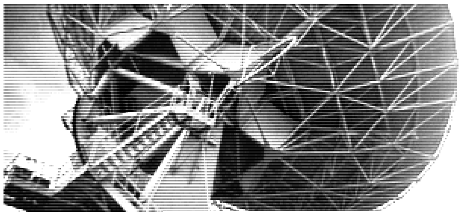


**FLETCHER, HEALD & HILDRETH**

*Communications Law & Regulation*

# MEMORANDUM TO CLIENTS

*News and Analysis of Recent Events in the Field of Communications*


*Indecency 2010*

## CBS and Janet Jackson: Back to the Third Circuit

### *Second of two pending indecency cases back to court for second round of arguments*

*By Dan Kirkpatrick*
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Indecency is once again back in the news. As we reported in January, the FCC appeared in the U.S. Court of Appeals for the Second Circuit in New York to attempt to defend the "fleeting expletives" portion of its indecency regime. And in late February, the FCC appeared in court again, this time in the U.S. Court of Appeals for the Third Circuit, to attempt to defend its imposition of a fine on CBS for the infamous broadcast of a flash of Janet Jackson's breast during half-time of the 2004 Super Bowl.

*The Third Circuit panel played things closer to the vest than their colleagues on the Second Circuit.*

The judges on the Third Circuit panel played things closer to the vest than their colleagues on the Second Circuit, although it appears they also have some questions about the constitutionality of the indecency regime.

Back in 2008, the Third Circuit reversed the FCC's order that had found CBS's half time show broadcast indecent. Like the Second Circuit in the *Fox* case, the Third Circuit decided that case on administrative law grounds, avoiding the constitutional issues raised by the FCC's indecency enforcement regime. (The Third Circuit also kept its feelings on those constitutional issues to itself – unlike the Second Circuit, which was all too happy to expound on those issues, even though they didn't play a part in the Second Circuit's ultimate decision.)

The Third Circuit in 2008 found that the FCC's decision to fine CBS for Ms. Jackson's flash was a departure from its previous policy of not fining "fleeting" indecency of any kind. Further, according to the court, the FCC had not sufficiently ("sufficiently" here meaning "at all") explained why it had chosen to depart from that policy. The court rejected the FCC's argument that the exception for "fleeting" indecency had never applied to images, but only to words. The Court also questioned the FCC's imposition of a fine against CBS, which required a finding that the broadcast of the questionable content was "willful." The Court held that while it would have been sufficient for the FCC to have shown CBS was reckless in failing to prevent the broadcast by, for example, including a delay, it did not believe the FCC had shown that.

Not surprisingly, the FCC appealed the decision to the Supreme Court. But then the Supremes reversed the *Fox* decision, sending it back down to the Second Circuit. Based on that action, the Supremes also shipped the *CBS* decision back to the Third Circuit for further consideration relative to the administrative law aspects of its ruling.

One particular aspect of the Supreme Court's *Fox* decision attracted attention in the Third Circuit. The Supremes suggested that, perhaps, the FCC's indecency policy differentiated between "literal" and "non-literal" uses of dirty words, where the "fleeting" *literal* use of such a word would justify a penalty, while a similarly fleeting *non*-literal use would not. (For example, if the word "fucking" were used clearly to refer to sexual activity, that use would be "literal" and

*(Continued on page 15)*

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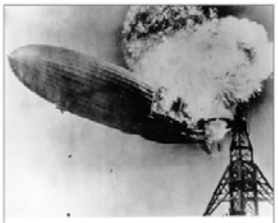

But for the OCAS system?

*Putting towers on auto-pilot?*

# New Tower Safety System Proposed

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What would you think about a tower safety device that reduces the number of aircraft collisions with towers, is environmentally friendly, and eliminates the need for towers to be continually lit? Too good to be true? Perhaps, but OCAS, Inc. (a company founded by two former military pilots) has petitioned the FCC for approval of just such a system.

Specifically, OCAS has asked the Commission to add a new Subpart T to Part 87 of its rules in order to allow OCAS's Obstacle Collision Avoidance System (OCAS ® – hence the company's acronymic name) to be widely deployed. The technology at work here is similar to air-to-air collision avoidance systems in use for some time now. In fact, the OCAS system itself has been used in a number of locations worldwide, including at some U.S. government (shh!) installations. In light of its successful operations over a period of time – not to mention marketplace demand for an improved obstacle warning system – OCAS is asking the Commission to change its rules as necessary to allow the system to be put to much wider use.

The OCAS system consists of three basic components: a low-powered continuous wave radar; an energy supply source to turn on and control the lighting on the structure; and a VHF radio which can transmit simultaneously on virtually all aviation-band frequencies.

The continuously operating radar device is attached on or near the tower (or whatever other air traffic obstacle you want to warn planes away from) and constantly monitors a series of pre-established "warning zones". If an aircraft enters the first warning zone, the system automatically turns on the tower lights to provide a visual warning to the pilot. If, despite the lights, the apparently errant aircraft advances toward the tower and enters the second warning zone, the VHF radio transmits an audio warning on all aviation transceiver channels alerting the flight crew to take immediate action to avoid a collision. Because of the very modest signal strength of the transmissions – the signal would need to extend over only the second warning zone, a relatively modest area – it is very unlikely that any aircraft outside of the danger zone would receive any false alarms.

This system – on paper, at least – screams "user-friendly". From the operational standpoint, the software governing each individual OCAS® unit can be adjusted to account for unusual terrain at a particular site. Plus, because the tower lights are activated only when an aircraft flies uncomfortably near the tower, use of OCAS® would both save on power costs ***and*** extend the life of tower light bulbs. As an added bonus, OCAS could take charge of the required tower monitoring chore and send daily status reports to the tower owner.

And Mother Nature should be pleased as well: the fact that the towers no longer would be constantly illuminated should decrease the incidence of fatal bird/tower collisions, since such collisions have been blamed on the disorienting effects on birds of constantly-lit towers.

Overall, with the exploding demand for tall structures – *e.g.*, communications towers, obviously, but also power-generating wind turbines – the OCAS system may be an idea whose time has come. Check our blog (www.commlawblog.com) for updates – we'll let you know if and when the FCC requests comments on this petition.

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***Licensee fined for using wrong channel*** – Although it does not happen very often, a fine was recently issued to a licensee for broadcasting on the wrong UHF TV channel. In Pittsburgh, FCC agents determined (in December, 2007) that a TV translator station was operating on Channel 32, even though it was licensed to operate on Channel 29 – and had (at least according to CDBS) been licensed to operate on that channel since the late 1990s. The licensee provided the FCC with an invoice indicating that the station had been operating on Channel 32 since April, 2007. It does not appear that the licensee provided any explanation for its decision to move three channels up the dial. (According to CDBS, several weeks *after* the December, 2007, inspection, the licensee filed for an STA to operate on 32; that request is still pending.)

# Focus on FCC Fines

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While industry and self-help may be laudable traits in many areas of life, television isn't one of them, at least when the self-help involves picking an operating channel that you think you might like better than the one the FCC has given you. So instead of getting a pat on the back, the licensee got whacked with a $4,000 fine for operating with facilities not specified in its license. The licensee claimed that it didn't have much income, and it pleaded for mercy as a first time offender. The first claim got it nowhere, primarily because the licensee failed to provide the Feds with sufficient information to determine the company's financial status. (The Commission requires that claims of poverty be amply supported by business records.) But the FCC did knock 20% off the bill because the licensee was a first time offender. The licensee now must cough up $3,200 and, hopefully, get back to its correct channel.

***Licensee fined for using wrong location*** – Broadcasting on the wrong channel is not the only way you can get fried by the Feds. Broadcasting from the wrong location, with the wrong antenna, and without EAS gear will also get you onto the hot seat *tout de suite*. A licensee on Long Island, New York, found out the hard way that such a mistake can cost $15,200 in fines.

A broadcaster in the spectrum-congested NYC region called the FCC to complain that he was receiving interference from TV Channel 32. The FCC looked into the matter and determined that a licensee on Channel 32 on eastern Long Island might be the source of the problem. The G-men showed up to have a look-see at the station and found several items which piqued their interest.

Paramount among the problems was a transmitter which was not where it was supposed to be. The FCC agents determined that the actual coordinates of the station were different (by 737 feet) from those on its FCC applications. The station blamed the error on its landlord and told the FCC that its lease had listed the wrong coordinates. As we have observed here before, the FCC doesn't buy that excuse in this day of widely (and inexpensively) available GPS equipment.

Being in the wrong place was not the station's only problem. The FCC agents had a look at the antenna system and found a SIRA model single panel directional antenna with a narrow single lobe radiation pattern. It should come as no surprise that the strongest signals were directed at the heavily populated areas west of the transmitter, including Manhattan. What might be a surprise is that the station was authorized to use a 4-bay MCI directional antenna with a narrow cardioid pattern. Although swapping out a carburetor from a Pontiac with one from an Oldsmobile may be acceptable in the world of auto repairs, swapping out antennae (and not telling the FCC) is frowned upon by the government unless the two units are essentially identical – and you may correctly assume that the licensed Sira single panel was not all that identical to the 4-bay MCI directional. So much so that the agents shut the station down.

While they were on site, the FCC agents also noticed that the station had no EAS equipment. Add that to the tab, too. In the end, the FCC sent the station a $19,000 bill for its violations. However, the station asked for, and got, the first-time-offender 20% discount. Bottom line: the station owes $15,200 to Uncle Sam.

***Late Fee for Ownership Report/ public file violations - $10,000*** – A non-commercial FM station owned by a school in New Hampshire will be having to rattle its fund-raising tambourine a boatload to pay its $10,000 non-fine to the FCC. The payment, which was part of a negotiated settlement, is for failing to properly maintain the station's public file and for failing to file an ownership report with the FCC.

The school's failures came to light when the station filed its renewal. As station staff went through the checklist of items in its public file, they noticed that a copy of their 2007 ownership report was missing. As they looked for a copy elsewhere, they finally concluded that the report was never filed. The station dutifully reported to the FCC that the report was missing – a fact which any FCC staff person or member of the public could also have discovered using the FCC's interactive database.

The FCC entered into a settlement agreement with the station and the FCC chose not to pursue any enforcement action against the station. This kindness from the FCC only came after the station (a) agreed to make a $10,000 "voluntary" contribution to Uncle Sam, and (b) adopted a compliance procedure program to ensure that the FCC rules were not overlooked again.

*Retransmission In Transition?*

# Major MVPDs Propose Overhaul of Retransmission Consent Process

By Harry Cole
Dan Kirkpatrick
Jeffrey J. Gee

A group consisting of some of the major multichannel video program distributors (MVPDs) has run to the Commission asking for changes in the retransmission consent rules. The group – for convenience, let's refer to them collectively as "Big Cable", although they include (in addition to major cable operators) non-cablers DirecTV, Dish, a couple of phone companies, and even some supposedly independent advocacy/think tank groups – is concerned that Big Cable's ability to call the shots when it comes to carriage of broadcast signals has gone away, and Big Cable understandably wants it back. Who wouldn't?

In a Petition for Rulemaking, Big Cable declares that the retransmission consent system is "broken". Not surprisingly, Big Cable had this particular epiphany immediately after several very public sets of carriage negotiations in which, *e.g.*, Fox and ABC demonstrated their negotiating acumen, and clout, in facing down some very major cable operators. Who "won" or who "lost" those negotiations is, of course, a matter of opinion and spin. But Big Cable is now urging the FCC to impose a mandatory arbitration process and to require that MVPDs continue to carry stations when parties can't reach a deal.

*According to the petition, the retrans system has unduly favored broadcasters from Day One.*

Way back when, in the misty eons of time prior to the Cable Act of 1992, broadcast stations got carried on cable systems pursuant to the "must-carry" rules. In rough terms, the cable systems *had* to carry local stations, and broadcasters *had* to allow such carriage. But with the 1992 Act, Congress started to coax the players into a more market-oriented arrangement. In addition to must-carry (which remained in place as an alternative), broadcast carriage could be agreed-to through "retransmission consent" arrangements privately negotiated between TV station and cable operator. The broadcaster had to elect which approach it would take in advance of the relevant three-year term. Those electing retransmission consent (or "retrans", to the *cognoscenti*) were then left to cut whatever deal they could.

The advantage to the broadcaster was that, ***if*** it could negotiate a favorable deal under retrans, it could get compensation for carriage that, under must-carry, it was giving up for free. The downside, of course, was that a broadcaster electing retrans and then unable to tie down a deal risked losing out on any carriage during the three-year term. Bummer. (All parties to retrans negotiations were, and still are, required to deal in good faith. While accusing the other side of acting in bad faith is a standard ploy, to date such claims have not moved the Commission to interject itself into retrans dealings. Basically, it's beyond difficult to establish that the other guy is negotiating in bad faith – and in its petition Big Cable pretty much concedes as much.)

In the early rounds, the cable companies held most, if not all, of the cards. Since they were all monopolies in their respective areas, they could avail themselves – usually successfully – of the tried-and-true negotiation position of "my way or the highway". Broadcasters electing retrans usually ended up getting access to one or more additional cable channels and maybe some advertising avails and the like – whatever scraps the cable company chose to leave on the table – but no cash payments for their programming.

Then a funny thing happened over the course of the last 18 years or so. Competition crept into the MVPD industry, through satellite services (*i.e.*, DirecTV and Dish) and telephone company offerings like FIOS. And while 200+ channels of non-broadcast programming may sound tempting, the viewing public still demonstrated an abiding affection for local TV stations. This happy confluence of trends was good news for broadcasters. Not so much for Big Cable.

Fast forward to New Year's Eve, 2009, when a negotiating impasse between Fox and Time-Warner (one of the Big Cable team) splashed across the headlines and threatened to deprive millions of viewers of Fox's New Years Day programming (can you spell "BCS"?). A couple of months later, ABC went mano-a-mano with Cablevision in the NYC market, cutting off carriage of the Oscars® for the first 13 minutes of the show before a deal was struck and the show went on.

And two days after the Oscars® face-off, who shows up at the FCC but Big Cable, petition for rulemaking in hand.

According to Big Cable, the retrans system has unduly favored broadcasters from Day One. The only reason Congress adopted the retransmission consent/must carry regime, so their story goes, was to prevent then-dominant cable systems from undermining free over-the-air broadcasting by exercising the market power that their monopoly positions afforded cable operators. They seem to think that, because broadcasters

*(Continued on page 14)*

*Split Circuit panel sidesteps constitutional argument*

# Cable Programming Exclusivity Ban Dodges The Appellate Bullet . . . *This* Time

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The U.S. Court of Appeals for the D.C. Circuit has affirmed the 2007 extension of the Commission's prohibition against exclusivity arrangements between cable operators and cable-affiliated programming networks. But the likelihood of that prohibition staying on the shelves beyond its current sell-by date (*i.e.*, 2012) is dubious.

For more than 15 years the FCC has prohibited exclusive contracts between cable operators and cable-affiliated programming networks. The prohibition was triggered by the Cable Act of 1992, which reflected Congressional concern about cable's monopolistic position in the realm of multichannel video programming distributors (MVPDs). But Congress was not inclined to let the FCC engrave the prohibition in stone. *Au contraire*, Congress included a sunset provision essentially causing the ban to go away automatically in ten years ***unless*** the FCC made an affirmative finding that the prohibition continued to be necessary to protect competition and diversity. In 2002 the Commission made such a finding, leaving the prohibition on the books for another five years. And in 2007, when that extension ran out, the Commission renewed it for another five years.

That's when Cablevision and Comcast, two of the biggest MVPDs, asked the Circuit to review the ban. In their view, the increasingly competitive MVPD market – now populated by such *nouveaux arrivés* as satellite TV providers DirecTV and Dish, not to mention telephone companies using their networks to deliver more than phone service – undercut the concerns that gave rise to the ban back in the days of the first President Bush.

By a 2-1 decision, the Circuit panel upheld the FCC. But in so doing, it gave the cable petitioners reason to believe that the prohibition won't be around a whole lot longer.

The majority opinion, written by Judge David Sentelle (with Judge Thomas Griffith joining him), relied on a standard statutory analysis of the FCC's decision, an approach in which the Court accords a boatload of deference to the agency. As usually happens when the Court takes that deferential tack, the FCC got the benefit of the doubt: the majority held that the Commission was not unreasonable in its conclusion that the prohibition is still justified, even though a different panel of the Court had, in an unrelated case decided last August, reached a seemingly inconsistent conclusion that "[c]able operators [ . . . ] no longer have the bottleneck power over programming that concerned the Congress in 1992."

But the victory may not comfort the Commission (or others supporting the prohibition) much. The majority wrapped up its opinion by observing that "[w]e expect that if the [MVPD] market continues to evolve at such a rapid pace, the Commission will soon be able to conclude that the exclusivity prohibition is no longer necessary to preserve and protect competition and diversity in the distribution of video programming." In other words, while the Court was willing to give the FCC a pass this time around, the Commission shouldn't necessarily count on similar treatment the next time around.

An interesting aspect of the majority opinion is that it rejected the cable petitioners' claims that, rather than the lenient, deferential statutory standard of review invoked by the majority, a more rigorous, less-agency-friendly First Amendment standard should apply because the cable operators' First Amendment rights were (according to the petitioners, at least) at stake. The majority declined to consider any First Amendment arguments because, according to Sentelle, the cable guys didn't raise them.

That was news to Judge Brett Kavanaugh, whose 29-page dissent – not quite twice as long as the majority opinion – relied heavily on First Amendment analysis to reach the conclusion that the FCC's prohibition ***is un***constitutional. In the majority's view, the cable petitioners never squarely argued that theirs was a First Amendment attack, and (according to the majority) the Court should not be in the business of deciding issues of constitutionality which the petitioner did not "set forth as an issue in the case and to which it refers only obliquely." [*Important practice tip: If you plan to argue a constitutional issue, be sure to refer to the Constitution in your Statement of Issues.]* In fairness, while Kavanaugh made a big effort to "tease out" (in Sentelle's words) enough constitutional references in the petitioner's briefs to cobble together an argument, it does appear that the cable guys declined to present the constitutional issue as such.

*In the majority's view, the cable petitioners never squarely argued that theirs was a First Amendment attack.*

While the cable petitioners may take considerable comfort from Judge Kavanaugh's constitutional analysis, even he had to acknowledge that "the First Amendment rights of a Cablevision or ESPN do not tug at the free speech heartstrings in the same way as the iconic political protester who lies at the core of the First Amendment." Ouch.

Next stop? The ball is in Cablevision/Comcast's court. They could sit back and wait for the current exten-

*(Continued on page 17)*

*An employer's guide to potential problems*

# Coping With Social Media In The Workplace

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Social media. All those irresistible Internet-based time vampires that allow everyday people to interact with a vast universe of friends and strangers in nearly infinite ways, personal and professional, important and trivial, worthwhile and worthless. Facebook. Twitter. LinkedIn. The blogosphere (yes, including – but never never limited to – www.commlawblog.com). Wiki. YouTube. And so on, and so on, and scooby dooby dooby.

So you're a businessperson, and your employees have company computers, and maybe even company phones, with Internet access. Do you let them use social media on your time and gear? Should you?

Pop quiz to help answer the first question: How many of your employees do you think are looking at their Facebook pages right now? Good guess. Now walk down the hallways and see if you can catch any of them in the act. Go ahead, we'll wait. We expect that, unless your guess was "probably all of them", you were way off. Because they're doing it – if not Facebook, then some other kindred site. You know it, even if you don't like it or want to admit it.

*Do you let your employees use social media on your time and gear? Should you?*

The deal is that, like it or not, your employees are social networking in some form. They may be doing it at home. They may be doing it at work. They may be doing it *for* work. No matter how, where or why, you and your business are at risk when your personnel and equipment are used for non-business activities on-line.

That brings us to the Big Question: what are you going to do about it?

The answer clearly has to be "something". "How much" depends on several factors, including your type of business, your desired business environment, and whether you actively employ social networking as part of your business development and operations.

At an unrealistic extreme, of course, you could try to ban social media use at work altogether – if you really relish creating considerable disgruntlement on the part of your staff while undertaking herculean (and likely impossible) enforcement efforts.

A more realistic approach is to promote and enforce responsible use. That's where we come in.

If you don't have strong policies relating to social media as part of your employee code of conduct or employee handbook, you're opening yourself up to potential liability from a wide variety of possible scenarios. We can help prepare policies governing your employees' use of social media as it affects, or could affect, your business.

Such policies can take many forms. They can be additions to existing employee handbooks or codes of conduct. Alternatively, they can comprise an entirely new stand-alone set of supplemental rules specifically applicable to social media use.

However you choose to impose them, a primary goal of such rules is to put you in a position to effectively punish violations through various measures – up to and including termination of the employee in extreme circumstances. But while enforcement is a key element, it is important to recognize that social media are a part of the current cultural landscape, in and out of the office. As a result, the tone, content and prohibitions of this code of conduct can influence not only your employees' views of you, but also the world's view of your business. So even though, as an employer, you have every right to tell your employees that use of social media on company time is verboten, do you really need, or want, to be that extreme? After all, a happy employee is a productive employee, right? While loss of productivity is a key concern, a quick Facebook break between projects can often be more helpful than harmful. Shoot, I've checked my Facebook page and updated my status twice since I started this article . . . .

But quick breaks become long breaks and long breaks become complete time-sucks before you know it. How can you regulate such use to prevent the occasional trickle from becoming a flood?

Or suppose that, during one of those breaks, an employee uses a company computer to post something somewhere that exposes you to legal liability – defamation, maybe, or copyright/trademark infringement. Worse yet, that employee is – or at least seems to be – speaking for the company because you told him or her to do so as a means of promoting your company, its products or its services. Before you know it, you're being sued.

*(Continued on page 7)*

*(Continued from page 6)*

While it's impossible to protect against every imaginable problem, a good policy will be designed to:

***Define the allowable use of social media on company time or from company equipment.*** To what extent, if any, is it allowed? If your business is actively using social media to promote itself, who is allowed to speak for the company through these media, who is overseeing those people, and what are the prescribed processes? How do you respond to requests for information received through social media? What procedures are in place to vet official company statements?

***Minimize the likelihood that employee statements are imputed to the company.*** Due to the prevalence of social media, Internet postings now have the real world impact of a face-to-face statement. Even if an employee is not officially speaking for the company, he or she may be identifiable as a company employee and that could cause big problems for you in several areas, including:

- Harassment, sexual or otherwise, (a) of one employee by another, or worse yet, (b) of a subordinate by a supervisor. Remember – innocent banter can turn into real harassment pretty quickly, especially in the two-dimensional/written word world of the Internet, where an effective Sarcasm Detection Filter has yet to be developed.

- Liability for unauthorized disclosure of trade secrets, confidential or other proprietary information.

- Defamation, invasion of privacy or other reputational torts.

- Copyright or Trademark Infringement.

- Violations of the FTC's new guidelines concerning testimonials.

> *Innocent banter can turn into real harassment quickly, especially in the world of the Internet, where an effective Sarcasm Detection Filter has yet to be developed.*

***Protect your company's brand or image and relationships*** with affiliates, clients and adversaries against harm generated through employee statements on the web. At the very least, you need a general "good judgment provision". But you may want, or need, to go further, reminding employees that, when they speak publicly, they should not do so in a way that disparages your company, its trademarks or brand names (by, *e.g.*, publicly venting internal problems or frustrations). You may also want to encourage them to keep their personal politics, religious views, and other proclivities or interests out of the online workplace, just as they do in the physical workspace (especially those photos you or friends have posted to Facebook). Ditto for statements about customers, clients competitors, and the like. (Which reminds us – Employees should also notify superiors if they see disparaging statements about the company, whether of internal or external origin.)

***Remind your employees that their use of company equipment comes with a diminished expectation of privacy***. You have the right to review every piece of information that travels across your computer system. You don't need their permission to do it.

***The policy should both apply to current employees and explicitly survive termination of the employee-employer relationship***, especially with regard to disparaging or damaging statements (which may require a social media-specific confidentiality provision in your separation agreements).

***Sensitize employees to the problems which can arise from providing on-line recommendations*** for current or former coworkers in, *e.g.*, their LinkedIn profiles. Employees need to realize that, even when such comments amount to just a quick line or two, such shout-outs can be deemed formal statements. Does that carry the weight of a formal letter of recommendation? Probably not. Could it carry the imprimatur of an official company statement? Perhaps. The temptation to make a negative statement about a former employee should definitely be resisted, as it can lead to allegations of wrongful termination or intentional interference with prospective business contracts (not to mention defamation).

***Guide your hiring policies and procedures.*** Companies increasingly mine the Internet for information about potential hires and their character. It can be very useful, but it can also expose you to lawsuits if it can be shown that you used social media to discriminate against a particular person on a "protected class" basis, such as race, age, religion, sexual orientation, etc. We can show you how to create a system for reviewing social media that allows you to maximize your knowledge but minimize your liability.

Again, these are just some of the major issues you're facing in this brave new world. There are many ways to attack them. We're happy to work with you in planning and implementing that attack. Apart from drafting or redrafting employee handbooks or codes of conduct, we can help create an enforcement plan and supplement your efforts with in-house seminars or Internet-based webinars to explain to employees and bosses alike the ways in which social media, even unintentionally, can endanger your business.

Until then, don't forget to subscribe to www.commlawblog. You can also become a fan on Facebook and follow us on Twitter!

*Court lifts seven-year-old stay*

# Newspapers And Broadcasting: A Match Made In The Third Circuit?

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It's been 35 years since any new permanent commonly-owned newspaper/broadcast combinations could be created in any given U.S. market. But that may now change – the U.S. Court of Appeals for the Third Circuit has lifted its stay of the FCC's 2007 decision relaxing that ban, although exactly when any changes may be realized is still up in the air.

The newspaper/broadcast cross-ownership prohibition was put in place in 1975 – during the Wiley Commission (for those of you with long memories) – out of concern that such combos would unduly dominate local media. In 2003, as part of its controversial ownership proceeding, the Powell Commission decided to relax the cross-ownership ban along with a variety of limits on common ownership. But before anybody could take advantage of the relaxation, the whole package of revisions – including the relaxation of the newspaper/broadcast cross-ownership ban – got appealed to the Third Circuit in the now famous *Prometheus Radio Project* case. And while the appeal was pending, the Third Circuit stayed the effectiveness of the proposed rule changes.

*The impact of the Third Circuit's lifting of the stay is likely to be minimal for almost everybody, at least for now.*

In 2004 the Court upheld the Commission's determination that an absolute ban on newspaper/broadcast cross-ownership was not warranted . . . BUT the Court disagreed with the way the FCC proposed to loosen the reins. So the Court remanded the decision back to the Commission for further proceedings. And in the meantime, the stay remained in effect – meaning that the 1975 rules still ruled.

In 2006 the Martin Commission again took up the media ownership rules (as Congress had told it to). And after still more hearings and droves of public comments, in 2008 out came a decision adopting a somewhat revised version of the 2003 newspaper/broadcast cross-ownership approach. Under the 2008 approach (as had been the case with the 2003 revision), the absolute ban from 1975 was gone. But now, combinations of a single broadcast station and a single daily newspaper in the top 20 television markets *would* be allowed, as long as (a) the television station was not ranked in the top four, and (b) a sufficient number of independent "major media voices" would remain in the market. In markets below the top 20, the Commission retained the ban, but set out a four-factor test that it would consider in granting waivers.

Not surprisingly, the FCC's 2008 Order was appealed, ending up in the Third Circuit again. And sure enough, the Third Circuit promptly continued its stay of the FCC's new rule changes. While the appeal was pending, the leadership of the FCC changed, and the new Genachowski Commission notified the Court that the 2008 decision no longer necessarily reflected the views of a majority of the current Commissioners. It asked the Court to continue the stay – ***and*** to hold the substantive appeal in abeyance – while the Commission addressed petitions for reconsideration of the 2008 decision and began its next statutorily required quadrennial review of its media ownership rules.

Three times in the past year the Third Circuit asked the FCC and the other parties to the case to update the Court on the status of those proceedings at the Commission. In its last such request (in December, 2009), the Court indicated some impatience with the lack of apparent progress: the Court expanded its previous request to ask why the stay shouldn't be lifted and why the Court shouldn't proceed to hear the case. The Commission responded that the Court really ought to wait until the conclusion of the 2010 quadrennial review. It appears that the Court was not convinced.

In a very brief Order, the Court has now lifted the stay, and established a briefing schedule for the remainder of the case. With initial briefs now due on May 17, and the overall briefing cycle set to wrap up by July 1 (barring any intervening interruptions), things are likely to move reasonably quickly.

In the interim, the 2008 changes to the newspaper/broadcast cross-ownership rule will go into effect, finally. But bear in mind that the current Commission has already made clear that it does not approve of those 2008 changes. Moreover, until the Third Circuit issues its decision on the merits of the pending appeals, the longevity of those changes is still very much an open question. (Recall that, in its 2004 opinion, the Third Circuit gave the thumbs up to relaxing the cross-ownership ban as a general matter, but at the same time gave the thumbs down to the mechanics of precisely how the FCC proposed to do the relaxing.) So the impact of the Third Circuit's lifting of the stay is likely to be minimal for almost everybody, at least for now. (The technical effectiveness of the 2008 changes will put some burdens on a limited number of parties to the appeal, but they are by far the exception, not the rule.)

Interestingly, the FCC had already scheduled its next public workshop in the media ownership proceeding – a forum titled Newspaper/Broadcast Cross-Ownership Impact on Competition and Diversity in the Media Marketplace – for April 20. With the stay now lifted, that get-together could prove entertaining.

*Pre-sunrise relief proposed for certain AM's*

# Higher AM Power In The Early AM Hour?

*By Lee G. Petro*
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For all you early risers who are hooked on AM radio (and, really, who isn't?), good news! The FCC has invited comments on a proposal that would permit the early commencement of Presunrise Service (PSR) by Class D and certain Class B Channels.

Generally, Class D and Class B Channels operating on Regional Channels are not allowed to crank themselves up to full daytime power prior to sunrise. Recognizing the hardship that this creates for many stations, particularly in winter months when sunrise occurs late (*e.g.*, after 7:00 a.m.), the Commission established the PSR authorization that permits some power increases (up to 500 watts into their daytime transmission facilities) uniformly at 6:00 a.m. regardless of when local sunrise occurs. Before 6:00, though, they're still stuck with way low power. (Class D AM stations, for example, typically can't exceed 100 watts.)

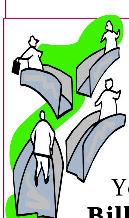
*The proposal: Permit Class D and Class B AM stations operating on Regional Channels to commence PSR operations at 5:00 a.m.*

Now comes Richard F. Arsenault, with a petition for rulemaking. His idea: let AM stations on Regional Channels commence PSR operation at 5:00 a.m. locally, rather than 6:00. He argues that these stations are at a substantial competitive disadvantage during morning drive-time hours, which typically begins between 5:00 a.m. and 5:30 a.m. in most areas. He suggests – and it's hard to contradict him on this – that most listeners who have to wake up by, say, 5:30 won't set their clock radios to such regional AM stations because those stations' signals are not receivable at that time. And the same goes for car radio pre-sets: if the commuter is on the road before 6:00 a.m., it's unlikely that he or she will try to tune into an AM still operating with a lame nighttime signal.

To remedy this situation, Arsenault proposes simply that the Commission permit Class D and Class B stations operating on Regional Channels to commence operations at 5:00 a.m. under PSR authority with up to 500 watts. He provides supporting calculations that indicate that his proposal could benefit as many as 2,063 Class D and Class B stations, and he avers that there will be no international considerations raised by the extension of PSR authority under these limited circumstances.

Whether – and if so, to what extent – the proposed change might cause new objectionable interference to other co-channel stations is not clear. The Petition lacks any detailed engineering showing on that point. The Commission will likely have to address whether improving the lots of Class B and D stations on Regional Channels during the 5:00 – 6:00 a.m. period outweighs any increase in interference that such extended operation might cause.

Without indicating whether or not it favors the proposal, the Commission has invited comments on it. Comments are due by April 26.



## FHH - On the Job, On the Go

If it's March, the NAB must be just around the corner. And sure enough, a phalanx of FHHers is shaping up for the trek to Sin City for the big do. Keep your eyes peeled for **Paul Feldman, both Franks (Jazzo** and **Montero**), **Jeff Gee**, **Scott Johnson**, **Michelle McClure**, **Lee Petro**, **Davina Sashkin, Kathleen Victory** and **Howard Weiss**. **Frank J** will be on the "Regulation: You Want Me To Do What?" panel on Monday, April 12 (2:30 – 4:00 p.m.), along with Media Bureau Chief **Bill Lake**, FCC General Counsel **Austin Schlick**, and NAB GC **Jane Mago**. And once that breaks up, you can scoot over to **Paul**'s presentation on Net Neutrality, at 5:15 p.m. the same day. **Peter** will be on-site from April 11-15, helping CTB Networks present their new technology for using TV ancillary capacity for broadband service – but then, on April 15, he'll be on a Broadcast Education Association panel.

On April 22, **Scott** will conduct a Political Broadcast Law Seminar (co-sponsored by the Alabama Broadcasters Association) in Birmingham, Alabama, along with **Bobby Baker**, Assistant Chief of the Media Bureau's Policy Division.

On May 14-16, **Peter** and **Kathleen** will be attending the National Translator Association Convention in Reno.

FHH all over the place this month. **Paul Feldman**, **Bob Gurss** and **Dan Kirkpatrick** were all quoted in *Comm Daily*. Schweet, but not schweet enough – because so was **Peter Tannenwald**, twice, and **Kevin Goldberg** got good quote in *Comm Daily plus* good link on welovedc.com. But if you're thinking *Media Darling*, think again. Coming up fast on the outside and leading down the stretch is **Harry Cole**, with four (count 'em, four) *Comm Daily* quotes, ***plus*** a link in the weekly newsletter of the Traffic Directors Guild of America, ***plus*** (will it never end?) his own featured *Cole's Law* column in *Radio World*. OK, **Harry**, take a lap and we'll meet you in Victory Lane for the presentation – you're our *Media Darling of the Month!*

*Absentee Licensee + Absent TBAs = $30K Fine*

# Bureau Whacks Licensee For Abdication Of Control

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The FCC's Enforcement Bureau has dropped two notices of apparent liability (NALs, in the vernacular) – each to the tune of $15,000 – on Birach Broadcasting Corporation (BBC). According to the NALs, BBC improperly handed control of its two Michigan AM stations over to the stations' respective time brokers. The FCC also dinged BBC for failing to staff each station's main studio with a BBC managerial employee *and* a BBC staff-level employee. (Links to the NALs are available on our blog – www.commlawblog.com.) If you're a licensee with one or more stations LMA'd out to other folks, it would be worth your time to check them out.

BBC's trouble began in April, 2005, when FCC agents inspected the two stations, one in Zeeland, the other in nearby Rockford. According to the NALs, no BBC employees were present at either station. Instead, non-owners were there pumping out their own programming with no formal time brokerage agreement (TBA, a/k/a LMA) in sight at either station. Perhaps thinking, incorrectly, that he was helping BBC out, one programmer told the inspectors that the station was being operated on BBC's behalf "pursuant to a 'handshake'" TBA.)

Possibly disturbed by the situation, the Bureau fired off a Letter of Inquiry (LOI) to BBC. (Actually, the Bureau could not have been *that* disturbed, since it took them not quite two years from the date of the inspections to get the LOI out the door.) The LOI asked BBC to cough up any written TBAs it had. In response, BBC provided nothing entitled "Time Brokerage Agreement", just some invoices signed by BBC and the programmers – one of which specified that the "Customer is responsible for any legal problem caused to the Station" – but no TBAs.

As to main studio staffing, BBC said its owner was responsible for operation of the stations. But according to the FCC's records, that gentleman's business address was roughly two hours away from the stations. Wouldn't that, um, impair his ability to run them? No problem, said BBC's counsel: given the state of technology, station operations can be supervised remotely. Be that as it may, though, BBC advised the Bureau that, after the inspections, BBC had hired a management-level employee to work half-time at WMFN and half-time at WMJH.

The Bureau was not favorably impressed with BBC's response to the LOI. (But, again, the Bureau could not have been *that* unfavorably impressed, since nearly three years passed between BBC's response and issuance of the NALs.)

According to the NALs, BBC essentially admits that, prior to the LOI, the time brokers: provided the programming the stations' aired; paid the salaries and wages of the personnel who operated the stations; handled the marketing and finances at the stations; and bore sole responsibility for ensuring compliance with various FCC requirements (like maintenance of the public inspection files and performance of EAS tests). BBC, for its part, was responsible for the maintenance of each station's physical plant.

> *Any TBA is supposed to reflect that the licensee has ultimate authority over the operation of the station.*

The lack of any formal TBA didn't help matters, since (according to the Bureau) Commission rules technically require each TBA to be in writing (and kept in the station's public inspection file, to boot). Plus, any TBA is supposed to reflect that the licensee has ultimate authority over the operation of the station, including specifically control over station finances, personnel and programming. The absence of formal TBAs undercut BBC's assertion that de facto control of the station had not passed to the programmers.

Regarding station staffing, the Bureau cited the policy, established nearly 20 years ago, that a licensee must, "at a minimum, maintain full-time managerial and full-time staff personnel" at the main studio. So BBC's arrangement – which amounted to a single licensee rep splitting his time, long distance, between two non-co-located stations – fell about three full-time employees short.

The thrust of the Commission's TBA and main studio policies is that the licensee must be in a position at any time to take over the station's reins. Even when a full-time TBA is in place, the licensee must be a presence, "a stand-alone entity", at the station, ready to run the operation. This concept may occasionally be overlooked by a licensee who, having arranged for a TBA, suddenly feels free of responsibility for station operation. As BBC's experience demonstrates, any such sense of freedom is a dangerous illusion.

How dangerous? Well, in BBC's case, the initial price tag set in the NALs is a total of $30K, in addition to which

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*Bureau blesses SSA/JSA/Option arrangement*

# Dealing With Duopoly

## Getting All The Pieces To Fit

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In the latest of a growing line of cases, the Commission's Media Bureau has approved a multi-level operating arrangement permitting two stations in the same DMA to merge aspects of their operations in ways which bump up against – but apparently don't violate (according to the Bureau) – the Commission's duopoly rule.

The case involved two stations (we'll call them Station A and Station B) in the Corpus Christi, Texas market. Common ownership of both stations would be barred by the duopoly rule, but the two licensees perceived considerable potential benefits if the two stations' operations were conjoined in certain respects. And as often is the case, where there's a will, there's a way.

Station A agreed to sell its licenses, network affiliation and syndication agreements, and certain equipment and leases to a third party ("the New Guy"). At the same time, Station A entered into a ***separate*** agreement to sell Station A's real property, certain other equipment, and additional assets to the owner of Station B. Station B and the New Guy also entered into a series of ten-year operating agreements, including a Shared Services Agreement (SSA), a Joint Sales Agreement (JSA), an Option Agreement and an Equipment Lease Agreement – but while the proposed sale of Station A was pending before the Bureau, the New Guy assigned those agreements to Station A. Additionally, Station B agreed to guarantee a bank loan for the New Guy.

Station A and Station B put the SSA, JSA and Lease Agreement into effect immediately, without waiting for FCC approval. The net result was that significant elements of Station A's operation became subject to substantial input, if not control, by Station B. For example, under the SSA, Station B provides newscasts (up to 15% of the station's programming) and Station A pays Station B a monthly fee of $100,000. Under the JSA, Station B sells all of Station A's commercial time and sets ad rates for Station A.

Needless to say, this arrangement attracted the attention, and aggressive opposition, of a competitor in the Corpus market. Alarmed that the arrangement would apparently give 50% of the ad revenues in the market to Station B, the competitor challenged the arrangement as a *de facto* duopoly and an unauthorized transfer of control. The Commission's staff ruled otherwise.

*In the new digital Internet world, it is inevitable that TV stations will resort to elaborate arrangements in order to survive.*

According to the staff, these kinds of arrangements have been approved in the past and have not been held to constitute transfers of control to Station B. As the staff read them, the parties' various agreements made clear that the licensee of Station A retained ultimate control over that station's newscasts and all programming decisions, as well as employees, and that the New Guy would inherit that control at closing.

The staff was not disturbed by the fact that physical assets would be sold to a buyer (*i.e.*, Station B) other than the proposed assignee of Station A (*i.e.*, the New Guy). Nor was the fact that the option price (in the option agreement between Station B and the New Guy) was a mere $10. The interests conveyed were not attributable under prior decisions and did not violate the so-called EDP ("equity plus debt") limit of 33% of total assets. The guarantee of debt and the option were not attributable under the FCC's rules.

In the new digital Internet world, televisions' non-broadcast competitors are able to form combinations without regulation, while the FCC's duopoly and attribution rules shackle television combinations in a manner divorced from reality. It is therefore inevitable that TV stations will resort to elaborate arrangements like the Corpus Christi deal in order to survive. This case provides a road map for creating such arrangements and should be read carefully for that purpose. It's a brave new world for sure.

*(Continued from page 10)*

BBC must report within 60 days regarding its steps to bring its stations back into compliance with the FCC's requirements. If BBC does not fully reassert control over the stations, the Bureau ominously assures that further sanctions – including, possibly, loss of license – may be in store.

It remains to be seen whether these NALs mark the beginning of a crack-down on TBAs – after all, the time line (inspections in 2005, NALs issued five years later) hardly suggests any urgency on the FCC's part here. But given the size of the proposed fines and the threat of further sanctions (including, possibly, the ultimate sanction), licensees engaged in TBAs would be well advised to make sure their houses are in order before the Feds drop by for a visit.

*Department of the Inferiors?*

# Constitutional Attack On CRB Rejected

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Inferiority never felt so superior. By successfully painting themselves as "Inferior Officers", the judges of the Copyright Royalty Board (CRB) have dodged a preliminary bullet. But while the odds seem pretty good that they'll make it through to the end of this particular round, there's plenty of reason to believe that the fight won't be over for some time to come.

The main issue: is the CRB unconstitutional? As we reported on our blog (www.commlawblog.com) last July, in a CRB-related appeal decided by the U.S. Court of Appeals for the D.C. Circuit, Judge Brett Kavanaugh issued a concurring opinion in which he questioned the CRB's constitutionality. When a U.S. appeals judge goes out of his way to opine that an agency may be unconstitutional, people take notice.

Live365 did just that. Live365 is an aggregator of digital radio stations which is subject to the compulsory copyright license scheme overseen by the CRB. In particular, Live 365 must suffer through the prolonged trial-type rate-setting proceedings CRB uses to set rates and establish terms, and Live365 must live with the (expensive) results of those proceedings.

*Judge Walton acknowledged that the law in this area is not at all clear.*

Sensing an opportunity, Live365 took the initiative to file a complaint in the U.S. District Court for the District of Columbia (not coincidentally, the court whose rulings are reviewed by Judge Kavanaugh and his D.C. Circuit colleagues) seeking a determination that the CRB is unconstitutional. Needless to say, if Live365's suit were successful, it would throw the entire rate-making process into massive disarray, possibly scuttling for an extended period the collection and distribution of copyright royalties for webcasting.

We outlined Live365's September, 2009 presentation (in the September, 2009 *Memo to Clients)*, deeming it "a very good initial argument", but cautioning that you really can't put too much stock on a complaint without first checking out what the other side has to say.

Truer words were never spoken.

Judge Reggie Walton has recently denied Live365's request for a preliminary injunction. But Judge Walton also rejected motions to dismiss Live365's case, so it lives on as Live365 presses for a permanent injunction and a final declaration that the CRB is unconstitutional. And while Judge Walton's denial of the preliminary injunction must be disappointing to Live365, the Judge acknowledged that the law in this area is not at all clear. What *is* clear is that we probably haven't heard the last of this matter.

As a threshold matter, Judge Walton rejected efforts to have the complaint tossed on jurisdictional grounds. No problem there, said the Judge, the District Court does indeed have jurisdiction – that is, the necessary authority – to hear such constitutional challenges.

Having brushed that question to the side, the Judge charged on to the merits.

As we reported last September, Live365's argument consisted of a two-prong attack based on Article II of the Constitution. That section refers to two separate types of "officers" of the U.S.: "principal" officers and "inferior" officers. Under the Constitution, "principal" officers must be appointed by the President and confirmed by the Senate; "inferior" officers, on the other hand, are not subject to the President/Senate limitation, ***but*** they may be appointed *only* by either the President, the courts, or "heads of departments". Live365 (and Judge Kavanaugh before it) doubted that CRB judges satisfied either set of criteria.

Live365 first argued that CRB judges are "principal" officers because:

- they function without any real supervision from the Librarian of Congress;
- they're not subject to limitations to which "inferior" officers are (such as limited duties, limited jurisdiction, temporary tenure, ability to be removed from office);
- they're not subject to performance appraisals from their superiors;
- they have the same powers and responsibilities as their predecessor body, the Copyright Royalty Tribunal, whose members were directly appointed by the President as "principal" officers.

The trouble is that, while all those factors might indeed support Live365's wished-for conclusion, the Supreme Court has not yet adopted any "bright line" test in this area. Rather, the Supreme Court has thus far chosen a

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case-by-case approach, looking at the peculiar matrix of factors presented in each individual case. Taking his cue from the Supremes, Judge Walton did the same here.

And to Live365's disappointment, he decided that the defendants had the better argument. In his view, CRB judges should be deemed "inferior" (but only in the best sense, of course), largely because:

- CRB judges receive direction and supervision from the Librarian of Congress and the Register of Copyrights, who can promulgate and enforce binding ethical rules;
- the Librarian of Congress and Register of Copyrights provide all the judges' administrative resources and assign other duties.
- the Register of Copyrights can review the CRB judges' decisions for "legal error".

But even Judge Walton acknowledged that there is room for disagreement here. Noting Judge Kavanaugh's "understandable" observations, Walton conceded that "[t]he current state of the law has essentially created a gray area", thanks to "the limited guidance the Framers of the Constitution provide as to where '[t]he line between 'inferior' and 'principal' officers . . . should be drawn,' and the Supreme Court's refusal to 'decide exactly where the line falls between the two types of officers.'"

Having satisfied himself that the CRB judges are "inferior officers", the Judge next analyzed Live365's claim that, as such, they miss the constitutional boat because they aren't appointed by either the President, a "Head of Department", or a court, like the Constitution requires.

CRB judges are appointed by the Librarian of Congress. In Live 365's view, the Librarian of Congress isn't a "Head of Department" because he's really part of the Legislative, not Executive, Branch. Not a crazy argument, since the Librarian reports to Congress, portrays itself as part of Congress, and has, in other contexts, been deemed by the D.C. Circuit to be part of the Legislative Branch. Hey, he's the Librarian ***of Congress***, for crying out loud.

Judge Walton was not persuaded. Sure, the Library of Congress is treated as a component of the Legislative Branch in the U.S. Code, but the Librarian (according to Walton) ***functions*** as an Executive Branch head: the Librarian is appointed (and can be removed) by the President and is in no way limited by Congress or Members of Congress. Moreover, the Copyright Act, in creating the Librarian of Congress, vests the Librarian with the power to appoint several employees in the manner afforded to other Executive Branch heads.

In light of those factors, Judge Walton concluded that Live365 had "not met its burden of showing that there is a ***substantial*** likelihood that it will succeed on the merits of its alternative Appointments Clause challenge". The emphasis on "***substantial***" was the Judge's, not ours – from which a reader could reasonably conclude that the Judge might think that there was at least some possibility (although obviously not a "***substantial*** likelihood") that Live365's argument might prevail. So perhaps hope should spring eternal. After all, the Judge was merely ruling on the "preliminary injunction" aspect of Live365's request, *i.e.*, the part in which Live365 asked the Judge to order the CRB to stop its proceedings pending resolution of Live365's request for a *permanent* injunction.

*The Library of Congress may be treated as a component of the Legislative Branch, but the Librarian (according to Walton)* ***functions*** *as an Executive Branch head.*

In seeking a preliminary injunction, a party is expected to demonstrate not only that it is likely to succeed on the merits of its ultimate claim, but also that it will sustain "irreparable harm" if a preliminary injunction is not granted. On this point, Live365 argued that, if it were forced to participate in a CRB rate-making proceeding while Judge Walton pondered Live365's request for a permanent injunction, Live365 would incur more than $1 million in costs. Unfortunately for Live365, mere monetary harm generally doesn't rise to the level of "irreparable" in the world of preliminary injunctions. And what's worse, Judge Walton found that the other side would be harmed if the preliminary injunction were to be granted. The "already-tight schedule" of the CRB proceeding would have to be further "compressed", and recording artists would not get paid during this period, which could adversely (and possibly profoundly) affect their finances. The Judge also decided that the public interest would not be harmed if the webcasting case goes forward. Bottom line: request for preliminary injunction denied.

So the CRB lives on to set rates, at least for the time being. Live365 may continue to press for a permanent injunction, although the short-term outlook there isn't great in view of Judge Walton's detailed, and unfavorable, analysis of Live365's constitutional arguments. Still, that analysis did include the acknowledgement that the question is far from settled, and Live365 has the added comfort of knowing that, once it moves past Judge Walton, it will find itself in the D.C. Circuit, *i.e.*, Judge Kavanaugh's house. Since Live365 has a pretty good idea that *that* judge, at least, is likely to be sympathetic to its arguments, don't be surprised if Live365 picks itself up off the canvas and keeps slugging to get to the next round.

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have gradually attained a more robust bargaining position, it's time to have the guv'mint control the parties' relationships.

In its Petition Big Cable acknowledges that in the early days of retransmission consent, cable systems were able to deflect paying cash compensation by agreeing to provide "in-kind" compensation – *e.g.*, agreeing to carry other non-broadcast programming channels in return for the right to carry the primary broadcast signal. Now that broadcasters are negotiating for cash compensation, however, Big Cable says that they and their MVPD confrères are (horror of horrors!) being forced to either (a) pay the broadcasters and pass those costs along to consumers, or (b) run the risk of having to remove the broadcasters' programming from their systems. And, according to Big Cable, broadcasters have taken to making unreasonable demands on cable and satellite operators. (Here, Big Cable bemoans the fact that the "good faith" negotiation requirement is so vague that MVPDs have not been able to show that broadcasters' demands have ever constituted "bad faith" negotiating tactics. Go figure.)

To "reform" the system, Big Cable advances a number of proposals that would shift the balance of power back more in Big Cable's direction. Here are the main ones:

*The Petition advances a number of proposals that would shift the balance of power back more in Big Cable's direction.*

First, the Commission should establish a mandatory dispute resolution system for retransmission consent negotiations, to bail out MVPD operators who find themselves unable to persuade the broadcaster that the offer on the table really should be acceptable to the broadcaster. This system would come into play not just on a showing of broadcaster bad faith (remember, that's too difficult to prove), but any time a cable or satellite operator claims that the parties cannot reach an agreement. Once the dispute resolution process was invoked, the appropriate compensation level would be established by arbitrators or some type of expert panel – ***not*** through direct negotiation between the parties.

Second, the new regime would effectively prohibit a broadcaster from demanding carriage of other programming services in return for the right to carry a broadcast signal by making such a demand a *per se* violation of the "good faith" negotiation requirement. Of course, Big Cable magnanimously suggests that the FCC *should* allow such arrangements, but *only if* the MVPD consents to them. That is, such an arrangement would be *per se* "bad faith" *only if* the MVPD didn't like it.

Third, the Commission should impose an "interim" and continuing grant of retransmission consent for as long as (a) the MVPD continues to negotiate in good faith and/or (b) any dispute resolution process is ongoing. Adding that condition of "good faith" negotiation is interesting in view of Big Cable's acknowledgement that it's virtually impossible to establish that a party is *not* negotiating in good faith.

So let's get this straight. If the MVPD and broadcaster are negotiating, the MVPD gets to carry the broadcaster's programming unless the MVPD is negotiating in bad faith, which is a showing everybody agrees can't be made – so the MVPD gets to carry the programming. And if the negotiations reach an impasse (according to the MVPD), the only alternative is the mandatory and binding arbitration process – during which, again, the MVPD gets to keep carrying the programming. It would only be after the failure of *both* private negotiations *and* mandatory arbitration that a broadcaster could ever exercise its rights to prevent retransmission of its signals. It is unclear, however, how an arbitration process that is both mandatory and binding could ever fail.

The Big Cable proposals are stunning in their one-sidedness. The broadcasters and MVPDs will negotiate – until the MVPDs decide the negotiations are at an impasse and demands arbitration. A broadcaster seeking carriage of additional non-broadcast programming is automatically acting in bad faith – unless the MVPD agrees to it. A broadcaster must extend its retrans consent until a deal is reached – and reaching a deal is mandatory.

And while Big Cable tries to depict itself as really just looking out for the consumer, it's not at all clear that that self-serving claim withstands scrutiny. Big Cable's claim is that, if MVPDs are forced (through the retrans negotiation process) to pay broadcasters for carriage, then those additional costs will be heaped on the broken and bleeding backs of the consumers, who will have to pay more to the MVPDs in order to watch broadcast fare. But who said that the cost of carriage ***has*** to be passed through to the consumer? Are MVPD profit margins so low that Big Cable can't absorb those additional costs and still make a tidy profit? Serious attention should be paid to such questions before anybody swallows the "poor little consumer" claims of Big Cable.

More fundamentally, the Big Cable proposal would transform the retrans consent bargaining process from a free market negotiation to a mandatory and binding arbitration, making it effectively impossible for a broadcaster ever to prevent a cable operator from retransmitting its signals.

It's as if, back in 1992, Big Cable had agreed to play an ostensibly fair game of coin toss with broadcasters – but, because of cable's then monopoly-based dominance, it was akin to playing with a two-headed coin,

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the FCC could penalize it, fleeting or not. But if, as another example, Bono were to exclaim "This is fuckin' brilliant", and the "fuckin'" in that case obviously was *not* intended to refer to sexual activity, then that would be a "non-literal" use, and a single fleeting incident standing alone would not be subject to penalty.)

This argument provided the latest Third Circuit proceedings with some new focus.

CBS argued that any suggestion in the *Fox* decision regarding fleeting images was non-binding *dicta*, as the *Fox* case itself did not deal with images. The Commission's actual practice for the past thirty years, CBS argued, has been to treat words and images in the same manner, and in both cases, the Commission has not punished fleeting indecency. In any event, even if the *Pacifica* decision stood for the proposition that fleeting nudity could be found indecent, this rule, and its applicability to the Super Bowl halftime show, was far from clear and so could not support the forfeiture imposed by the Commission.

*If the Court couldn't understand the FCC's standards, how could CBS have been expected to get it right?*

The FCC not surprisingly disagreed, claiming that the exception for fleeting words was never intended to apply, and never has applied, to images.

Of particular importance to the Third Circuit judges seemed to be how the Commission would deal with its decision in *Young Broadcasting*, which was decided well after *Pacifica*. *Young* dealt with a broadcast of an act titled "The Puppetry of the Penis", which involved performers manipulating their genitals in various ways. As Judge Rendell noted, *Young* presented the FCC with an opportunity to clearly say that the fleeting exception did not apply to video – but the FCC didn't do so. It chose instead to declare that the broadcast was indecent despite being fleeting because it was designed to pander and titillate.

How the Third Circuit is likely to rule is far from clear, based on the recent oral argument. While that argument dealt mainly with the scope of the "fleeting" exception, the Court did express some hesitation about the Commission's indecency regime in general. The Court seemed troubled by the FCC's inconsistencies and apparent lack of standards. As Judge Scirica asked, if the Third Circuit misunderstood the Commission's standards the first time it decided the *CBS* case, how could CBS itself have been expected to get it right?

As we reported previously, the smart money figures that the Second Circuit will find at least part of the Commission's indecency regime unconstitutional. Whether the Third Circuit will follow suit is less certain. The Third Circuit could avoid the constitutional issues and either (a) uphold its previous decision on administrative grounds, or (b) send the case back to the FCC to determine whether CBS's broadcast was "willful". In any event, it is likely that whichever party comes out on the losing end will appeal to the Supreme Court once again, possibly in a consolidated appeal of the Second Circuit's decision in *Fox*.

In the meantime, even with the constitutionality of the indecency regime up in the air, the agency appears to be once again ramping up enforcement, reportedly sending letters of inquiry to a number of licensees in recent months regarding allegedly indecent broadcasts over the past few years. With Chairman Genachowski promising to work on the many complaint backlogs currently in place at the FCC, the Enforcement Bureau has its work cut out for it. Press reports indicate that there are currently more than a million pending indecency complaints (although obviously many of those relate to the same programs), many of which have been pending for four or more years. Although no longer the headline grabber it was in the mid 2000's, the battle over indecency is still far from over.

*(Continued from page 14)*

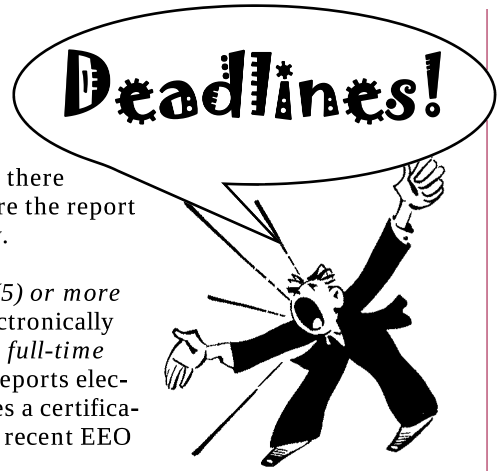
making it easy for Big Cable to win the toss each time. And now, 20 years or so into the game, with the two-headed coin removed and a more competitive normal coin put into play, Big Cable is saying that it's happy to keep playing as long as the rules are tweaked ever so slightly to provide them with a "heads I win, tails you lose" option.

Big Cable has not limited its push to the Commission. Cable and satellite operators have also gone to Congress, sending a letter raising many of the same points to the House and Senate Commerce Committees. In response, the NAB has fired back with its own letter to those committees.

This is a fist fight that would ordinarily last some time, particularly because the Commission can be expected to be distracted from mundane mass media matters by its current preoccupation – nay, all-consuming obsession – with broadband issues *uber alles*. But in Congressional testimony on March 11, Chairman Genachowski said that the issue of the retrans consent process "is a subject that should be looked at seriously . . . for a framework that works for consumers." Uh-oh. And sure enough, a mere ten days after the cable petition was filed, the FCC issued a public notice inviting comments on it. (The deadline for comments is April 19; reply comments are due on May 4.)

Cable's play of the consumer card, heavy-handed and disingenuous though it may seem to many, may be the equivalent of Tinker Bell's fairy dust which, when liberally sprinkled here and there, can cause otherwise flightless things to take wing. We shall see.

[*The views expressed in this article are those of the authors and do not necessarily reflect the position of the law firm of Fletcher Heald & Hildreth, P.L.C.*]




**April 1, 2010**

***EEO Public File Reports*** **-** All *radio* and *television* stations *with five (5) or more full-time employees* located in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, **Tennessee**, and **Texas** must place EEO Public File Reports in their public inspection files. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

***EEO Mid-Term Reports*** **-** All *television* station employment units *with five (5) or more full-time employees* and located in **Texas** 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 Delaware or Pennsylvania 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.

***Noncommercial Radio Ownership Reports*** **-** All *noncommercial radio* stations located in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, or **Tennessee** must file a biennial Ownership Report on Form 323-E. All reports must be filed electronically.

***Noncommercial Television Ownership Reports*** **-** All *noncommercial television* stations located in **Texas** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

**April 12, 2010**

***Children's Television Programming Reports*** - *Analog and Digital* **-** For *all commercial television* and *Class A television* stations, the first quarter reports on FCC Form 398 must be filed electronically with the Commission, and a copy must be placed in each station's local public inspection file. Please note, however, that for television stations, only digital programming will be included, as all analog programming ended last year. 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.

***Issues/Programs Lists*** **-** For *all radio, television,* and *Class A television* stations, a listing of each station's most significant treatment of community issues must be placed in the station's local public inspection file. The list should include a brief narrative describing the issues covered and the programs which provided the coverage, with information concerning the time, date, duration, and title of each program.

**May 7, 2010**

***Future of Media*** **-** Comments are due in the FCC's proceeding examining in very broad terms the future of media in the digital age.

**June 1, 2010**

***EEO Public File Reports*** **-** All *radio* and *television* stations *with five (5) or more full-time employees* located in **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **Michigan**, **Nevada**, **New Mexico**, **Ohio**, **Utah**, **Virginia**, **West Virginia**, and **Wyoming** must place EEO Public File Reports in their public inspection files. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

***EEO Mid-Term Reports*** **-** All *television* station employment units *with five (5) or more full-time employees* and lo-

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### FM ALLOTMENTS ADOPTED – 2/18/10-3/18/10

| State | Community | Approximate Location | Channel | Docket or Ref. No. | Availability for Filing |
|---|---|---|---|---|---|
| TX | Buffalo | 76 miles E of Waco, TX | 278A | 09-187 | TBA |
| TX | Centerville | 83 miles SE of Waco, TX | 267A | 09-187 | TBA |

### Notice Concerning Listings of FM Allotments

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

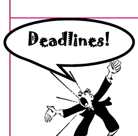
*(Continued from page 5)*

sion to expire (in 2012) and see what the FCC does. Or they could continue their litigation by seeking either: (a) reconsideration by the Sentelle/Griffith/Kavanaugh panel; or (b) rehearing *en banc* by the full D.C. Circuit; or (c) review by the Supreme Court.

The odds of success in pursuing any of those options tend to be long against the guy seeking review. However, consider these facts. First, the cable petitioners have the advantage of a very thoughtful dissent on their side, reflecting at least one judge's approval of their First Amendment arguments. That might be helpful in persuading Kavanaugh's colleagues on the full Circuit that those arguments have merit. Second, another panel of the Circuit did issue that decision on the cable ownership caps just last August, containing language that could easily be viewed as inconsistent with (or at least in strong tension with) the more recent ruling. The full Circuit might be inclined to look at that aspect to confirm that the Court's rulings are not heading in opposite directions. And if cable's goal is really to get the Supreme Court to revisit the issue of cable's First Amendment rights – an issue last decided there more than a decade ago, by a slim 5-4 vote – Cablevision and/or Comcast may figure that the Supremes might want to take a look (particularly in view of Judge Kavanaugh's dissent).

Even if the cable petitioners pursue their litigation successfully, though, it's possible that that litigation won't be resolved until 2011 or even 2012. And at that point, the prohibition against exclusivity will be expiring anyway . . . unless the Commission decides otherwise.

[*Department of Credit-where-credit-is-due: FHH's own Paul Feldman represented the Broadband Service Providers Association as an amicus on the FCC's side before the Circuit in this case.*]

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cated in **Arizona**, **Idaho**, **Nevada**, **New Mexico**, **Utah**, or **Wyoming** must file EEO Mid-Term Reports electronically on FCC Form 397. This report must include copies of the two most recent EEO Public File Reports for the employment unit.

***Noncommercial Radio Ownership Reports*** - All *noncommercial radio* stations located in **Michigan** or **Ohio** must file a biennial Ownership Report on Form 323-E. All reports must be filed electronically.

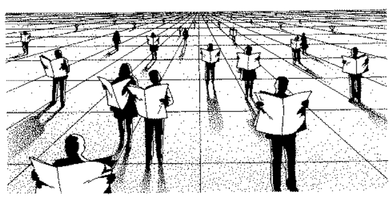
***Noncommercial Television Ownership Reports*** - All *noncommercial television* stations located in **Arizona**, **Idaho**, the **District of Columbia**, **Maryland**, **Nevada**, **New Mexico**, **Utah**, **Virginia**, **West Virginia**, or **Wyoming** must file a biennial Ownership Report. All reports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

*Stuff you may have read about before if back again . . .*

# Updates On The News

***Some lingering questions about the NBP*** – So apparently the FCC has been working on something called the National Broadband Plan. Who knew?

Actually, unless you've spent the last couple of months stuck in a sensory-deprivation tank, in a cave, on the moon, you couldn't have avoided the constant, swelling drumbeat of carefully coordinated PR leading up to the Big Day when the NBP would be released. That happened on March 16, generating a deafening outpouring of self-congratulation on the part of the Commission and Congress (which had ordered up the NBP last year when Congress was trying to stimulate us all out of the recession). (For overviews of the various components of the NBP, check out our blog at www.commlawblog.com – just search for "National Broadband Plan Impact". And *FHH Telecom Law*, the sister publication to the *Memo to Clients*, will soon be issuing a compilation of commentary about the NBP.)



But a job's never over until the paperwork is done, and sure enough, a week after the tablets bearing the NBP were borne down from the mountaintop and revealed to the Great Unwashed, Chairman Genachowski was back at work, answering a set of questions from Representative Cliff Stearns (R-FL). Turns out Mr. Stearns was curious about who had been working on the NBP all these months, where they got hired from, what kinds of efforts had been made to screen for potential conflicts of interest and, bottom line, how much did the darn thing cost to prepare anyway?

Before we get to the Chairman's answers, let's stop for a minute and ponder a couple of questions of our own. For instance, given the generally accepted notion that it's best not to put the cart before the horse, mightn't it have been a good idea to ask some of Mr. Stearns's questions, um, maybe, last year, ***before*** the process started? After all, if there is concern about who was assembling the NBP, what private interests they might have, and how much we're all going to pay for it, why not get those issues resolved first? Isn't that what most people do when they start in on a project?

Anyway, according to the Chairman, the FCC ended up hiring 78 temporary employees (some full-time, some part-time) – at a total cost of $4 million – to help out "over 300 [Commission] employees, part time" (total cost, $2.38 million). Then there was a bunch of "3rd Party Research", which included "over 20" datasets. Such research and datasets don't come cheap – ring up another $4 million and change. But darn it all, those pesky datasets were apparently more than the FCC's clunky old hardware could handle, because another $5.37 million had to be dumped into "IT Infrastructure and Support", which included upgrades to host new datasets. You get the point – a few bucks here, a few bucks there, it all added up . . . to just north of $20 million for the package.

Interestingly, Stearns's questions stopped a tad short in at least one regard. In asking about the Commission's reliance on "private sector consultants" to prepare the NBP, Stearns observed that many of those consultants "may return to the private sector". True that. But if that's the case, why didn't he ask what steps (if any) had been taken to prevent anyone working on the NBP – private or public sector – to derive personal profit, after the fact, from their involvement in the project?

Finally, Stearns wrapped up with a question beginning "Please answer yes or no to each of the following questions." The Chairman's response to that question consists of 185 words, none of which is either "yes" or "no".

***Let's get digital*** – If you happen to have filed an application for a new analog LPTV CP about ten years ago and your application is still pending, heads up. The Media Bureau has announced that you must go digital or go home. The Bureau released a list of several hundred analog LPTV applications (all but a small handful filed back in 2000), with the instruction that those applications must be amended to specify digital operation by May 24, 2010. Applications that aren't so amended by that deadline will be toast. Note that the Bureau plans to treat these amendments as "major changes", meaning that there'll be a $705 filing fee.

***Return of the tech advisers II?*** – Back in January we reported on a bill submitted by Senator Snowe which would permit each Commissioner to hire his/her own personal electrical engineer or computer scientist to assist the Commissioner with technical issues. That bill cleared the Senate Committee on Science, Commerce and Trans-

*(Continued on page 19)*

*Irony Alert: "Truth About Nutrition" cited for deception*

# FTC Gives Strong Medicine To Advertisers

*By Jeffrey J. Gee*
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*703-812-0511*

While broadcasters are principally regulated by the FCC, all media companies would do well to remember that there are other federal agencies on the lookout for misbehavior. Case in point: the Federal Trade Commission (FTC) recently ordered a company that marketed dietary supplements and health-related devices to pay $3 million in restitution to consumers to settle FTC charges that the company deceptively claimed their products treated or prevented a wide variety of serious diseases and medical conditions. The FTC based its charges largely on claims made during the company's nationally broadcast, live, hour-long, call-in radio program titled "The Truth About Nutrition".

The company in question, Roex, Inc., sold products on the Internet and through print materials, but the FTC described the radio program as Roex's "main advertising vehicle." On the program, Roex promoted several health-related products, including an infrared sauna sold to treat cancer and a variety of nutritional supplements sold to treat, reduce the risk of, or prevent various health conditions, including cancer, HIV/AIDS, diabetes, strokes and heart attacks, Alzheimer's disease, Parkinson's disease, arthritis, multiple sclerosis and other autoimmune diseases, ulcers, herpes, asthma, and glaucoma.

The FTC regularly brings actions against unfair and deceptive advertisers. Less than three weeks after the Roex settlement, the FTC announced an even larger settlement involving "nutritional supplement" advertising. National pharmacy chain Walgreens agreed to pay nearly $6 million to settle charges that the company deceptively advertised the "Wal-Born" dietary supplement using "baseless claims that the supplements could prevent colds, fight germs, and boost the immune system." In recent years, the FTC has expressed particular concern about the marketing of dubious weight loss products, "work at home" schemes, and "credit repair" services, as well as health-related products.

> *While neither the FTC nor the FCC requires broadcasters to conduct extensive investigations into the claims made by their advertising clients, broadcasters could be deemed liable for advertising that they know to be false.*

While the FTC does not typically bring actions against broadcasters running ads for such products and services, the FTC does from time to time remind broadcasters of their obligation to not knowingly air false or deceptive advertising. While neither the FTC nor the FCC requires broadcasters to conduct extensive investigations into the claims made by their advertising clients, broadcasters and other media companies could be deemed liable for advertising that they know to be false. And as we noted in our October, 2007 *Memo to Clients*, the FTC has indicated that, as a matter of practice, it may hold broadcasters to an even higher standard if they are involved in the production of the suspect advertising. Thus, our readers would do well to be cautious about airing ads – and *extremely* cautious about producing ads – that include "too good to be true" claims about diet-and-exercise-free weight loss, miracle cures, opportunities for fabulous wealth, or absolute immunity from government oversight.

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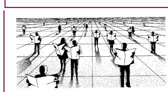

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portation recently, and now heads on to full Senate. A companion resolution (R.4809) has been introduced in the House. Some observers predict that this is on a fast track to approval, but you never know.

***Expedia.FCC?*** – Demonstrating that it's really a full-service governmental agency with the public's interest at heart, this month the FCC released a list of "hotel accommodations near the FCC". The list consists of 19 hotels, with their addresses, phone numbers and websites listed along with descriptions apparently downloaded from the hotels' various websites. Interestingly, the list does not include the Mandarin Oriental, which is about as close as you can get to the FCC without actually being in the FCC. That omission may be explained by the fact that the FCC's list appears to have been most recently revised as of October, 2005 – only shortly after the Mandarin opened.

***CAP-friendly EAS?*** – The Commission has asked for comments on how its Emergency Alert System (EAS) rules in Part 11 will need to be revised to accommodate the Next Generation EAS architecture, which will be based on the Common Alerting Protocol (CAP) format to be adopted by the Federal Emergency Management Agency (FEMA). FEMA's adoption of CAP may occur as early as this Fall; that action will in turn start a 180-day countdown for all EAS participants to accept CAP-based EAS alerts.