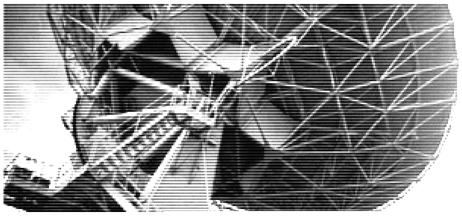

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Communications Law & Regulation

MEMORANDUM TO CLIENTS

News and Analysis of Recent Events in the Field of Communications

Sisyphus 2009 – Let's get the ball rolling!

Multiple Ownership Review Cranking Up, Again

Issues still linger unresolved from 2002, 2006 reviews, but . . .

By Davina Sashkin
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Has it been four years *already*? Time really does fly when you're having fun.

That's right, folks – it's time once again for the FCC's quadrennial review of broadcast multiple ownership rules. Mandated by statute to revisit them every four years, the FCC must begin anew in 2010 a study of the rules that (a) restrict the number of radio or television stations an entity may own and (b) limit the cross-ownership by owners of broadcast stations and newspapers in the same market.

The time has come for the FCC to begin anew a study of the rules that restrict broadcast ownership.

In gearing up for this round, the FCC has scheduled a series of public workshops for the first week of November ("public" meaning that you can listen but not comment) and has opened a docket for comments (where you *can* comment) designed to help the FCC figure out the appropriate scope, methodology, and analytical framework for the review.

October, 2009 **No. 09-10**

Inside this issue . . .

The Commission's announcements provides a tiny bit of insight into the FCC's approach to the new review (in a word: methodical), but what exactly can broadcasters expect from this next round? Or, perhaps more importantly, based on the results of the last few reviews, what's at stake in 2010?

Some historical background on the quadrennial review process may be helpful. In the deregulatory spirit of the 1996 Act, Congress directed the Commission to review broadcast multiple ownership rules periodically (at first it was every two years, later changed to every four) to determine "whether any of such rules are necessary in the public interest as a result of competition" and to "repeal or modify any regulation it determines to be no longer in the public interest." As you can see from Congress's language, the subtle suggestion was that ownership limitations were presumptively undesirable and to be discarded unless the FCC could justify them.

Initially, the FCC was cautious in wielding the deregulatory stick – so cautious that it was chastised by the U.S. Court of Appeals for the D.C. Circuit twice in one year (2002) for failing to demonstrate why it hadn't found a need for further liberalization, particularly of the national ownership cap.

But, as often happens, things changed. Considerable sentiment against Big Media swelled up among various segments of the populace. Suddenly, ownership limitations which had been viewed by many (including, it would appear, Congress) as antiquated shackles unnecessarily impeding the growth of the industry came to be seen as vital tools for safe-guarding the public interest. That set the scene for the upheaval that was the 2002 Biennial Review.

Then-Chairman Powell determined that the 2002 Biennial Review would be a comprehensive overhaul of the ownership rules. After conducting public hearings across the country and receiving countless written comments, the

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Trouble in River City?

Power To The Parents Redux

It's still all about the kids

By Harry F. Cole
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If you're looking for a good example of your tax dollars being spent – spent, yes, but ***not*** necessarily being put to work – you should check out the Notice of Inquiry (NOI) issued by the Commission on October 23. Entitled "Empowering Parents and Protecting Children in an Evolving Media Landscape", it reads like a cross between an undergraduate course in child psychology and a weekend program on "modern parenting" that might be offered at the local community center.

While no one can fault the Good Intentions presumably underlying the NOI – after all, Looking Out For The Kids ranks right up there with apple pie, the flag and motherhood in the pantheon of unassailable motivations – the NOI is grossly flawed in numerous ways. It lacks legislative authority, raises the specter of unconstitutionality, largely duplicates an inquiry just completed by the Commission, inserts the FCC into a regulatory area which other, presumably more competent, agencies are already working, and asks questions which are unanswerable.

If this is how the Genachowski Commission plans to deploy its resources, we'd all better fasten our seatbelts – it could be a bumpy night.

In last month's *Memo to Clients* we reported on the FCC's report to Congress relative to parental controls on video and audio programming (regardless of source). The preparation of that report was ordered by Congress, which is the boss of the FCC, so the Commission had no choice but to invite and review public comments and prepare the report.

But as we noted last month, in its report the Commission mentioned that it planned to issue its own NOI following up on its 87-page magnum opus to Congress. Little did we know that that NOI would be released within two months of the report to Congress.

The stated goal of the NOI is to "develop a record that will help [the Commission] answer the question of how to empower parents to help their children take advantage of these opportunities [presented by technological developments], while at the same time protecting children from the risks inherent in use of these platforms." Bear in mind, just last March the Commission issued an inquiry into essentially the same questions relating to "advanced blocking technologies and existing parental empowerment tools" and looking to "improve or enhance the ability of a parent to protect his or her child". And the Commission managed to generate nearly 100 pages of report in response. While the NOI supposedly "picks up where the [earlier report] left off", it's difficult to imagine exactly what more the Commission expects to learn that it did not already learn in response to the broad inquiry it posed last March (which resulted in the report to Congress).

But before delving into such practical questions, let's focus on a more fundamental threshold question: where does the Commission think it gets the authority to sprawl itself out into the area of child-raising? After all, the FCC is not a free-wheeling operation that can take up any subject matter it chooses. Rather, it's a federal agency whose range of activities is strictly limited by Congress and the Constitution. Before an agency can act at all, it must first determine whether it has the necessary authority to take the action, and it should always be mindful of whether the Constitution permits it to take the action.

And yet, in the NOI, the Commission makes no such determination. To the contrary, it isn't until Page 3 of the NOI that the FCC acknowledges any concern about such niggling details. And there it merely asks commenters to "discuss whether the Commission has the statutory authority to take any proposed actions and whether those actions would be consistent with the First Amendment". (On the third-from-

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Honolulu SSA under fire

Shared Services Arrangement Challenged By Public Interest Group

Consolidated news operation violates rules, according to complainant

By Steve Lovelady
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Out in aloha-land, a citizen's media group has teamed up with a Georgetown University-based public interest law group to challenge an arrangement by the two licensees of three Honolulu TV stations. Under a Shared Services Agreement (SSA), the newsroom operations of the Honolulu affiliates of NBC, CBS and MyNetworkTV would be combined. According to Media Council Hawai`i, the deal would create a three-station combo in the market in violation of the Commission's multiple ownership rules. Unsurprisingly, the licensees disagree with that assessment.

We reported on SSAs generally back in the September, 2007 *Memo to Clients*. As we said there, when given the opportunity, the FCC has approved certain operational combinations in smaller television markets where the current media ownership rules wouldn't normally allow outright common ownership of the stations. Such approval normally comes only after close Commission scrutiny of the proposed arrangements and, in some cases, imposition of conditions of varying sorts.

The transactions we described typically involved sales of stations to friendly parties known as "sidecars", sales which included SSAs along with several other related agreements – in other words, situations where the SSA is an integral component of a transaction for which prior FCC approval is required. While the same technical standards apply to all SSAs whether or not they are formally presented to the FCC, many SSA situations avoid FCC scrutiny because they do not involve transactions that require prior agency approval. The Hawaii deal is such a case: the parties are not proposing that any station licenses change hands; instead, they have simply agreed to certain cooperative working relationships among their respective stations.

During the two years since our 2007 Intro to SSAs article, TV station profitability has dramatically declined. The global economic recession and increased siphoning-off of advertising revenue by new media sources have caused financial hardships at virtually every commercial television station. Not coincidentally, there has been a recent flurry of SSA-type transactions, with reported combinations in Los Angeles, Syracuse, Peoria, El Paso and Augusta, in addition to the Hawaii station transaction. With the increased popularity of such deals, and the start of a new round of inquiries in the FCC's quadrennial review of its media ownership rules (*see* related article on Page 1), it will be interesting to see how the FCC responds to Media Council Hawai`i's complaint.

Ordinarily, the Hawaii SSA might never have popped up on anybody's regulatory radar. But that's where the Council comes in. A self-described "non-partisan, non-profit, non-governmental independent group", the Council "seeks to improve public access to information, strengthen public support for First Amendment rights and freedoms, broaden public understanding of the role of the media, and promote accurate and fair journalism in Hawaii." And it has set its sights on the proposed SSA with a 27-page complaint (accompanied by 60+ pages of exhibits).

The gist of the Council's complaint is that the SSA arrangement in Hawaii is effectively a transfer of control from one station owner to another. Since transfers of control require prior FCC approval, and the SSA parties haven't sought (much less obtained) such approval, the deal is unlawful, at least as the Council sees things. The Council also opined that operation of the three stations under the control of one company would exceed the limit under the FCC's media ownership rules in the Honolulu market, even if the parties had properly requested permission from the FCC. The Council claims that viewers in Honolulu will go from having four independent sources of local TV news to only three. Even though the combined news reporting operation of the three stations will be bigger than the prior operations at any one of the stations, all but four of the newsroom staffers were laid-off at the NBC affiliate in Hawaii.

Reportedly, the Council has also asked the US Justice Department's antitrust division to look into the matter.

The two companies that own the three Hawaii stations

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Editor's Note: R.J. Quianzon, whose reports on the FCC's fines and forfeitures activities normally appear on Page 3, tells us that this month there have been no activities to report on — so we gave him the month off. Coverage of fines and forfeitures will resume when the fines and forfeitures resume.

Dear CRB: Thanks for nothing

Final Playlist Reporting Requirements For Webcasters Announced

By Kevin Goldberg
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After years of proposals and deliberations and interim policies, the Copyright Royalty Board (CRB) has at long last published "final rules" dictating the playlist reporting requirements for web-casters. But like so many things in this day and age of fast-paced technological and regulatory development, the "new" rules, which take effect on November 12, 2009, are likely to be of little more than academic interest to many. That's because intervening events – including multiple separate agreements among various web-caster groups and SoundExchange – have largely marginalized the significance of the CRB's role in this aspect of webcasting.

The rules won't be of particular interest to

- "smaller" Internet-streaming broadcasters, *i.e.*, operators with such a small on-line listenership that they never exceed the $500 annual minimum payment in a given year, to whom the full-time "census" reporting of playlist information does not apply; or
- broadcasters who have elected to participate in one or more of the agreements (general noncommercial and noncommercial educational or CPB or commercial broadcaster) to settle outstanding appeals of the March 2, 2007 decision of the CRB to institute rates and terms for the statutory license for the period 2006-2010.

Still, if you are in the dwindling universe of web-casters who remain subject to the CRB's reporting requirements, you should familiarize yourself with the "new" rules.

The reporting rules are part of the system established by the CRB for assuring collection and payment of appropriate royalties to copyright holders. Using webcaster-supplied playlists reflecting the frequency with which songs are played on the web, SoundExchange can fairly distribute the royalties it collects. When the CRB first finalized the playlist reporting requirements in 2006, all webcasters were required to file quarterly reports with SoundExchange listing every song played by the webcaster during two seven day periods in that quarter. In December 2008, the CRB proposed to change those quarterly filings to "census" filings – *i.e.*, monthly filings containing information about every song played during the month. The recently-published rules formally adopt that census filing approach.

Under the "new" rules, census reporting – that is, reporting within 45 days of the end of each month the required information about *all* songs played during that month – is required for *all* webcasters ***except***

- broadcasters simulcasting an over-the-air broadcast on the Internet which have such a small listenership that they do not exceed the $500 annual minimum payment per year (in other words, any very small commercial webcasters and non-commercial webcasters that do not exceed 159,140 aggregate tuning hours in any month); and
- preexisting satellite digital audio radio services, new subscription services or business establishment services who cannot accurately measure listenership for technological reasons. (These folks must still report their playlists, but can do so on a modified "aggregate tuning hour" basis.)

Of course webcasters who elected to participate in one of the several settlement agreements reached in the past couple of years are bound by the playlist reporting requirements in the applicable agreement. These webcasters should review their particular settlement agreement, and let us know if you have any questions about your reporting requirements.

The song-related information which must be filed has not markedly changed, though there is one key exception applicable to broadcasters. The reportable information still consists of:

- The name of the webcasting service
- The category transmission code, *although this has changed slightly, with broadcasters now using one of the following category codes*:
  - Eligible nonsubscription transmissions of broadcast simulcast programming not reasonably classified as news, talk, sports or business programming (essentially, simulcast of a broadcast station's music programming);
  - Eligible nonsubscription transmissions of

(Continued on page 5)

Signs of life, despite the toe-tag

It's ALIVE!!!

Performance Rights Bill approved by Senate Committee, But chances of survival appear limited

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The American public is seriously into zombies just now – how else to account for the fact that *Zombieland* took in some $25 million during its first weekend, and *Pride and Prejudice and Zombies* has spent considerable time on many best seller lists? So we should not be surprised that, on October 15, the Senate Judiciary Committee passed S.379, the Senate's version of the Performance Rights Act (PRA), by a 21-9 vote.

Yes, that means that S.379, like its House counterpart, H.R. 848, is still alive and kicking, in an undead sort of way. And either version could, theoretically, become law – if, that is, it survives a floor vote in its own chamber, gets approved by the other chamber, and is eventually signed by the President. Should all those stars happen to align, broadcasters would for the first time be required to pay copyright royalties for over-the-air performance of sound recordings.

No, we *still* don't know how either bill will actually survive. After all, 250 members of the House have co-sponsored the "Local Radio Freedom Act", a nonbinding statement of *opposition* to the performance right embodied in H. R. 848 and S.379. Since 250 votes constitute a majority of the House, the defeat of H. R. 848 in the House would still seem to be a mortal lock, thus pounding a stake through the PRA's heart. (For the record, we're not surprised at all that S.379 passed the Senate Judiciary Committee, since that Committee's Chairman, Patrick Leahy – like his House counterpart, John Conyers – is a supporter of the legislation, and that alone can be enough to get legislation through a committee.)

That's all we feel the need to say on the matter right now.

(Continued from page 4)

non-music programming reasonably classified as news, talk, sports or business programming (essentially, a broadcast station's news, talk, sports or business programming); and

- ✓ Transmissions of broadcast simulcast programming not reasonably classified as news, talk, sports or business programming made by an eligible new subscription service (this category involves subscription-only simulcast of music programming by a broadcast station)

- ♬ The featured artists
- ♬ The sound recording title
- ♬ The International Standard Recording Code, or a combination of (a) album title and (b) marketing label
- ♬ Actual total performances of the song, or a combination of (a) aggregate tuning hours and (b) channel or program name and (c) number of times the song was played during the relevant period

For the last category (actual total performances of the song or the listed combination), the "combination" alternative is applicable only to a preexisting satellite digital audio radio service, a new subscription service, a business establishment service and broadcasters who do not exceed the annual minimum payment required for a given channel (currently $500).

The new rules have been purged of unnecessary references to prior license terms, obsolete categories (*e.g.*, "small webcaster") and the like. And illustrating the March of Technology, the CRB has deleted the option of filing the reports on floppy diskettes.

Notably, the Copyright Royalty Board did *not* adopt the following proposed changes:

- Any form of "proxy fee" or other exemption from filing altogether, even for the smallest webcasters;
- Imposition of a late fee for tardy or non-filed playlist reports; or
- An exemption from playlist reporting of songs played during syndicated radio programming

While we have focused here on the applicability of these rules to broadcasters who are also webcasting, a section of the newly final rules applies slightly different standards to "preexisting subscription services". Please contact us if you believe you qualify as a "preexisting subscription service" and require guidance as to how the new rules apply to you.

Again, the CRB's changes go into effect on November 12, 2009.

Get your FRNs now, avoid the December rush

Revised 323 Approved By OMB

By Harry F. Cole
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Surprising many oddsmakers, the Office of Management and Budget has approved the FCC's revised Ownership Report (FCC Form 323) for commercial broadcast licensees – but not before the Commission performed a last-minute two-step to clean up one loose end. The new form still isn't ready for prime time: the FCC first has to issue a public notice (a) announcing OMB's approval and (b) cluing us in as to when we'll all be due to file our next 323. The public notice could come any day now, but the deadline for filing will be at least 30 days after that notice. Still, if you're a commercial AM, FM, TV, LPTV or Class A licensee, you might want to get ahead of the curve by taking a look at the form and penciling in your answers now. We expect that CDBS's resources will be, um, strained as the deadline approaches, so early filers may avoid some headaches.

When will the new Form 323 be required to be filed? That's the big question.

We have chronicled the FCC's efforts to overhaul its ownership reporting process in previous issues of the *Memo to Clients*, as well on our blog (www.commlawblog.com). Here's the abridged edition.

The FCC would like to take steps to increase minority and female broadcast ownership, but government agencies are very limited (by the Equal Protection Clause of the Constitution, for openers) from engaging in race/gender-based decision-making. A 1995 Supreme Court case (*Adarand v. Pena*) gives agencies some very limited leeway on that score, but the agency must have a solid evidentiary justification. The Commission has decided that the ownership information which it has historically collected won't do the trick. The solution? Upgrade the FCC's ownership database by changing Form 323 (and its non-commercial sibling, Form 323-E) and the underlying reporting process.

But rather than get its own hands all dirty in the form revision process, the Commission dumped that chore onto the Media Bureau. The Bureau duly closed the doors, pulled the shades and threw together a revised form without bothering to let anybody out in the real world know exactly what changes the Bureau had in mind. The form the Bureau ultimately cooked up was then shipped over to OMB for its review in August, before anyone in the public could take a peek. When OMB quietly posted the form on its website, lo and behold – the form contained a number of surprises. (The NAB, which had also filed a petition for reconsideration with the Commission, thereupon did an admirable job letting OMB know about the problems with the new form, as did a handful of other groups.)

A central element of the revised reporting requirement was the shift to a single filing deadline for all commercial broadcasters. Traditionally, biennial ownership reports have been due on the anniversary of each station's renewal application. No longer. As announced by the Commission last May, the new drill called for everybody to file their respective reports on November 1 (reflecting data accurate as of the previous October 1) . . . starting this November 1. As that magical date approached, however, the Commission had a problem. It couldn't use the new form until OMB approved it, and as we rounded the turn and headed into October, that approval was still MIA. So earlier this month the Commission announced that the November 1 deadline was no longer operative this year (although November 1 will be the deadline in future years). Instead, the FCC would wait for OMB approval and then let us all know when to file.

But then, on October 16, the Commission released its decision on the NAB petition for reconsideration. While it denied that petition in part, it also purported to grant the petition in part. The NAB had objected to the new requirement that sole proprietorships file biennially. The Commission rejected that argument. But the NAB had also pointed out that another new provision – requiring the reporting of certain non-attributable interests previously not subject to the reporting requirement – had not even been hinted at in any notice of proposed rulemaking or responsive comments. Under the Administrative Procedure Act, agencies aren't supposed to surprise us all like that, a point which the NAB made convincingly. And sure enough, the FCC had to agree. So the Commission said that it was deleting that aspect of the new form.

Score one for the NAB, right?

Not exactly. Having "granted" the NAB's petition in one breath, in the very next breath the Commission decided that it would invite public comment on the proposed reporting requirement for certain non-attributable interests, thereby effectively side-

(Continued on page 9)

I am FCC, hear me roar

FCC Joins the Blogosphere - Now What?

By Anne Goodwin Crump
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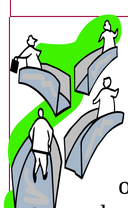
As a part of its ongoing efforts to make its proceedings more accessible to the public and to appear to be up on modern methods of communication, the FCC announced last month that it had launched on Ideascale, a "crowd-sourcing platform". The stated purpose of this launch is to allow the "online community" to discuss ideas related to issues (including particularly all things broadband) pending before the FCC in its various proceedings. In addition, the Commission noted the posting of Chairman Julius Genachowski's first video blog to the FCC's blog on broadband (which has been creatively dubbed "Blogband"). The FCC continued its flurry of new media activity by announcing that it will be launching on Facebook and Twitter as well, and they will be linked through www.fcc.gov/connect.

Shortly after making these announcements, however, the Commission apparently paused to consider the legal ramifications of all of these marvelous new methods of communicating with the public. That is, how will what is said on the Blogband and other new sources fit in with the notice and comment procedures mandated by the Administrative Procedure Act (APA)? These concerns are especially relevant to the National Broadband Plan, which is the subject of a docketed rule making proceeding. In such proceedings, interested parties are invited to submit written comments through the Commission's Electronic Comment Filing System (ECFS), and copies of such comments are generally available for review on ECFS. The Blogband, however, is completely outside of that system. How, then, was the Commission to follow proper APA-mandated procedures so that interested parties could have notice of all other parties' submissions and so that all comments considered would be included in the administrative record? After all, an administrative record is necessary for effective review of the agency's activities by the courts. Further, how would Blogband postings fit in with the Commission's *ex parte* rules, which generally require that submissions made to decision-making personnel also be filed with the Office of the Secretary to be made a part of the record?

The Commission began answering these questions in a Public Notice released on September 22, 2009. Taking perhaps the simplest approach, the Commission stated that it would deem the Blogband to be a part of the record in the docketed proceeding dealing with the National Broadband Plan. It further advised all interested parties to review not only ECFS submissions but also the Blogband. Finally, since Blogband postings are available for review by the public, the Commission stated that it would waive the requirement that postings be filed with the Secretary.

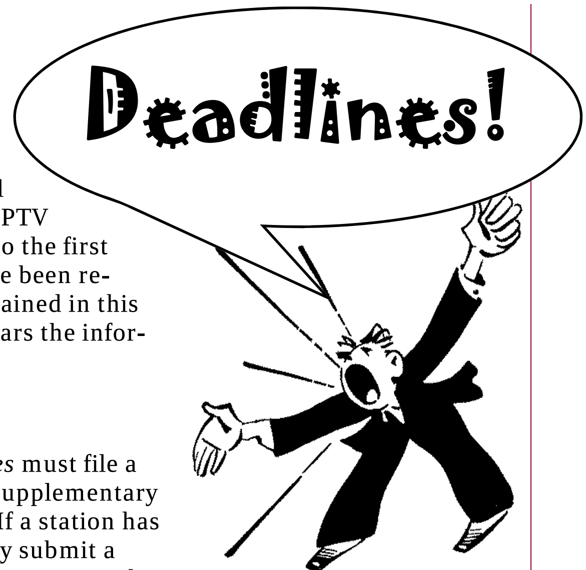
The September 22 Public Notice thus takes care of a number of the most pressing issues as they relate to the broadband proceeding, but it leaves a number of questions unanswered. For example, we now know how blog postings made by members of the public are to be treated, but what about responses or other postings made by FCC personnel? What legal status would they have? Is someone at the FCC reviewing every posting before it is made? This issue would seem to get even bigger once the Commission is active on Facebook and Twitter. Also, what will happen when blog/Facebook/Twitter communiqués are used for proceedings other than broadband? There would seem to be a huge possibility for an FCC staff member to make a statement that might either (a) indicate ahead of time which way a Commission decision is going or (b) contradict FCC policy. The use of social networks in particular, with their informal atmosphere, would appear to be fraught with danger. We will be watching with interest to see what issues arise and how the Commission deals with them.



FHH - On the Job, On the Go

Frank Montero will be a panelist on the FCC's Capitalization and Strategies Workshop on November 12 at 9:00 a.m. The workshop, organized through the FCC's Office of Communications and Business Opportunities, is designed to bring leaders in the private and government sectors together to explore how small businesses, socially and economically disadvantaged businesses, and others can obtain the capital needed to participate in the telecommunications industry. It will be telecast on the Internet.

Media Darlings of the Month? **Harry Cole** got a tip of the *Comm Daily* hat for his blog on the parental empowerment Notice of Inquiry (*see* Page 2). Not bad. But **Lee Petro** matched him with his own *Comm Daily* shout-out and raised him with a *TVNewsCheck* link (and a much better headline: "NPR Asks FCC for Unprotected Six",which have dutifully adopted here, as a sign of our sincere respect), both about his blog on the NPR/Channel 6 proposal (*see* Page 10). That kind of recognition would usually be enough for Darling-dom (or is it Darling-itis?) . . . except when **Kevin Goldberg** gets interviewed on www.MyTechnologyLawyer.com, where he is described as a "sports law expert" and a "high profile guest". OK, Kev, you can stop blushing — you're our High Profile Expert Media Darling of the Month.



November 1, 2009

Biennial Ownership Reports – Biennial ownership reports were originally scheduled to be due for all *commercial AM, FM, TV, LPTV,* and *Class A television* stations on November 1. ***However, that deadline has been postponed to a later date which the Commission will announce*** (at least 30 days prior to the re-scheduled deadline). The form will have to be filed electronically on FCC Form 323. This is the first time that LPTV and Class A stations have been required to file a biennial report, and it is also the first time that sole proprietors and partnerships made up of only individuals have been required to file biennial reports. The FCC has indicated that information contained in this year's report must be current as of November 1, 2009 (although in future years the information should be current as of October 1 of the reporting year).

December 1, 2009

DTV Ancillary Services Statements – All *DTV licensees* and *permittees* must file a report on FCC Form 317 stating whether they have offered any ancillary or supplementary services together with its broadcast service during the previous fiscal year. If a station has offered such services, and has charged a fee for them, then it must separately submit a payment equal to five percent of the gross revenues received and an FCC Remittance Advice (Form 159) to the Commission. The report on Form 317 specifically asks for a list of any ancillary services, whether a fee was charged, and the gross amount of revenue derived from those services. Ancillary services do not include broadcasts on multicast channels of free, over-the-air programming for reception by the public.

EEO Public File Reports – All *radio* and *television* stations with *five (5) or more full-time employees* located in **Alabama**, **Colorado**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **Minnesota**, **Montana**, **New Hampshire**, **North Dakota**, **Rhode Island**, **South Dakota**, and **Vermont** 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 **Colorado**, **Minnesota**, **Montana**, **North Dakota**, and **South Dakota** 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 **Connecticut**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island**, and **Vermont** 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 **Colorado**, **Minnesota**, **Montana**, **North Dakota**, and **South Dakota** 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 universal filing deadline noted above.

Radio Ownership Reports – All *noncommercial radio* stations located in **Alabama**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island**, and **Vermont** 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 universal filing deadline noted above.

January 10, 2010

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 certifica-

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Wilkommen, Bienvenu, Welcome

Dan Kirkpatrick Joins FHH as Associate

Fletcher, Heald & Hildreth is pleased to announce that Dan Kirkpatrick has joined the firm as an associate.

Dan has been practicing communications law for six years. He is a graduate of the University of Virginia Law School, where he was on the law review and a member of the Order of the Coif (the law school equivalent of Phi Beta Kappa). He received his undergraduate degree (in philosophy and psychology) from The College of William and Mary.

Dan's primary professional focus has been broadcasting. He has considerable experience with ownership, EEO and children's programming questions. Outside the office, he's Mister Outdoorsman: cycling, marathons (eight under his belt so far, with a personal best of 3:18), and most other kinds of outdoor activity.

And for carbo loading, his preference runs to Belgian beers.

Dan is married and lives in Arlington, Virginia.

FHH welcomes Dan to the fold. He can be reached at 703-812-0432 or kirkpatrick@fhhlaw.com.

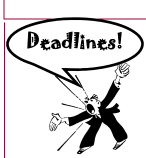
(Continued from page 6)

stepping the basis for the NAB's objection. In other words, any victory the NAB may have enjoyed is likely to be short-lived: we can reasonably expect that, when the dust finally settles on this latest detour, that particular reporting requirement will have been re-inserted into the form.

Still, didn't this last-minute shift in gears – which would require further revision of the draft form sitting over at OMB – mean that any OMB approval would likely be postponed further? You might have thought that, but then, on October 19, OMB went ahead and approved the form anyway. The Commission had slipped OMB the word that the requirement to report non-attributable interests was being deleted, and OMB proceeded to approve the form with that stipulation.

So here's where things seem to stand, at least for the moment. The Media Bureau's draft form has been approved by OMB, minus the provision for reporting non-attributable interests. You can find a copy of the revised and (we think) approved form here on the OMB website: http://www.reginfo.gov/public/do/DownloadDocument?documentID=140558&version=1 - yes, we know that it says "not approved by OMB" in the upper-right hand corner, but the file name as it appears on the OMB website is "FCC Form 323 Post-Reconsideration Version (Final).doc". (But don't forget that the FCC is considering reinserting the requirement to report non-attributables, and it seems pretty clear that we'll be seeing that provision back in the form before long.) The requirement that everyone with an attributable interest be identified in Form 323 with his/her/its FCC Registration Number (FRN) is still in there – which means that the FCC will likely be seeing a long line forming on CORES as previous FRN-less folks queue up, SSNs and TINs in hand, to lay claim to their own new FRNs so that they can duly report them in Form 323.

When will the new Form 323 be required to be filed? That's the big question, and it won't be answered until the FCC issues a public notice. A number of observers are guessing that December 15 is a likely pick, but who knows? (Anyone who would like to join in a pool to guess the 323 deadline should feel free to submit their guesses in comments to our blog.) We'll let you know when the notice comes out – check back with www.commlawblog.com for up-to-the-minute updates.



(Continued from page 8)

tion 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.

NPR to FCC: Repeal Section 73.525

NPR Asks FCC For Unprotected Six!

By Lee G Petro
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In a bold move guaranteed to generate heated debate, National Public Radio (NPR) has asked the Commission to dump the Channel 6 protection obligations (set out in Section 73.525 of the rules) which have been imposed on noncommercial FM stations for the last quarter century. While the proposal no doubt appeals strongly to NPR's NCE-FM constituency, the television side of the universe – and particularly current Channel 6 licensees and viewers – can't be happy.

The protection requirements were imposed in the first place because the portion of the FM band reserved for NCE operations butts up against Channel 6, spectrum-wise. As a result, the potential for interference to Channel 6 operations from stations in the NCE-FM band was thought to be considerable, leading the Commission back in 1985 to impose extra hurdles in the path of new and improved NCE-FM service in order to shelter Channel 6. For all you spectrum historians, NPR's petition for rulemaking provides interesting background about the development of the protection requirements. (Interesting factoid: the receivers used to determine the appropriate level of protection were all manufactured prior to 1979, meaning that the protection standards in place today are based on 30-year-old receiver technology – at best.)

> *NPR claims that not too many viewers are likely to notice NCE-induced interference to Channel 6 operations. In contrast, it points to the seemingly insatiable demand for NCE-FM service.*

According to NPR, the increased sensitivity of today's television receivers – particularly in the wake of the DTV transition – warrants reconsideration of the standards. NPR even has two studies, conducted by its own labs and by the highly-respected techno-gurus at Hammett & Edison, which it cites in support of the proposition that the interference rule no longer serves any real purpose.

NPR also claims that not too many viewers are likely to notice NCE-FM-induced interference to Channel 6 operations because more than 90% of U.S. viewers get their TV by cable or satellite, sources which are not subject to such interference.

In contrast, NPR points to the seemingly insatiable demand for NCE-FM service. The most recent window filing opportunities for new non-comm radio authorizations (full-service and translators) have attracted tens of thousands of applications, each subject to the limiting effects of the Channel 6 rules. According to NPR, NCE-FM stations would enjoy, on average, a 75% increase in 60 dBu population coverage if Section 73.525 were to be tossed; some might increase by more than 200%.

NPR makes it all sound so good.

But what NPR doesn't mention is that, while there may not be boatloads of full-service DTV stations still operating on Channel 6, there ***are*** a significant number of analog LPTV stations still up and running. These licensees do not yet have a deadline for converting to digital operation, and they typically provide service to the 10% of the public that does not have satellite and cable service. In addition, it isn't clear whether analog TV sets that are plugged into DTV converter boxes will continue to experience interference if the interference protection requirements are lifted. Indeed, it's apparently not even clear whether DTV converter boxes introduce or reduce the possibility of increased interference. Taking the NPR bait could lead to considerable reception problems for over-the-air viewers still loyal to Channel 6 stations.

These questions would obviously have to be examined carefully in any consideration of NPR's proposal.

The NPR petition was filed on October 20. The Commission has not yet taken any action on it. In view of the petition's relatively controversial proposal – as well as the Commission's current fixation with all things broadband (to the apparent exclusion of anything broadcast) – the FCC may not get around to the petition for some time, if it gets around to it at all. In all likelihood, the first sign of progress we might see on this would be the assignment of a rulemaking number to the petition, together with a public notice soliciting comments on it. That could happen in a matter of weeks, or months, or longer. We will post an alert on www.commlawblog.com if and when any opportunity to comment on the proposal opens up.

[*Note: The NPR proposal is* ***un****related to the MMTC proposal, included in the MMTC Radio Rescue Petition (which we reported on in last August's Memo to Clients), to have TV Channels 5 and 6 re-purposed for audio use only. It will be interesting to see if the Commission is inclined to fold the two together.*]

Open Window For Vacant NCE-Reserved Channels Announced

Mark your calendars: February 19-26, 2010

By Harry F. Cole
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If you're interested in filing for a new non-commercial FM construction permit specifying a channel that would otherwise be restricted for commercial use, here's your chance. The Commission has announced that, between February 19-26, 2010, it will open a filing window opportunity for certain vacant FM allotments. (Actually, the window period was originally announced to be in December, but a week after that announcement, the Commission reconsidered and pushed everything back two months.)

As has happened in connection with previous window filing opportunities. the announcement of an upcoming window entails freezes on certain types of applications. *See* the accompanying article on Page 13 for more details.

An applicant's comparative qualifications cannot be improved – but can be reduced – by changes after the window slams shut.

The allotments being made available – 67 in all – are in the commercial band; however, at the request of some would-be applicants (who were able to satisfy relatively complex Commission policies governing such things), these channels were reserved for NCE use, so commercial applicants need not apply.

The FCC's public notice provides general directions for those interested in applying. It solicitously cautions applicants about some of the vagaries and vexations of the CDBS filing system which must be used for the application process. (Sample advice: "[I]t is important that the applicant shares its CDBS account passwords with only those individuals who are authorized to view and/or modify proposals in progress.") It warns that "redlight" considerations could prevent an applicant from getting in the door. It encourages all applicants to make sure that their applications really have been submitted (hint: CDBS provides a "confirmation" screen immediately after a successful submission.)

The notice also anticipates that mutually exclusive applications will be filed. No big surprise there. It makes clear that, in the event that multiple applications are filed for a single channel, the standard NCE comparative analysis will be utilized. (If you're unfamiliar with that analysis, it's set out in Sections 73.7000-73.7005 of the Commission's rules.)

Apropos of comparative considerations, each applicant's positive comparative attributes will be frozen as of the close of the window. On the other hand, post-window changes that detract from an applicant's comparative position *will* be considered, to the applicant's detriment. So an applicant's comparative qualifications cannot be improved – but can be reduced – by changes after the window slams shut. To the extent that an applicant does claim comparative "points", it will have to submit documentation to support such claims – and the Commission "recommends" that such documentation be included as exhibits to the application.

One narrow exception to the no-comparative-improvements rule: in some limited instances, an applicant which holds certain other interests – say, an LPFM or a fill-in translator or a same-area Class D station – may avoid the adverse comparative impact of those holdings by committing, in its application prior to the close of the window, to divest them. In other words, the divestiture does not have to occur prior to the close of the window, but the commitment to divest must be made by then. Check out the FCC's public notice for further details.

The Commission's notice also underscores a technical peculiarity which must be addressed in each application. The channels up for grabs are in the portion of the FM band ordinarily used for *commercial* stations. They were reserved for ***non***-commercial operation pursuant to a policy adopted six years ago, a policy designed to accommodate situations in which no NCE channels were available for use in a given geographical area. (You can read a bit about the background of that policy in an article that appeared in the October, 2003 *Memo to Clients* – you can find it at: http://www.fhhlaw.com/memo_clients/2003/FCC%20Announces%20Standards.pdf.) Under that policy, certain showings had to be made relative to the channel before the FCC would reserve it for NCE use. That being the case, the Commission wants to be sure that the conditions underlying the reservation remain applicable.

Three such conditions apply here. A commercial channel may be reserved for non-commercial use if it is shown that: (a) no NCE channel could be used without causing prohibited interference to TV Channel 6 stations; (b) no NCE channel could be used without causing prohibited interference to foreign broadcast stations; or (c) no NCE channel is available ***and*** the proposed reserved channel "would provide a first and/or second NCE radio service to at least ten percent of the population within the 1 mV/m contour of its proposed station". If a channel was reserved pursuant to (c), NCE applicants for that channel must demonstrate, in their applications, that their propos-

(Continued on page 13)

(***Multiple Ownership Review** - Continued from page 1*)
Commission adopted a largely deregulatory approach which was loudly criticized both before and after its adoption. Among other changes, the national television station ownership limit was raised from 35% to 45% audience reach. Local television ownership was relaxed to permit ownership of more than one station, so long as only one of the stations owned was among the top four in that market. And the prior ban on cross-ownership of newspapers and broadcast stations in single markets was pretty much thrown out.

It is true understatement to say that there was an uproar in response to the new rules and the anticipated onslaught of media consolidation they would invite. This outcry should not have come as much of a surprise to the FCC, since it had received over a million comments (most of which were in opposition to one aspect or another) during the rulemaking proceeding leading to the adoption of the rules. Demonstrating how dramatically the prevailing political winds had shifted, Congress – so accommodatingly deregulatory in 1996 – was so annoyed it managed a rare bipartisan act to legislatively reduce the nationwide television audience cap to 39%.

The Commission intends to engage in a top-to-bottom review of the rules themselves AND various assumptions and definitions underlying the rules.

A coalition of opponents of the new rules brought a challenge in the U.S. Court of Appeals for the Third Circuit – and won on a number of points. The court's ultimate decision was expected by many, since the court had already issued a preliminary stay of the rules in September 2003. (Such judicial stays are highly unusual, and require that those challenging the agency's new rules demonstrate a substantial likelihood that their appeal will succeed.)

And sure enough, in its 2004 opinion in *Prometheus Radio Project v. FCC*, the court – noting that federal law requires agencies to demonstrate review of sufficient data and to provide reasoned analysis in repealing or modifying regulations – sent nearly all of the revised ownership rules back to give the Commission a chance to come up with better justifications for the changes it made. (The changes to methods in determining local radio ownership limits were upheld, but the court did question the FCC's justification for the particular limits it had chosen to impose.) The court also left its earlier stay in place, although elements of that stay were later lifted.

Since the 2004 *Prometheus* decision, little has changed in the landscape of broadcast multiple ownership. In 2008, the FCC released an order (the result of the 2006 Quadrennial Review) modestly loosening the newspaper-broadcast cross-ownership rules. But that too was challenged in the Third Circuit and stayed (in consolidation with the court's previous stay order) pending further Commission deliberations.

Those further deliberations haven't happened yet, though – possibly because the issue of media ownership is such a hot potato, but also possibly because the FCC has been distracted and deconstructed in the meantime. After all, 2008-2009 was DTV Transition time, when the Commission had little time for anything but DTV-related activities (which included Commissioners criss-crossing the nation to give the public the DTV equivalent of the "stop-drop-roll" lecture on how to survive the transition). Also, there was an election toward the end of 2008, which led to a temporary reduction-in-force on the Eighth Floor which left only three Commissioners (one of them, Jonathan Adelstein, an admitted lame duck) in place for the first half of 2009.

The Third Circuit may be getting a little tired of the FCC dragging its feet: in May it asked the parties to show cause why the stay on the newspaper-broadcast cross-ownership rule changes should not be lifted. Lifting of the stay would allow the Commission to implement at least some of the ownership rules which had been challenged – so ordinarily you might expect the Commission to greet the Court's request warmly. Not this time. With only a temporary three-man Commission in place (and the arrival of a total of three new Commissioners, appointed by the new administration, on the near horizon), the FCC asked the court to leave the stay in place. It explained to the court that the revised cross-ownership rules did not necessarily reflect the views of a majority of then-sitting Commissioners. The court agreed to continue the stay in effect, but ordered status reports to be submitted periodically. In October, the FCC asked the court to leave the stay in place at least long enough to allow the newly-constituted Commission to undertake its mandated 2010 review and to reach a decision on an administrative challenge to the 2008 order.

Which brings us back to the opening of the 2010 quadrennial review. With a new Commission which has already demonstrated its sympathy for the issues and the organizations so prominent in the challenges to the agency's 2003 and 2008 ownership decisions, we can expect a substantially different approach this time around. And sure enough, the public notice detailing the agenda of the kick-off "workshops" to be held in early November reflects the Commission's interest in engaging in a top-to-bottom review not only of the rules themselves, but also of various regulatory assumptions and definitions which are fundamental to the way the rules operate.

For example, the Commission intends to explore how the concepts of "competition" and "diversity" are to be defined, measured and factored into its ownership rules and policies. Perhaps more significantly, the FCC plans to delve into the issue of "localism" as well. The work-

(Continued on page 13)

Brrrrrrr - The Chill Is On

FCC announces FM freezes in light of upcoming December filing window

With the initial announcement of an upcoming open window for certain FM allotments (*see* related article on Page 11), the FCC froze, ***effective immediately*** (*i.e.*, as of October 16, 2009), (a) applications proposing to modify the reference coordinates of any of the 67 allotments available for application in the upcoming window, or (b) petitions and counterproposals that propose a change in channel, class, community, or reference coordinates for any of those 67 allotments. While the dates for the open window filing opportunity were changed a week after the window was first announced, the start-date for this freeze remains October 16.

This freeze will remain in effect until the day after the close of the window. The window is currently set to close on February 26, 2010, which would mean that the freeze should be lifted on February 27, barring any unforeseen developments.

The Commission also froze the filing of ***any*** commercial or noncommercial minor mod applications ***after 11:59 p.m. on February 5, 2010 until the close of the window***.

These freezes are standard operating procedure when filing windows are about to be opened. The goal is to avoid the creation of any conflicts (unforeseeable or otherwise) that could muck up the filing process.

(Continued from page 11)
als will satisfy that condition – *i.e.*, first/second NCE service to at least ten percent of the 1 mV/m population, AND that service area population must be at least 2,000 persons.

The Commission has helpfully identified the channels which were reserved on the basis of the "first/second NCE service" criterion. Those channels are marked with double-asterisks on the channel list issued with the public notice. Approximately 90% of the 67 listed channels are so marked.

The public notice also alerts prospective applicants that they are expected to have both (a) "reasonable assurance" of the availability of their proposed antenna sites and (b) sufficient financial wherewithal (liquid assets on hand or otherwise committed) to build and operate the station for three months. For tie-breaker purposes, they must also list all applications they are filing in the window (including the subject application itself) as well as any application filed prior to the window which has not been granted, dismissed or denied prior to the opening of the window. (Requests filed on Form 175 to participate in channel auctions need *not* be included.)

There is no cap on the number of applications which may be filed during the window ***but*** applicants should bear in mind that, if it comes down to a tie-breaker, the applicant with the fewest pending new/major change applications in the same service should prevail.

In view of the fact that the Commission's staff has still not completed the processing of all the applications that were filed in the 2003 FM translator window or the 2007 NCE window (which was limited to channels in the NCE end of the band), it's not likely that we'll be seeing too many filing opportunities for new NCE stations in the foreseeable future. For that reason alone a considerable turn-out for the February window may be expected.

(***Multiple Ownership Review*** - *Continued from page 12*)
shops will include discussion of how localism should be defined and measured, and how it should be connected to the "structure of media ownership".

This inquiry into "localism" is particularly interesting in view of the fact that the Commission already has an on-going proceeding addressing "localism" – commenced in 2003 (under Chairman Powell) and ratcheted up dramatically in 2007 (under Chairman Martin). It would seem unlikely – if not downright nonsensical – for the Commission to adopt new "localism" rules in that 2003 localism proceeding while it is admittedly still trying to define exactly what localism is (and, once it is defined, how it is to be measured) in the 2009 ownership proceeding. How the Commission plans to resolve that particular conundrum remains to be seen.

It is not yet clear what the Genachowski Commission's intentions are, though the Chairman himself has been known to favor competition with a nudge by government (read: broadband). What *is* known is that it will be a long and tedious process as broadcasters, interest groups, and the public all have a stake in the outcome and will demand to be heard.

FTC Applies Endorsement/Advertising Guides To Social Media

"Results not typical" safe harbor eliminated

By Harry F. Cole
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Hey, all you Bloggers and Twitterers and Social Media Mavens. The Federal Trade Commission has concluded that you all have made it to the Big Time. According to Uncle Sam, you are now part of the Media whose reach is so totally awesome that it needs to be subject to "guides" relative to their content. And sure enough, the FTC has come up with just the guides for you.

Actually, the FTC has had "Guides Concerning the Use of Endorsements and Testimonials in Advertising" in place for decades. They are primarily designed to insure accuracy and transparency in advertising presented as endorsements or testimonials: if somebody (or some organization) has been paid to endorse a product, that fact should be disclosed to the consumer, along with enough information to permit the consumer to evaluate the credibility/validity of the endorsement.

But those Guides had not been revised since 1980 (for reference purposes, Jimmy Carter was in the White House), and even the FTC had to admit that the world has changed a tad since then. Hence the revised guides.

The new guides are generally similar to the old ones. The consistent threads running throughout are that your average consumers should (a) not have to guess about whether or not what they are hearing or seeing in the media is a bought-and-paid-for ad; and (b) be let in on any information that might affect an endorsement's apparent persuasiveness. The first prong, in particular, should sound familiar to broadcasters subject to the FCC's sponsorship identification rules. Other traditional media are similarly accustomed to both of these concepts.

But the largely unregulated Internet has no such extended history of interaction with the Feds. Obviously, the FTC figures that it's time for the government to step in to safeguard the people from entrepreneurs who see the vast profit potential that the new Internet-based social media have created. Twitter, Facebook, MySpace, blogging, etc. – there are now many ways in which to reach vast audiences instantaneously. And those vast audiences can be targeted by factors such as age, socio-economic characteristics, political/religious/philosophical leaning, and so forth. This is an advertiser's dream, and the potential for mischief is considerable.

So the FTC wants us all to know that the same standards which have historically applied to traditional media also apply to the New Media: advertising messages must be disclosed as such, and grandiose claims of a product's benefits must be tempered with down-to-earth facts.

This doesn't mean that bloggers can't get up on their electronic soapboxes and sing the praises of products or services they like. They can do so anytime they want, using pretty much whatever language they want (assuming that it's accurate). But if they happen to have some "material connection" with the source of the product or service, they have to say so. For example, if the blogger (or Facebooker, or Twitterer, etc.) is being paid by that source, or if he/she enjoys some special relation with that source which entitles him/her to multiple free samples, other products or privileges, or some other benefits, that must be disclosed. (A single, unsolicited free sample would ***not*** ordinarily trigger that requirement.)

And even if social media users are on the take, big-time or otherwise, from the source of the goods/services being touted, they can *still* go on touting all they want – ***as long as*** they disclose their true relationship with the source of those goods/services. The ultimate goal is to let the consumer know of relationships between the blogger (or Twitterer, etc.) and the goods/services that the consumer would not otherwise expect. That way, so the theory goes, the consumer can better evaluate the importance, or credibility, of whatever is being said about the good or service.

In addressing the issue of disclosure, the FTC makes clear that people engaging in the role of "reviewer", with all that that traditionally implies, are generally ***not*** to be deemed endorsers. The FTC is ***not*** trying to discourage bona fide, free and open discourse about the relative merits or demerits of goods or services. It just wants to make sure that, if any participants in that discourse are getting compensated for that participation through some special relationship with the advertiser, the fact of that compensation is included in the conversation.

The FTC's attempt to wrangle all the social media users on the Internet presents a number of practical problems, not the least of which is the issue of enforcement: seriously, how can an agency with limited resources believe that it could ride herd on the millions upon millions of folks who might be guilty of undisclosed advertising? Of course, if you happen to be the one blogger who gets caught, it would stink to be you – but the odds that you might get caught certainly seem to be relatively small.

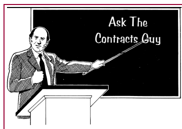
(Continued on page 18)

FM ALLOTMENTS PROPOSED – 6/20/09-10/20/09

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (*i.e.*, Drop-in, Section 1.420, Counterproposal)
TX	Buffalo	109 miles W of Waco, TX	278A	09-187	Comments: 12/07/09 Reply: 12/22/09	Accommodation Substitution
TX	Centerville	84 miles SE of Waco, TX	267A	09-187	Comments: 12/07/09 Reply: 12/22/09	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 a pplications may eventually be filed, and also to changes (both proposed and adopted) in the FM Table of Allotments which might present opportunities for further changes in other communities. Not included in this advisory are those windows, proposed allotments and proposed channel substitutions in which one of this firm's clients has expressed an interest, or for which the firm is otherwise unavailable for representation. If you are interested in applying for a channel, or if you wish us to keep track of applications filed for allocations in your area, please notify the FHH attorney with whom you normally work.



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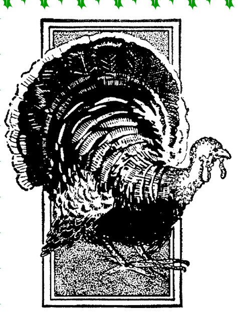
have formally responded (separately) to the Council's complaint, telling the FCC that their deal fully complies with the FCC's rules. Each company will remain completely responsible for the programming content broadcast on its respective station(s). Although the local news programs on one company's station will be prepared and provided by the other company's newsroom operation, this will amount to less than 15% of the total programming on the first station, which is below the threshold limit for creation of an "attributable" interest under the FCC's current media ownership rules. Moreover, the companies will be keeping separate advertising sales staffs – an uncharacteristic SSA approach. Most companies in similar SSA transactions enter into Joint Sales Agreements which result in combined sales staffs.

The two companies observe that numerous prior decisions by the FCC support their position that the Hawaii SSA does not require FCC approval and is perfectly legal. One of the companies has included (as an exhibit to its response) a redacted copy of the SSA document to prove that it contains the proper bells and whistles to meet the FCC's requirements for such contractual arrangements.

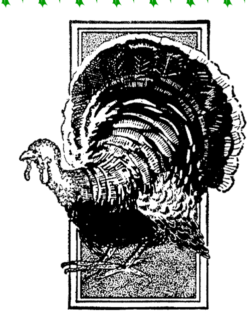
Media Council Hawai`i had requested FCC emergency action to prevent the SSA from taking effect, but the FCC didn't take action to stop the transaction before the companies combined their operations: according to local published reports, the merged newsroom operations began on Monday, October 26. Another report, however, indicates that the Commission did send a further inquiry to the licensees, asking for more information about their SSA arrangements.

Our lawyerly prediction is that, under the current ownership rules and past FCC interpretations of those rules, the Council's complaint will be dismissed by the FCC. However, as the trend toward more SSA-type arrangements continues, the FCC may try to impose more restrictions on these transactions.



Holiday Schedule Reminder

Fletcher, Heald & Hildreth, P.L.C.
will be officially closed on
November 26-27 (Thanksgiving weekend),
December 24-25 and January 1.
We will be open on Wednesday, November 11
(the federal holiday in honor of Veterans' Day).



(Continued from page 2)
the-last page of the NOI, the Commission circles back around to the questions of statutory and Constitutional authority. Again, though, it declines to offer its own analysis, but instead simply asks for suggestions as to where the Commission might look for such authority.)

It's not like the Commission is putting the cart before the horse here; it's more like the Commission has started pulling the cart down the road while it asks passersby whether they happen to have seen a horse anywhere nearby.

And as to the Constitution – it does not appear to be much of a concern to the Commission. The NOI refers repeatedly to the risks or threats posed by (among other things) "inappropriate content", which includes "offensive language" and "hate speech", as if the Commission (or any governmental agency, for that matter) could regulate "inappropriate content" for being, well, "inappropriate". Maybe we missed something back in Constitutional Law 101, but it's news to us that the government might be able to regulate speech simply by characterizing that speech as inappropriate. There is, of course, a set of well-established constitutional standards for defining "obscenity". But beyond that, the government's ability to regulate speech is far less clear.

Perhaps there is indeed some trouble in our River City.

That's especially so when the trigger for such regulation is the dramatically imprecise concept of "inappropriate" – and when that concept is used in connection with child-raising. It is difficult to imagine a subject more private and less susceptible to definition (much less control) by a federal agency that that which may be deemed "appropriate" for children. Perhaps *the* paramount privilege and responsibility of parenthood is the task of instilling one's children with standards and values of the parents' choosing. Does the First Amendment countenance governmental intrusion into the ultra-private realm of child-raising in the name of controlling the "inappropriate"? We doubt it, and the NOI provides no analysis to support the contrary position.

Still, the Commission plunges deeply into the inner sanctum of the family, even going so far as to ask about "household media rules", by which it means rules which parents establish to govern their own children's media use.

Putting aside the threshold question of statutory and Constitutional authority, we should also note – as the Commission itself does – that "other federal agencies are addressing some of the same issues" presented in the NOI. But if that's the case, why should the FCC feel the need to weigh in? It is, after all, the Federal *Communications* Commission, not the Federal Child-Raising-and-Protecting Commission. Of course, if other agencies with more direct interest in this area – say, the Department of Education, or maybe the Department of Health and Human Services, for two – call on the FCC for input relative to areas within the FCC's particular area of expertise, the FCC should assist. But it's unclear why the FCC believes that it can or should be in the forefront of any such effort.

The NOI consists of 25 single-spaced pages chock-a-block full of questions along the following lines:

- What is "the level of awareness among parents, teachers, and children of the benefits of electronic media"?
- "Is there a sufficient amount of cognitive/intellectual children's programming available today?"
- "What options are there to protect [certain] children from the risks of exposure to electronic media?"
- Is there "a minimum level of media literacy that parents, teachers, and children must have to ensure that children can participate effectively in modern society and enjoy the benefits of electronic media while avoiding the potential harms"? (Note that responding to this particular question will be complicated by the fact that the NOI fails to define (a) "media literacy" or (b) "effective participation in modern society".)

We could go on, but you presumably get the point: these are not questions which are likely to generate any seriously useful answers.

Oh, and in case the questions posed by the Commission weren't general enough, the NOI also invites comments to "ask and answer any other questions that this NOI fails to raise which they believe would help inform [the FCC's] inquiry." Talk about open-ended!

The deadlines for comments and replies have not yet been set – they depend on when the NOI is published in the Federal Register. Since the Commission's inquiry last March attracted more than 10,000 comments, we may see the same here. On the other hand, since that last inquiry covered largely the same turf as the NOI, maybe not; but in view of the vastness of the questions posed, the NOI may attract more. We'll have to wait and see.

While perhaps well-intentioned, the NOI is reminiscent of the presentation made by Professor Harold Hill to the parents in River City, Iowa. Hill (the central character in *The Music Man*) wanted to convince the town's parents that a serious problem existed among the town's youth, a problem for which he, conveniently enough, had the solution. Was there really a problem? Probably not, but you never know. Did Hill have the solution to the possibly non-existent problem? He managed to convince the parents that he did. The analogy to the NOI is tempting, but it isn't perfect. Perhaps there is indeed some trouble in our River City – but that would be trouble with a "T", and that rhymes with "FCC" and that stands for . . . well, you know the tune.

Meanwhile, back in the Third Circuit . . .

CBS Pleads The First

Eye Net wants re-match of 2004 Super Bowl Half Time fight, but this time on constitutional grounds

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In a supplemental brief recently filed with the U.S. Court of Appeals for the Third Circuit, CBS has asked the court to directly address the question of whether the FCC's indecency rules violate the First Amendment. The brief was submitted in connection with the still-ongoing battle over Janet Jacket's wardrobe malfunction during the 2004 Super Bowl.

As long-time readers will remember, in July, 2008, the Third Circuit found the FCC's $550,000 fine against CBS to be "arbitrary and capricious" on the basis of a relatively narrow issue of administrative law. In May, 2009, the Supreme Court vacated that decision, shortly after it overturned a similar decision from the Second Circuit (in Fox Network's "fleeting expletive" case). In both cases, the decisions turned on issues of administrative law and avoided direct decisions on First Amendment grounds.

According to CBS, it's time to stop avoiding the issue. "This Court," CBS urged, "should embrace the Supreme Court's invitation to assess the constitutionality of the indecency rules given current realities and find that most applications can no longer survive First Amendment scrutiny." Among those "current realities", CBS's brief notes the rise of other media sources and new parental control technologies that did not exist when the Supreme Court considered the issue thirty years ago in the *Pacifica* case (*i.e.*, the famous "Seven Dirty Words" case). These changes, CBS argues, mean that broadcasting is no longer the "uniquely" pervasive medium that it was in 1978, nor is broadcasting content "uniquely accessible" to children – two of the key assumptions that supported the *Pacifica* court's view that broadcasting should be accorded less First Amendment protection than other media.

CBS's brief responded to a filing from the FCC in which the FCC argued that the Supreme Court's rationale in the Fox "fleeting expletive" case validated the FCC's approach to Ms. Jackson's transgression. Moreover, the FCC disagreed with the Third Circuit's previous finding that there wasn't enough evidence to show that CBS's actions in broadcasting the event were sufficiently "willful" to support a fine. Thus, the FCC reasoned, the case should be returned to the FCC for further investigation of whether CBS "willfully" violated the FCC's rules by "recklessly" airing the Super Bowl Halftime Show live, rather than with a delay that could have prevented the nation from exposure to Ms. Jackson's breast for nine-sixteenths of one second.

According to CBS, any such investigations would unnecessarily prolong the case. "The issues the FCC now raises all have been thoroughly briefed, argued, and decided by this Court, following an exhaustive investigation and three rounds of pleadings at the agency," CBS stated, before blasting the FCC's "Ahab-like obsession with this case." In the meantime, CBS noted, broadcasters' free speech rights continue to be chilled by the uncertainty surrounding the FCC's indecency policies. By delaying the ultimate reckoning of its rules, CBS argued, the FCC forces broadcasters to continually second guess themselves as they try to comply with notoriously vague and arbitrary standards.

While both the Third Circuit and the Second Circuit clearly have the opportunity (and now the invitation, thanks to the Supreme Court's *Fox* decision last Spring) to consider whether the FCC's indecency rules violate the First Amendment, it is not certain that either will do so. In light of the Supreme Court's reversals, both courts could choose to simply return the cases to the FCC for further proceedings. On the other hand, both courts, particularly the Second Circuit, previously appeared to be skeptical of whether the FCC's indecency rules – particularly as applied to such fleeting and isolated words and images – could pass Constitutional muster.

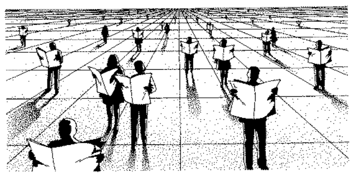
It is also uncertain when the lower courts will make their decisions. The Third Circuit has not requested further oral arguments at this time. If it does, a decision would be unlikely before early 2010. The Second Circuit is likely to take as long or longer. In response to the Supreme Court's overturning of the Second Circuit decision, Fox filed its brief in the Second Circuit in late September. The FCC's response was filed October 28, and Fox will have until November 12 to file a further reply. The Second Circuit has indicated that it *will* hold oral arguments, but it won't be announcing a schedule for the arguments until after all the paperwork has been filed. Thus, we wouldn't expect to see decisions from the lower courts until early or mid-2010.

Of course, if the lower courts do make a decision on First Amendment grounds, the matter is virtually certain to return to the Supreme Court. But briefing and argument there couldn't happen until late 2010 or early 2011 – at the *very* earliest – further prolonging the longest fraction of a second in broadcasting history.

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

Updates on the News

It's 2009 – Do you know where your spectrum is? – Word around the FCC is that the Commission is hunting high and low for spectrum that it can allocate to the seemingly all-consuming broadband juggernaut that has enthralled the Genachowski Commission since it took over last summer. We plan to look more closely at this situation in coming months, but for now, all we can say is – watch out.



It should be clear to just about anybody who hasn't been in a coma for the last couple of months that BROADBAND is the only game in town as far as the Commission is concerned. And the goal seems to be to spread that game as far and as wide as possible. But that takes spectrum. (The Chairman has reportedly said that spectrum is the "oxygen" of the wireless world. That world, of course, is a major element of the ultimate broadband expansion.) And as we all know, they're not making new spectrum anymore.

So how does the FCC plan to feed to the voracious Broadband Beast all the spectrum that that beast may demand? That's the hard question we should be worrying about.

While no specific proposals have been floated yet, there have been a number of ominous signs. They started innocently enough last March, with the introduction of S. 649, a Senate bill calling for an inventory of all spectrum regulated by NTIA and the FCC. In explaining the bill, one of its sponsors (Senator Olympia Snowe) commented that "there is no new spectrum to allocate, only redistribute." Some reports have indicated that that bill was backed by Google, which would be a likely beneficiary of expanded broadband.

More recently, the Commission has issued a notice soliciting comments on where it might find spectrum to accommodate its broadband needs. That inquiry specifically alluded to the possibility of "moving spectrum allocations toward their highest and best use in the public interest". Hmmm.

And even more recently, the Commission announced the appointment of Steven Waldman to be in charge of an effort on the "future of media in a changing technological landscape". His responsibility: to make recommendations "designed to ensure a vibrant media landscape". Double hmmmm.

Again, we'll be looking at all this in more detail in coming issues. There's no reason to panic yet – but there is plenty of reason to stay tuned.

*(**FTC Guides** - Continued from page 14)*

The FTC's Guides and accompanying explanatory discussion, which consist of more than 80 pages of text, address a wide range of advertiser/endorsement/testimonial-related matters that anyone – new and old media folks alike – should be aware of. Those matters include some new limitations. For example, as a historical matter ads which refer to one endorser's experience with a product could be disclaimed with verbiage along the lines of "results not typical", thereby opening the door to the presentation of wildly atypical examples, the extent of whose atypicality could be masked by those three little words. With the revised Guides that "safe harbor" has been eliminated: such ads must "conspicuously disclose the generally expected performance in the depicted circumstances".

The precise reach of the revised Guides is not entirely clear. The focus, of course, is on the advertisers themselves, and also on any "endorsers" who (a) assist in the promotion of the advertisers' wares while (b) accepting consideration from the advertiser and (b) failing to disclose that consideration. But what about an employer whose employee uses company facilities – *e.g.*, the corporate blog – to engage in undisclosed advertising. Is there potential liability there? Also, what if a broadcast station reports on a celebrity's Twitter activities, including references to specific products mentioned in the celebrity's Tweets . . . and what if the celebrity is being paid by the makers of those products to the word out? Would FCC sponsorship ID requirements obligate the broadcaster to check for the existence of some such relationship, and to slap an ID tag on any report about the Tweets?

Frankly, we're not sure how these or other such cases may get sorted out, but we think that it's best to worry about this sort of thing before any trouble arises.

Notably, the FTC itself has made a public effort to allay fears of massive, across-the-board crackdowns for alleged violations of the Guides. The agency claims that it's going after only the "most egregious actors", according to one press report. But check out the FTC's website for a video of an FTC spokesperson addressing the question "Is the FTC planning to sue bloggers?" We've watched it a number of times, and we still haven't heard her answer that specific yes/no question with a simple yes/no answer. (You can also find a number of brief, FTC-produced video snippets about the guides on the FTC's website.)

In the end, common sense and candor are probably the best protections against an FTC action based on alleged violations of the guides.

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