spent some time on Capitol Hill and, after leaving the Commission in 1997, worked in the technology sector as an executive and entrepreneur. While the new Chair has tended toward the new tech end of things, broadcasters will appreciate that he has roots in their backyard: his résumé includes a stint as a writer and researcher for Fred Friendly. Oh yeah, he's also a certified emergency medical technician and former CPR instructor.


Commissioner Robert McDowell

Next up, Commissioner Robert McDowell, returning for a new term. Filling one of the Republican seats, McDowell has served on the Commission since 2006. A lawyer by training, he was an executive for an association representing competitive facilities-based telecommunications service providers and their supplier partners before joining the FCC.

Commissioner Mignon Clyburn

One of two new faces at the Portals is Commissioner Mignon Clyburn. Clyburn knows about government regulations, having served the past 11 years on the Public Services Commission of South Carolina. (She was Chair of the PSC for two of those years.) Prior to that, she was the publisher and general manager of the *Coastal Times*, a weekly newspaper in Charleston, South Carolina. Her father, House Majority Whip James Clyburn, is the highest-ranking African-American member of Congress.

The second new face is that of Meredith Attwell Baker. You

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Fines, reporting conditions for procedural short-falls

Adventures in EEO-Land

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Following up on audits of the EEO performance of a number of broadcast licensees, the Media Bureau has dished out fines ranging from $3,000 to $12,000 to three licensees for various shortcomings. In addition to the fines, each of the three is also saddled with reporting requirements for the next three-four years – and if any of the stations happen to be sold in the meantime, the buyer will get stuck with the reporting chores. (Good luck explaining to the buyer exactly why he or she should bear that particular cross.)

As has been invariably the case for years, the "EEO" miscues at issue did ***not*** involve any actual, or even alleged, illegal discrimination. Rather, in each case the licensee failed to jump through various procedural hoops in just the right way. For example, one licensee failed to send out notices of vacancies to two organizations which had asked to be on its mailing list. It also neglected to "retain fully detailed documentation to support the data reported" in its annual EEO report in its public file. That'll be $3,000, please – be sure to make the check payable to the FCC.

There's more.

One of the licensees was taken to task for re-hiring a former employee to fill a vacancy without undertaking "sufficient recruitment" for that slot. While the Bureau's decision provides virtually no description of the particular facts here, it seems strange that the Commission would not view re-hires as a permitted exception to the full-tilt-recruitment-*uber-alles* approach. After all, the licensee knows the former employee/re-hire candidate and is perfectly situated to know whether that candidate (who is presumably already familiar with the licensee's operations) is suited for the job.

Why then go through an elaborate recruitment dance if the result is, reasonably and legitimately, a foregone conclusion? Don't bother to try to answer that rhetorical question. (That's kind of like when positions in government agencies are "posted" as if they're really open for applications when, in fact, it's understood by all concerned that the positions have already been filled.) The fact of the matter is that, according to the Bureau, re-hires without "sufficient recruitment" can get you a $3,000 fine and, possibly, reporting conditions. Again, just make that check payable to the FCC.

One element common to two of the cases was the fact that each licensee had, in its recruitment for at least one vacancy, relied solely (or at least primarily) on Internet web sites as recruitment sources. Bad idea.

According to the Bureau, the Commission's EEO policy "requires a licensee to recruit from non-Internet sources, in addition to any sources from the Internet, in order for its recruitment to sufficiently widely disseminate information concerning the vacancy."

This neo-Luddite aversion to reliance on the Internet is a throw-back to 2002, when the Commission declined to permit such reliance. Back then, the FCC cautiously promised to "continue to monitor the viability of the Internet as a recruitment source" and to "consider whether future circumstances warranted a change". Can we all agree that, in the intervening seven years, Internet accessibility has increased dramatically, as has the extent to which everybody – including the FCC itself – relies on the Internet to conduct routine, day-to-day business? (Any doubters out there are invited to go to the FCC's "Forms" page and count the number of applications and reports that ***must*** be filed electronically.) Nevertheless, the Commission

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Focus on FCC Fines

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More underwriting fines – In our March *Memo to Cli*ents, we provided a detailed explanation of the factors that the FCC considers when fining noncommercial stations for using the wrong words in sponsorship identification. To recap the March article, NCE licensees are prohibited from broadcasting any program material which (a) is in exchange for remuneration and (b) promotes any service, facility, or product of any for-profit entity. The March discussion reported on a Texas low power station that faced a $20,000 fine for airing announcements whose language – at least in the Commission's view – crossed the line over into the impermissibly promotional. This month the FCC made that fine official, although it reduced the fine to a mere $6,000 – not because it had second thoughts about the underlying policy, but rather because the licensee's pleas of poverty convinced the Commission that the licensee would be unable to pay the full $20K.

In addition to the Texas station, this month the FCC also targeted non-commercial FM stations in Ohio and New York with fines for similar transgressions. The Ohio station – licensed to a non-profit educational foundation – was tackled with a $7,500 fine for announcements made during local college football games. The New York station – licensed to a community college – was tagged with a $2,000 fine for its errors during a broadcast of a local minor league baseball game. These two fines should remind non-commercial stations that turning the microphone over to someone for color commentary during sporting events may expose you to liability for what the announcer says.

In the Ohio case, the station's coverage of local college football games was underwritten by local restaurants, insurance agents, car dealerships and flower shops. A listener – perhaps a supporter of a rival school – complained to the FCC about the seemingly commercial or promotional nature of the underwriter acknowledgements being broadcast. The FCC determined that at least some of the announcements were unduly comparative. For instance, the references to "best hotel choices," "memorable quality," "low prices," "better results," and "luxury" – that kind of thing. The station was also punished for encouraging its listeners to patronize sponsors, like when announcements urged listeners to "be sure to 'go' with the winner," "'visit' our store" and "'stop in' at one of our offices."

In the New York case, the underwriting payments didn't even go to the station. The station in that case broadcast games played by the local minor league baseball team. Team sponsors contributed $100 per season to the team – not to the station – to help defray the team's travel costs. The FCC decided that the team's consent to allow the station to air the games – which gave the station, in effect, free programming – constituted consideration to the station. In turn, the station identified the team's sponsors on air and used language which the Commission decided was inappropriately promotional. Final score: a $2,000 fine from Uncle Sam. The station did not dispute that some of its announcements, which used terms including "good," "discounted," and "excellence", may have been too promotional. But the station did put up a fight on others. In particularly, it argued that terms such as "flexible financing," "cold refreshing beer" and "banking the old fashion way" should not result in a fine. The station got shut out on those arguments, however, as the FCC found that each of those terms provided an impermissible comparative and qualitative description.

Station admonished for temporarily unlocked gate – On a March afternoon, FCC agents from Denver drove 60 miles north to Greeley, Colorado, and conducted an AM station inspection. On their arrival, the agents found a fenced enclosure with a gate protecting the tower. The agents even found a lock on the gate. That was the good news. The bad news was that the lock wasn't engaged. The agents tested the lock and determined that it was somehow messed up and could not be engaged. An hour later, the agents went to the main studio and reported to the licensee that the lock was broken. Within two hours, the very diligent licensee had installed a new lock on the gate; he even called the FCC agents to report the corrective action.

Four days later, the agents drove the 60 miles north again to verify that the lock had been fixed. Sure enough, the lock had been repaired. The agents then called three different contact engineers who worked for the station to see if anyone had encountered the broken lock prior to the inspection. None of the engineers recalled the lock having been broken. After driving twice to the station, inspecting its towers and studio and interviewing the different engineers, the FCC issued a notice of apparent liability, spanking the licensee to the tune of $7,000 for the broken lock. In response, the station argued that that was too hefty a punishment for such a minor – and short-lived – violation.

In a rare reversal, the FCC staff agreed that $7,000 was an excessive fine. In fact, it decided that any fine was excessive in this case, so it cancelled the forfeiture and instead merely admonished the station. The staff based

(Continued on page 7)

Hint: Rhymes with "Gidget"

The M-word?

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If the Little People of America, Inc. (LPA) – a non-profit advocacy organization providing support and information to people of short stature and their families – has its way, there will soon be an eighth word you can't say on television: "midget." According to a recent complaint filed online with the FCC's Consumer & Governmental Affairs Bureau's Consumer Inquiries and Complaints Division, the repeated use of that word on an episode of NBC's *Celebrity Apprentice* that aired in April was humiliating to short-statured individuals. (In the episode, the contestants created a detergent ad – still viewable on YouTube, when last we checked – titled "Jesse James and the Midgets". One suggested variation of that fake ad involved having little people be laundered and hung out to dry.)

In the LPA's view, the word "midget" is "highly offensive and obscene to the dwarfism community." The LPA has announced that, in filing the complaint, it hopes to induce the FCC to ban the use of the word on broadcast television.

While we appreciate the derogatory nature of the term "midget", tagging it as "obscene" seems a bit extreme.

While we appreciate the derogatory nature of the word and the corresponding hurt it might cause some individuals, tagging it as "obscene" seems a bit extreme. The term "obscenity" has a very definite, very limited, meaning in First Amendment jurisprudence. (According to the Supreme Court's long-established test, a determination that a work is obscene requires a three-part inquiry: (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.) It is difficult, if not impossible, to see how the use of a single word, by itself, could be deemed "obscene".

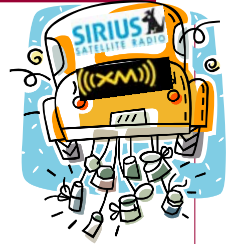
Offensive as the word "midget" may be to some, the First Amendment counsels against according any governmental official(s) the authority to pick and choose what language may be used and what language may be proscribed. The LPA complaint runs counter to that notion. So, too, does a recent effort (separate and apart from the LPA complaint) by the National Hispanic Media Coalition (NHMC) and a slew of other advocacy organizations to urge the Commission to take up their previous request for an inquiry into "hate speech".

As we reported in the February *Memo to Clients*, the NHMC asked for the FCC to open an inquiry into "hate speech" on broadcast *and* subscription media. They have renewed that request with separate letters urging action on the petition. Perhaps recognizing the thin legal ice on which they are skating, in their recent letters the NHMC and others reiterate that they seek only data collection to determine the extent and nature of hate speech; they also suggest that an FCC inquiry in this area might serve to raise public awareness and provide a public forum on the issue. (Of course, if the desired result is "raising public awareness", an effective campaign of public service announcements could accomplish that *without* giving rise to any pesky First Amendment problems.)

Interestingly, the FCC itself has shown no appetite at all for even attempting to regulate broadcast (let alone non-broadcast) content based on anything but sexual and/or excretory considerations. Recall when, in 2004, the Commission dramatically expanded its regulation in that area to include a proscription against "profanity", it defined that term to include language "so grossly offensive to members of the public who actually hear it as to amount to a nuisance". Sounds like that would include "hate speech", right?

Not so, the FCC clarified two years later, when it limited its working definition of "profanity" to words that are "sexual or excretory in nature or are derived from such terms". That definition would appear to exclude "midget" as well as the vast majority of race/religion/ethnicity/gender/etc.-based epithets that might ordinarily be thought to constitute "hate speech".

No doubt there are hundreds, if not thousands, of words and phrases that are offensive to one or another person or group in this country at any given moment. While the underlying concerns of organizations like the NHMC and the LPA may warrant empathy on an individual-to-individual, personal, basis, fundamental First Amendment principles hold that governmental suppression of speech is presumptively unacceptable. The conundrum of Commission content control is chronic and the slope slippery. Despite the very clear constitutional and statutory proscriptions against such regulation, the temptation to invite the Government to control broadcast content in order to protect particular sensitivities has proved irresistible time and again to individuals or groups with such sensitivities. Fortunately, the Commission has by and large declined the invitation (with the obvious exception of its limited, but nonetheless regrettable, "indecency/profanity" policy, the constitutionality of which is, at the very best, dubious). If the new Genachowski Commission recognizes and respects the limitations which the First Amendment imposes on it, it will refrain from expanding such policies beyond their current scope.



First anniversary, and still working on the pre-nup

Commission Extends (Again) Time For Compliance With XM/Sirius Merger Conditions

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Exactly one year ago, the FCC granted its consent to the merger of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings, Inc., clearing the way for the current XM/Sirius monopoly in satellite radio services. At the time, XM and Sirius agreed to a number of "voluntary commitments" as a condition for the FCC's approval. One of those voluntary commitments was to enter into long-term leases or other agreements giving "Qualified Entities" the right to program up to four percent of the channels on each service platform. (Other voluntary commitments included retail price caps, new programming packages, interoperable receivers, and open access for third party equipment manufacturers to develop compatible satellite radio receivers.) Although the original commitment was to enter into these leases within four months of the merger, the FCC recently extended the deadline while the FCC continues to sort out essential practical details, like the definition of a "Qualified Entity" and the process by which such leases should be made available.

Minority programmers probably shouldn't hold their breath waiting for access to the XM/Sirius platform.

One of the chief concerns about creating a monopoly in satellite radio service was that having a single entity owning and operating all of the country's satellite radio capacity might limit the diversity of viewpoints on satellite radio. The commitment to lease capacity to third parties was intended to address that concern. These third parties would not be required to make any lease payments for the channels and XM/Sirius would not be involved in the selection of the third parties or have any editorial control over their programming. Such leases, however, were limited to "Qualified Entities", which the FCC initially defined as any entity that is majority-owned by persons who are African Americans, Asian or Pacific Islanders, American Indians, or Alaskan Natives, or Hispanics.

Even when the FCC approved this "voluntary" commitment, it was clear that implementing it would require the FCC to resolve many complicated details. How would an explicitly race-based policy survive Constitutional scrutiny? Should the definition of "Qualified Entity" be more expansive? Should there be technical or financial qualifications for third party programmers? Would there be a single third party programmer or would many programmers have access? What mechanism would be used to select third party programmers? Who would oversee the selection procession? What criteria would be used to choose between programmers if the demand for channels exceeded the supply? What is the duration of these "long-term" leases? Would programmers need to provide 24/7 programming or would the channels be subject to "time sharing" among many programmers? If so, how would the various day parts be allocated? Although the FCC acknowledged many of these concerns at the time, it declined to address any of them leaving them to be worked out "at a later date."

Here we are, a year down the road, and that "later date" has yet to arrive. The XM-Sirius merger closed on July 28, 2008 – so the obligation to lease capacity to Qualified Entities technically should have kicked in by November 28, 2008. The FCC, however, didn't even request public comments on the various issues surrounding the proposed channel leases until the end of February, 2009. Thus, the FCC has been granting a series of extensions to the deadline – the most recent of which was issued on June 29, 2009.

In the meantime, the FCC has received a variety of comments proposing several different schemes for allocating the channels to variously-defined "Qualified Entities." One commenter suggested that a single independent entity should be designated as the channel administrator (and – here's a surprise – proposed itself as the ideal candidate for the task). Another insisted that only the FCC could allocate and administer the channels. Some commenters urged the FCC to restrict access to minority-controlled non-profits, while other commenters urged the FCC avoid Constitutional problems by using a more race-neutral definition of "Qualified Entities."

While the FCC has not given any indication on how it might resolve these open issues, there may be light at the end of this tunnel. The FCC's June extension of the leasing commitment stated that the Media Bureau "anticipates Commission action on the implementation guidelines in the very near future." Then again, the Bureau's May, 2009 extension order said exactly the same thing. Regardless, minority programmers are not advised to hold their breath waiting for access to the XM/Sirius platform. The qualifications and mechanisms which the FCC may eventually select are bound to disappoint someone(s), and disappointed people tend to file appeals and challenges, which will take time to resolve. Add in the time to actually implement whatever mechanisms survive the process and we may see yet another year pass before a third party programmer is heard on satellite radio.

FCC Opening Door for New LPTV and TV Translator Applications

First-come, first-served filing opportunity for rural facilities begins August 25, Nationwide opportunity slated to start January 25, 2010

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Ever want to own your own television station? Your chance is just around the corner, as long as you're willing to start small with a Low Power Television or TV translator station. The FCC has announced that the welcome mat for applications for new LPTV/translator stations (and major changes to existing stations) will be out as of August 25, if you want a rural station; if you're looking for Bright Lights/Big City action, though, you'll have to wait until next January.

In a Public Notice released June 29, the FCC announced a two-phase plan for the filing of applications for new digital-only LPTV and TV translator stations (we'll call them LPTVs collectively) and for major changes of existing LPTVs. Also, any analog LPTVs that didn't pick up a digital companion channel in the last go-round back in 2006 will now get another chance.

Applications will be accepted first-come, first-served, and will be "cut-off" on a daily basis — so if you file your application one day after a conflicting application, you're out of luck

Phase 1 begins August 25, 2009, when the FCC will begin accepting, on a first-come, first-served basis, applications for new digital-only LPTV stations, major changes in existing LPTVs and digital companion channels ***in rural areas only***.

What's a "rural" area? To meet that condition, you must specify a transmitter site at least 75 miles (121 kilometers) from the reference points for any of the top 100 markets. (In an Appendix to the Public Notice, the Commission has helpfully listed not only all of the top 100 markets, but also their respective reference points.)

The geographical "rural only" restriction goes away when Phase 2 begins on January 25, 2010. From that date on, applications for new LPTVs, major changes and companion channels may be filed regardless of the proximity of the transmitter site to a major market.

In both phases, applications will be accepted first-come, first-served, and will be "cut-off" on a daily basis. That means that if you file your application one day *after* a conflicting application, you're out of luck (unless, of course, the earlier-filed conflicting application gets dismissed, in which case you would get a second chance). If two conflicting applications happen to be filed on the same day, they will be deemed to be "mutually exclusive", which will entitle them to go through the FCC's auction process.

Applications for new LPTVs and replacement translators must specify an in-core channel (*i.e.*, Channels 2 through 51). Incumbent analog LPTVs looking for digital companion channels should also try to specify an in-core channel, but if nothing suitable is available, a channel between 52 and 59 may be used *if* the applicant goes through a whole circus full of hoops outlined in the FCC's Public Notice.

(Our colleague Peter Tannenwald raises an interesting question: why would an existing LPTV analog station with an in-core channel apply for a second in-core channel as a digital companion facility, rather than simply applying for a new station on that second channel? The problem with companion channels is that, at some point, that licensee will have to choose between its original channel and its companion channel – that is, in the end the licensee would have only one station on one channel. On the other hand, if the LPTV licensee got an in-core channel as a *new stand-alone* station – *i.e.*, not a companion channel – and eventually did a flash-cut switch to digital on its original channel, it would end up with two channels, both of which it could keep.)

And on the topic of flash-cuts, the FCC reminds LPTV and Class A licensees currently operating in analog that they can file on-channel digital conversion (*i.e.*, flash-cut) applications at any time – like right now, if they want. The Commission encourages analog LPTV stations that are planning on filing flash-cut applications to do so *before* the FCC begins accepting first-come, first-served digital applications. Acting sooner rather than later will get you ahead of any tsunami of applications that might develop in, say, August (or January) as far as processing is concerned; it may also prevent other applications from limiting your options in some ways.

The FCC application filing fee for a new LPTV station or for a major change in an existing station is $705.00. There is no FCC filing fee for flash-cut or

(Continued on page 13)

Now's the Time to Reason with Hurricane Season

An FCC reminder about important emergency contact information

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With the Fourth of July fading into the past and Labor Day looming ominously just beyond the horizon, hurricane season is upon us. Lisa Fowlkes, Deputy Chief of the Commission's Public Safety & Homeland Security Bureau, has asked us to pass along to our clients and readers some important FCC contact information in case Mother Nature turns nasty in the coming weeks and months.

First, the link to the FCC's emergency contacts page, including its 24/7 Operations Center, is http://www.fcc.gov/pshs/about-us/contacts.html.

Also, the Bureau continues to encourage communications service providers – ***particularly broadcasters*** – to register with the Commission's Disaster Information Reporting System (DIRS) and to participate in DIRS if the system is activated. The link to the DIRS login page is https://www.fcc.gov/nors/disaster/Login.cfm. FEMA and FCC emergency response personnel (ESF-2) use DIRS reports to coordinate needed assistance (*e.g.*, fuel, generators, etc) in the aftermath of natural disasters. ("ESF-2" is FEMA-speak for "Emergency Support Function #2" – the governmental system that, among other chores, supports the restoration of the communications infrastructure and coordinates Federal communications support to response efforts during incidents requiring a coordinated Federal response.)

Thanks for the reminder, Lisa. We all hope that none of us will need to call on the guv'mint to "restore communications infrastructure", a notion which conjures up images of worst case scenarios. But the unfortunate truth of the matter is that Big Storms are beyond our control. This is one of those cases where a timely ounce of prevention is clearly worth a pound of cure.

(Continued from page 3)

this conclusion on the fact that there was no evidence as to how long (if at all) the lock had been broken prior to the arrival of the agents. The only thing that the FCC knew for certain was that the lock was broken when they arrived at the tower and that it had been repaired within a couple of hours after that. Despite the FCC's inquiries to the station's engineers, nobody could state when the lock became broken. The FCC advised that the broken lock was not a minor matter but that they had no proof that the lock was broken for more than three hours.

The computer really did eat my report – In another case of a cancelled fine, the FCC back-pedaled when it realized it could not punish a company for failing to sign a report when the company did, in fact, sign the report. In February, the FCC issued a six-page notice assessing a $3,000 fine to a company for failing to sign a paper report regarding its telephone protection measures. On the very same day that the fine was proposed, the company sent an e-mail to the FCC advising them that the report had been properly signed and filed. Five months later, the FCC admitted its error. According to the Commission's terse order, while the company had filed a properly-executed report, the "certification was scanned imperfectly into the Commission's Electronic Comment Filing System ("ECFS") and thus appeared to the Bureau to be missing certain information." Not much of a mea culpa, but at least the Commission did cancel the fine.

This decision provides a couple of take-home messages. First, it establishes the principle that electronic equipment (or, at least, the operation of said equipment) is not always infallible, and that stuff does occasionally happen that leads to inadvertent, purely unintended results. When such things happen on the licensee's side, the Commission is generally loathe to let the licensee off the hook. Rather, the Commission tends to take the position that it's the licensee's obligation to make sure that everything has worked as it should, and any lapse is subject to penalty. But here, the shoe was on the other foot, and it was the lapse of the FCC's gear (or operation thereof) that fell short. Perhaps this will lead the FCC to be a bit more magnanimous in the future. (Well, we can dream, can't we?)

This case also underscores the wisdom of obtaining, and holding onto, stamped "receipt" copies of materials you file with the Commission. Presumably the company in question here had done just that – and thus was able to demonstrate, conclusively and immediately, that the Commission's determination that led to the initial fine was simply wrong. That ability saved these folks $3,000.

Found in translation . . . at last!

FCC OK's AM on FM Translators

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In an effort to provide a lifeline to an AM radio industry in continued, and dramatic, competitive decline, the Commission has changed its rules to permit AM stations to rebroadcast their signals on FM translators under certain conditions. The long-awaited Report and Order – whose release was anticipated last Fall – opens the door for considerable, but not universal, "cross-service translation".

Under the new rules, AM stations may rebroadcast on "currently authorized" translators in the non-reserved (*i.e.*, commercial) portion of the FM band, ***provided that*** no portion of the 60 dBu contour of the translator extends beyond the ***smaller*** of either (a) the AM's 2 mV/m daytime contour or (b) a 25-mile radius from the AM's transmitter site. To be a "currently authorized" translator for these purposes, a translator must have been licensed or authorized in a construction permit in effect as of May 1, 2009. (In other words, translators whose initial permits are granted after May 1, 2009, will ***not*** be eligible; nor will any translators whose authorizations, even if granted on or before that date, have since expired.)

Perhaps the real winners here are those lucky, or prescient, souls who managed to get themselves translator licenses or permits on unreserved channels prior to May 1, 2009.

And for all you Class D AM stations, a special break: you will be allowed to originate programming on the translator during time periods when your AM station is not operating. While that does some violence to the technical concept of "translator" service (since origination, after all, does not involve "translation" in any sense), the Commission viewed it as in keeping with the agency's desire to bolster the competitive position of AM licensees.

These changes have been a couple of years in the making. Back in 2006, the NAB filed a petition for rulemaking proposing the idea of cross-service translation. And in 2007, the Commission had started issuing STA's to let some AM folks translate on a case-by-case basis. (We reported on that phenomenon on our blog two years ago. Through March 18, 2009, a total of 215 such STA's had been issued.) The Commission released a Notice of Proposed Rulemaking moving the ball a bit farther down the field in August, 2007, and it looked like the final rules were set to be adopted last Fall. But suddenly the item was removed from the Commission's agenda without explanation. (Some suspected that the LPFM lobby, which has no love for translators and would prefer to rein in their spread, had made a successful, last-ditch effort to derail the proposal.) While that disappearance from the regulatory radar screen may have been cause for alarm, the Commission continued to grant STA's, suggesting strongly that the rules would ultimately be adopted.

And sure enough, here they are. The new rules should do the trick for many, if not most, interested AM stations. That is, AM stations subject to multiple interference sources (due to the nature of AM technology) should be able to reach their core service area with FM signals in addition to their AM signals.

But there *are* limitations. For example, while the AM licensee does not necessarily have to own the translator on which its signal is being rebroadcast, the limiting "financial support" rules that apply to FM licensees will equally apply to AMers. If the translator used for AM fill-in service is not owned by the AM licensee, a rebroadcast consent agreement between the two licensees must be in place. And as to ownership of multiple translators, while a single AM station may own more than one FM translator, the Commission will not permit ownership of more than one translator serving the "same area". This parallels existing rules for FM stations. By requiring full service stations, AM or FM, to demonstrate the "technical need" for more than one translator serving substantially the same area as another, previously authorized translator, the Commission hopes to prevent "monopoliz-[ation]" of local spectrum.

In this vein, the Commission warns ominously that it will "consider it an abuse of our rules for a licensee to use two or more cross-service translators to effectively create a *de facto* FM station." Ditto for a licensee who tries to "use two or more FM translators in a manner which circumvents the local radio ownership limits." However, the Commission provides no clear indication of how it will identify such situations.

One other limitation: cross-service translation will not be permitted on translators operating on reserved

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Commissioner Meredith Attwell Baker

probably heard of her back when the DTV Transition was all over the news: she was then acting head of the National Telecommunications and Information Administration (NTIA), which (among other things) was in charge of the DTV converter box coupon program. Prior to her stint in the government, Baker spent several years in the telecom industry. She also has a prominent relative: her father-in-law is James Baker, former Secretary of State.

While Commissioners Clyburn and Baker received their Senate confirmations on July 24, their paperwork had still not been completed a week later — apparently the White House still needed to dot some i's and cross some t's — but there is no doubt that they will be on board soon. As of this writing, neither Clyburn nor Baker had announced any staffing appointments, but the new Chair (who is fully ensconced on the 8th Floor) had.

His Chief of Staff is Edward Lazarus, an attorney who had been co-head of the "global litigation practice" of a world-wide firm with more than 800 lawyers. His two senior advisors – Colin Crowell and Bruce Liang Gottlieb – have considerable experience on the Hill and at the FCC, respectively. Sherrese Smith will be Genachowski's go-to Legal Advisor for media matters. She was most recently Vice President and General Counsel for Washingon Post Digital, and has deep roots in the area of intellectual property. Finally, long-time Commission veteran Mary Beth Richards is back from a three-year tour in the FTC's Bureau of Consumer Protection. Prior to that, she had spent 23 years in a number of positions throughout the FCC. Richards will head up the FCC Reform initiative "to provide openness and transparency".
Down at the Bureau level, William "Bill" Lake is the new permanent chief of the Media Bureau. He is a communications lawyer who served as head of the Commission's DTV task force in the march-up to the transition. Bob Ratcliff, who had been serving as acting chief, will now become a Deputy Chief in the Media Bureau, as will Kris Monteith, formerly Chief of the Enforcement Bureau.

Other new appointments include: Chief, Wireless Bureau – Ruth Milkman; Chief, Public Safety and Homeland Security Bureau – Rear Admiral (ret.) Jamie Barnett); Managing Director –Steven VanRoekel; General Counsel – Austin Schlick; Chief, Office of Strategic Planning and Policy Analysis – Paul de Sa; Director, Office of Legislative Affairs – Terri Glaze; and Chief Economist – Jonathan Baker.

Also, there are reports that Julius Knapp will remain the chief of the Office of Engineering and Technology.

So there you have it. While there may be a slight hiccup in on-going proceedings as the new folks adjust their chairs and personalize their computer desktops, August is always slow in Washington (it used to be a swamp, you know). Still, we're hoping that the new team will be ready to hit the ground running. We will, of course, provide you with updates – on our blog (www.commlawblog.com), on our Facebook page and through Twitter – as events unfold.

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(educational) channels.

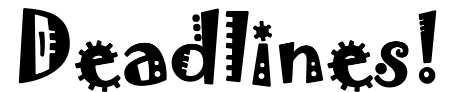
While the cross-service translator proponents appear to have achieved a major success, the LPFM lobby did not go home empty-handed. The "currently authorized" limitation – *i.e.*, the rule preventing cross-service translation on a translator authorized since May 1, 2009 – is intended to cap the universe of eligible translators and prevent any new efforts to squeeze more FM translators out of the FCC's processing line. Providing further assurance along those lines to the LPFM folks, the Commission makes clear in the Report and Order that the next LPFM application window will be opening *before* the next FM translator opportunity. (No dates for either window have been set – and the smart money figures that we probably won't be seeing the LPFM window for at least a year, but you never know.)

Additionally, the Commission expressly agreed that the LPFM service is generally at "cross-purposes" with the notion of allowing LPFM stations to rebroadcast AM signals. Still, the Commission elected to permit such rebroadcasts as long as they are done "in a manner that complies with the LPFM rules."

Perhaps the real winners here are those lucky, or prescient, souls who managed to get themselves translator licenses or permits on unreserved channels prior to May 1, 2009. The new rules likely increase the demand for such stations, the supply of those stations is inelastic (having been set in stone as of May 1, 2009), and Econ 101 principles tell us that, in such circumstances, the price to acquire such stations is almost certain to go up, up, up.

The new rules will not become effective until they get published in the Federal Register and get blessed by OMB. As of the effective date, all outstanding cross-service translator STA's will be cancelled, and any still-pending requests for such STA's will be dismissed. (Any FM translator licensee currently rebroadcasting AM signals must file written notification specifying the AM primary station pursuant to Section 74.1251(c) sometime between now and then.) Check back at www.CommLawBlog.com for updates.

August 1, 2009



EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in **California**, **Illinois**, **North Carolina**, **South Carolina**, and **Wisconsin** 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 **Illinois** and **Wisconsin** 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 **California** 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 *noncommercial television* stations located in **Illinois** and **Wisconsin** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically. The filing requirement for commercial stations has been suspended, as all commercial stations are subject to the new November 1, 2009 universal filing deadline.

Radio Ownership Reports - All *noncommercial radio* stations located in **California**, **North Carolina**, and **South Carolina** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E. The filing requirement for commercial stations has been suspended, as all commercial stations are subject to the new November 1, 2009, universal filing deadline.

August 25, 2009

LPTV and TV Translator Stations - Application filing opportunity begins for new, digital-only LPTV and television translator stations, for major changes to analog or digital stations in these categories, and for digital companion channel, so long as the application is for a rural area. A "rural area" is defined as a transmitting site location more than 75 miles from the reference co-ordinates of any of the 100 cities identified in the Commission's public notice announcing this filing opportunity.

October 1, 2009

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Iowa**, **Mariana Islands**, **Missouri**, **Oregon**, **Puerto Rico**, the **Virgin Islands**, and **Washington** 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 **Iowa** and **Missouri** 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 **Alaska**, **American Samoa**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon** and **Washington** 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 *noncommercial television* stations located in **Iowa** and **Missouri** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically. The filing requirement for commercial stations has been suspended, as all commercial stations are subject to the new November 1, 2009 universal filing deadline.

Radio Ownership Reports - All *noncommercial radio* stations located in **Alaska**, **American Samoa**, **Florida**,

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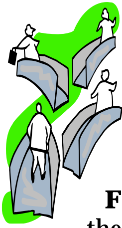

FHH - On the Job, On the Go

On July 20, **Frank Montero** spoke on a panel ("How to Finance Media and Telecom Ventures Even in a Weak Market") at the Minority Media and Telecommunications Council's Access to Capital and Telecommunications Policy Conference in Washington.

Frank M was also invited to testify before a House Committee on minority broadcasting issues, but declined the opportunity (along with other leading representatives of minority broadcasting interests) when it became apparent that the hearing was going to be used *not* to discuss minority ownership issues as originally advertised, but rather to promote the Performance Rights Act being championed by Rep. Conyers, who just happened to be chairing the hearing. **Frank M's** absence was noted by Rep. Conyers, who took the unprecedented step of reading aloud into the record the names of all witnesses who withdrew.

On August 8, **Jeff Gee** will be speaking at the West Virginia Broadcasters Association Annual Greenbrier Meeting at (where else?) the Greenbrier Resort Hotel in White Sulphur Springs, WV.

On August 14-15, you can catch **Scott Johnson** in Columbia, SC, as the South Carolina Broadcasters Association gets together at the Columbia Metropolitan Convention Center in connection with the STAR Awards Dinner and Ceremony.

Also on August 14-15, **Frank Jazzo** and **Vince Curtis** will be leading the "Washington Update" sessions at the New Mexico Broadcasters Association Convention 2009 in Albuquerque.

Hitting the road in August as well will be **Harry Martin**, who will be appearing on a legal panel ("FCC Regulatory Update: Problems and Possibilities") at the Texas Association of Broadcasters Annual Convention and Trade Show in Austin on August 20.

On September 25, **Frank M** will be speaking on a panel ("Convincing Capitol Hill: How to Effectively Petition Members of Congress") at the NAB Radio Show in Philadelphia.

Ron Whitworth and **Davina Sashkin** have been elected officers of the Alumni Association Board of the Communications Law Institute of the Columbus School of Law at the Catholic University of America. **Ron** is the President-elect (meaning that he'll serve as President in 2010-11) and **Davina** is the 2009-10 Secretary.

Media Darling of the Month? Why, that would be this month's Other Frank, **Frank J**, whose authoritative pronouncements about the MMTC radio rescue petition (sample: "It's too soon to predict which provisions have legs") were duly noted by *Comm Daily.*

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Guam, **Hawaii**, **Mariana Islands**, **Oregon**, **Puerto Rico**, the **Virgin Islands** and **Washington** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E. The filing requirement for commercial stations has been suspended, as all commercial stations are subject to the new November 1, 2009, universal filing deadline.

October 10, 2009

Children's Television Programming Reports - Analog and Digital - For **all** *commercial television* and *Class A television* stations, the second 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. Please note, however, that for television stations, only digital programming will be included, as all analog programming ended last quarter. Only Class A stations will need to use the analog programming section of the form.

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.

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

Updates on the News

Eighth Floor access control – It looks like Chairman Genachowski is taking steps to get an early handle both on the procession of interested parties seeking to meet with him and on the issues that will be discussed in such meetings. When folks try to get an appointment to speak with him (or his staff) – in person or by phone – they are asked to provide a boatload of information about what's on their minds ***before*** they can get themselves penciled into the Big Guy's calendar. (This was recently reported by *Comm Daily* and comports with our own experience thus far in the young Genachowski regime.)

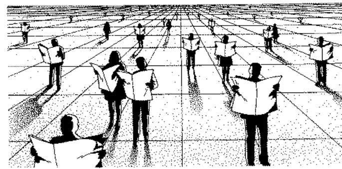
If you'd like to speak with the new Chair or his people, be prepared to hand over, in advance:

- a description (two-three paragraphs should do the trick) of the "precise issues" you want to discuss;
- a list of any pending Commission proceedings that are involved;
- copies of any letters, handouts or pleadings that you may already have presented to anybody else in the Commission that "best set forth the issues you wish to discuss"; and
- a list – with names and dates, thank you very much – of meetings you have had with other Commission personnel. Interestingly, the general expectation is that anyone wanting to see the Chairman will have already touched base with the "relevant" Bureau beforehand.

(You'll also have to let them know whether you plan to talk about funding or policy issues under the Recovery Act, and if so, whether a registered lobbyist will be along for the ride. Such information is required to comply with the Recovery Act.)

The goal of this new procedure – which is unlike anything that's been in place in recent memory (if ever) – is to ensure compliance with applicable rules and regulations, and also to clue the Chairman's office in about what other FCC personnel should be invited to attend. And, of course, knowing what the meeting's going to be about lets everybody bone up on the relevant issues ahead of time.

So now when you want to chat up the Chair, you have to jump through one more hoop. But that may turn out to be a good thing. The process should help focus such conversations, getting everybody on the same page from minute one. Plus, the submission of the information will create a useful historical record of the Chairman's contacts with the private sector. In fact, it would be a good idea if the Chairman were to post all such pre-meeting submissions on his website so that everybody will have an idea of who's talking to him about what. (They should normally be available through the Freedom of Information Act anyway, but why make everybody – private parties and FCC personnel alike – go through *that* particular hassle?)



The expectation is that this process will be applied across-the-board to ***everybody*** who wants to bend the Chairman's ear. If some favored folks are permitted to move to the head of the line – or, worse, to skip the line entirely, slipping in the side door unannounced – questions could legitimately be raised about the new administration's commitment to fairness and transparency. But we are optimistic that this new process is a signal of a refreshing new openness on the 8th Floor. We'll keep our fingers crossed.

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apparently doesn't think that that dramatic increase is a "circumstance[ ] warrant[ing] a change" in its EEO policy. Go figure.

But if you really want to scratch your head, consider this. The Commission's rules require that each licensee's EEO public file report be posted on that licensee's website. And the two guys that got whacked for over-reliance on the Internet? The reporting conditions that they are now subject to (for the next several years) specifically require them to demonstrate to the Commission, each year, that their EEO reports have been duly posted on the Internet.

Let's get this straight: the Internet is so widespread that it is a matter of regulatory imperative that annual EEO reports ***must*** be posted there, but ***not*** widespread enough to give the Commission assurance that any interested – and motivated – prospective job applicant would be able to find out about job vacancies posted there. That doesn't seem to make much sense – but it's not clear that sense is necessarily a factor here.

In any event, all broadcast licensees should be aware that the Commission's EEO enforcement mechanism is still primed to lunge at the capillaries of procedural minutiae, rather than the jugular of actual discriminatory activity.

Them that's got shall give . . .

Commission's Fine Adjustments Go Both Ways

Scales of justice subject to recalibration

By Ron Whitworth
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As reported in last month's *Memo to Clients*, the fact that an entity happens to be "highly profitable" may result in the doubling of a forfeiture. It's not that the underlying misconduct was somehow more deserving of opprobrium – it's just that the Big Bucks Company can afford to pay more, and therefore, in the view of the Commission, it should.

But there's another side to that coin. Other decisions indicate that the Commission is willing to take the opposite tack as well. In a recent spate of decisions involving the failure of Low Power FM stations (LPFMs) to renew their licenses, the Commission has drastically reduced the amounts owed, apparently just because the entities being fined are LPFM licensees.

If an LPFM station is involved, a reduction in fine to the $250-$500 level may be in order.

In one case, an LPFM station's license renewal application was due on August 1, 2004, with the license set to expire on December 1, 2004. The licensee didn't file its renewal application until December 23, 2004, more than three weeks after the license's expiration. The licensee did not dispute the fact that it failed to timely file its renewal, but did request a reduction or cancellation of its fine. It claimed that payment of the forfeiture would be "devastating," although it failed to provide the FCC any evidence that that was, in fact, the case. Nevertheless, the Media Bureau dropped the forfeiture from $7,000 to $500, stating that the decision was "consistent with our recent precedent regarding Low Power FM Stations."

The same day, the Bureau made it clear that its charity was limited to LPFMs. In a decision involving a full-power educational FM licensee, the FCC declined to reduce a $1,500 forfeiture for a failure to timely file its renewal application. Like the LPFM situation, the full-power NCE's mistake had been inadvertent, and its renewal application had been submitted nearly three months before the license's expiration. Nevertheless, the FCC declined to reduce the forfeiture at all, upholding the full amount.

The precise basis for what appears to be the Bureau's LPFM forfeiture policy is not entirely clear. As long ago as December, 2007, the Bureau whittled a $3,000 fine down to $250 for an LPFM licensee. In so doing, however, it offered virtually no detailed explanation. Since then, that 2007 decision has been cited as the governing precedent – which leaves us all a bit uncertain as to exactly what the operative considerations may be, other than that, if an LPFM station is involved, a reduction in fine to the $250-$500 level may be in order.

Ordinarily, when a licensee (in any service) thinks that it should be relieved of a fine because of inability to pay, the licensee is expected to submit: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflect the licensee's current financial status. Generally, in order to justify a reduction (or cancellation) in a fine, the Commission requires that such documentation demonstrate the forfeiture amount either approaches or exceeds the licensee's ***gross revenues***. (While some licensees have historically attempted to show that operational losses justify fine reduction, the Commission has most recently – and most emphatically – sought to put the kibosh on such claims. Instead, it has emphasized that a licensee's gross revenues are the primary measure of its ability to pay.)

To sum up, if you're an LPFM station and forget to file your renewal, it's quite possible your forfeiture will be reduced to just $500 with minimal explanation required. If you are not an LPFM, however, getting a forfeiture reduced will take quite an effort. Even if you're operating at a significant net loss, unless you can demonstrate that your gross revenues would be wiped out by the fine, don't expect any reduction. And as reported last month, if you are one of the lucky few businesses that happens to be "highly profitable," look out. Your fine might be doubled as a "deterrent" to future lapses.

(Continued from page 6)

digital companion channel applications. All applications must be submitted electronically through the FCC's CDBS program.

It's been years since the FCC has flung open the door for new (*i.e.*, non-companion) LPTV stations anywhere. As a result, it is extremely likely, if not an odds-on mortal lock, that some serious demand has built up – demand that we will see unleashed on August 25. In other words, we can probably expect a ton of filings as soon as the door opens. Since the coming opportunity is strictly first-come, first-served, applications which are filed at the first opportunity will block out later-filed applications. That being the case, if you have specific notions of filing for a new station in a particular community, you would be smart to get all your ducks in a row so that you will be able to file on August 25. Otherwise, you run the risk that somebody else will get there first.

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First Class