FLETCHER, HEALD & HILDRETH
Communications Law & Regulation

MEMORANDUM TO CLIENTS

News and Analysis of Recent Events in the Field of Communications

Next stop—the Supreme Court?

Second Circuit Flushes FCC Indecency Policy

By Jeffrey J. Gee
gee@fhhlaw.com
703-812-0511

In a huge win for broadcasters and First Amendment-loving citizens, the U.S. Court of Appeals for the Second Circuit has struck down the FCC's indecency policy. According to the Court, that policy violates the First Amendment because it is unconstitutionally vague and creates a "chilling effect" on constitutionally protected free speech. Importantly, the Court's decision extends beyond the "fleeting expletives" aspect of indecency regulation (which was the original focus of the case) and, instead, strikes down the FCC's fundamental policy on indecency.

Observers figured that the Second Circuit would reach the constitutional issue. The Second Circuit did not disappoint.

The Second Circuit issued its opinion in *Fox v. FCC*, about which we have written before (check out the *Memos to Clients* back in June, 2007, May, 2009, and January, 2010, for examples, or search our blog at www.commlawblog.com). The case involves comments made in front of an open mike by (a) Cher ("fuck 'em") and (b) Nicole Richie ("Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple.").

The FCC initially held that those comments, which were broadcast by Fox, were indecent. Fox appealed to the Second Circuit and, in 2007, the Circuit overturned the FCC's policy on technical, administrative law grounds. As the Second Circuit saw it, the supposedly indecent remarks were "fleeting expletives", the kind of incidental, extemporaneous exclamations that the FCC had historically not penalized. While that hands-off policy had changed with the 2004 Bono/Golden Globes decision (involving a broadcast in which Bono, upon receiving an award, famously exclaimed, "This is really, really, fucking brilliant"), in its first whack at the *Fox* case in 2007 the Second Circuit determined that the FCC had not adequately explained the shift in its treatment of "fleeting expletives".

In 2009 the U.S. Supreme Court reversed that narrow decision, holding that the FCC's explanation was just fine, thank you. The Supremes shipped the case back down to the Second Circuit for another look. The Second Circuit's initial opinion had included an extended, non-decisional discussion of constitutional issues – a discussion which unmistakably indicated that the Circuit felt the FCC's policy to be ***un***constitutional. As a result, many – possibly most – observers figured that the Second Circuit would use this second bite at the apple to reach the constitutional issue for real.

The Second Circuit did not disappoint.

Acknowledging that the Supreme Court (in the 1978 *Pacifica* case) had clearly held that the Constitution permits *some* regulation of indecency, the Second Circuit observed that the media landscape has changed dramatically in the 30 years since *Pacifica*. The overwhelming penetration level of cable and satellite services and the development of an "omnipresent" Internet offering all sorts of video programming starkly contrast with the state of affairs in 1978, when broadcast media occupied a "uniquely pervasive presence in the lives of all Americans". The Circuit

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July, 2010 **No. 10-07**

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One small step toward spectrum re-purposing

S. 3610: The Carrot And The Stick Make Their Appearance

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

In March, 2009, we reported on S. 649, a Senate bill that would have required the FCC and NTIA to undertake a "radio spectrum inventory". A year later that bill was reported out of the Senate Commerce Committee and placed on the Senate Legislative Calendar. And there it sits.

But wait! Its sponsor, Sen. John Kerry, and one of its co-sponsors, Sen. Olympia Snowe, have just introduced yet another bill along the same lines. S. 3610, the "Spectrum Measurement and Policy Reform Act" popped up on July 19. According to Kerry, the new bill "tasks the FCC and the National Telecommunications and Information Administration (NTIA) to perform much needed spectrum measurements to determine actual usage and occupancy rates" – in other words, pretty much what last year's version did.

But wait, there's more! The new bill – which weighs in at a hefty 27 pages, as opposed to last year's two or so – provides for lots more than just a spectrum inventory: among other things, it opens the door for (a) the sharing of spectrum auction proceeds – an ominous harbinger of broadband-induced spectrum repurposing – and (b) even more ominously, the specter of annual spectrum fees.

Of course, to read the Kerry/Snowe press release, you might not realize that.

The release speaks in conventionally upbeat, BIG PICTURE, press-release jargon about "moderniz[ing] the nation's radio spectrum planning, management, and coordination activities", "laying the groundwork" for lots of stuff (Lower prices! More reliable service!), avoiding the "looming spectrum crisis", "empower[ing] innovation", "encourag[ing] competition", "ensuring that the proper framework is in place" and so on and so on.

It isn't until the antepenultimate line that we learn that the bill would require "more market-based incentives to promote efficient spectrum use".

Incentives as in carrot and stick.

To get an idea of what they're really talking about, you have to read the bill itself. On page 17, in Section 6(b)(2), you find that the bill would amend Section 309(j)(8) of the Communications Act to include the following provisions:

> (F) AUCTION REVENUE SHARING PLAN.— Notwithstanding subparagraph (A), if the Commission determines that it is consistent with the public interest in utilization of the spectrum for a licensee to relinquish some or all of its licensed spectrum usage rights in order to permit the assignment of new initial licenses or the allocation of spectrum for unlicensed use subject to new service rules, the proceeds from the use of a competitive bidding system under this subsection may be shared, in an amount or percentage determined in the discretion of the Commission, with any licensee who agreed to participate in relinquishing such auction usage rights.
>
> (G) SPECTRUM LICENSE FEE.—
>
> (i) IN GENERAL.—The Commission shall have the authority to assess and collect from each licensee an annual fee for the spectrum assigned to such licensee that is based on the fair market commercial value of that spectrum and the public interest of the service the spectrum is being used for, using a methodology adopted by the Commission, after providing notice and opportunity for public comment.

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FLETCHER, HEALD & HILDRETH P.L.C.

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

Co-Editors
Howard M. Weiss
Harry F. Cole

Contributing Writers
Denise A. Branson,
Anne Goodwin Crump,
Jeffrey J. Gee, Kevin M. Goldberg,
Steve Lovelady, R.J. Quianzon,
Davina Sashkin and
Peter Tannenwald

Editor Emeritus
Vincent J. Curtis, Jr.

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Focus on FCC Fines

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

FCC as Webster: Inadvertence = willfulness – In a recent decision admonishing a New Mexico noncommercial station, the FCC declared that an inadvertent violation is a willful violation. While this decision could have cost the station $1,500, the FCC chose merely to admonish the station.

Back in 2005, the licensee attempted to file its station renewal application with the FCC. The FCC, of course, has long required that such applications be filed electronically, through the Commission's CDBS filing system. The station had time to spare before its renewal deadline and station staff dutifully began the process of electronically submitting its routine renewal application.

CDBS has its charms, but user-friendliness is not necessarily among them. It should come as no surprise to anyone familiar with CDBS that, at some point in the online filing process, the station's personnel became frustrated with the maze-like quality of that system . . . so fed up, as it turned out, that the station's staff ultimately abandoned their valiant on-line efforts and chose instead simply to fill out a paper version of the renewal form and ship it on in to the Commission along with the required fee in advance of the deadline.

Not good enough. The FCC is wedded to its CDBS. And even though most FCC practitioners familiar with CDBS can attest to its complexity and quirky nature, in the Commission's eyes "confusion or difficulties" encountered by the public in trying to steer through the FCC's labyrinth are no excuse. As a result, the Commission initially proposed a $1,500 fine for the station for filing its renewal application late – since, by the time the station's staff was advised by the FCC that the paper renewal application wouldn't do the trick, the renewal deadline had come and gone.

In response, the licensee argued that it had made a good faith effort to file electronically and its ultimate decision to file on paper was due to "ignorance and unfamiliarity with the renewal process and forms". The Commission was unmoved by this, and continued to insist that the station had violated the rules by failing to file a timely renewal through CDBS. Interestingly, the Commission cited the licensee for violating Section 73.3539. That's interesting because that section makes no mention at all of CDBS or electronic filing. Oh well.

In any event, things worked out for the station. The Commission cancelled the fine, but still admonished the station for failing to demonstrate good cause for not filing electronically.

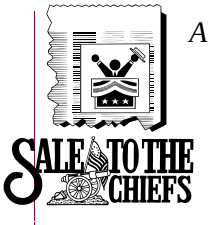
Perhaps the most unsettling aspect of this decision (aside from the fact that the rule section supposedly violated does not on its face proscribe what the licensee did here) is the Commission's continued reliance on the notion that "violations resulting from inadvertent error . . . are willful violations." That seems to impose a difficult, if not impossible, standard to achieve. That is, any "inadvertent" error will be deemed to have been "willful". As a result, even licensees (such as the New Mexico noncom in question here) who make good faith efforts to comply but fail to do so because of lack of understanding on their part will be deemed to have engaged in "willful" violation of the rules. The Commission's inclination to re-define "willful" to encompass the merely "inadvertent" is troublesome.

Pirates, Ahoy! – The FCC spent the first part of summer sending out several fines to pirates around the country. In one instance, the Commission monitored a pirate on four different occasions before issuing a fine; in another, multiple individuals in the same house were given a fine and left to figure out how to split the bill among themselves.

In 2008, FCC agents in Florida found a man operating on 91.7 MHz out of his condominium, without a license. They issued him a warning and directed him to stop. The pirate then simply moved up the dial and began broadcasting, still from his condo, at 95.9 MHz. The FCC tracked the signal down and inspected the building three more times over eight months. Following the third inspection, the agents sent the pirate a bill for $10,000.

New York city agents hit a pirate with a $4,500 fine after they discovered his studio and transmitter. In this case, before even speaking to the pirate, the FCC agents had what they needed. Although he was apparently not at all concerned about complying with the FCC's rules, he was obviously concerned about niceties in other legal areas. Stunningly, the pirate had entered into a five-year lease with a Brooklyn landlord to rent space to house his radio station and transmitter.

Three guys set up an FM station in Dorchester, Massachusetts and ignored FCC licensing rules. As often happens in such self-help situations, when these pirates turned on their station, they caused interference to properly licensed stations, which promptly complained. The FCC duly located the pirates and issued warnings to them. Several months later, the FCC received more complaints. Agents went searching for the station, and found the same guys operating it. But this time they were operating from a different site, using a sawed-off tree trunk as a make-shift tower. All three men were issued a single $10,000 fine, jointly and severally.



A gentle Memo to Clients reminder

2010 Mid-Term Elections Are Coming - Is Your Station Ready?

By Jeffrey J. Gee
gee@fhhlaw.com
703-812-0511

Although 2010 mid-term elections are still three months away, *now* is the time for broadcasters to review their systems to assure that they will be in compliance with the FCC's political advertising requirements. A little advanced planning can go a long way in making this, or *any*, election season run smoothly for your station.

The FCC's political broadcast rules generally cover: (1) who is entitled to access to broadcast advertising time; (2) how much they pay for that time; and (3) disclosure and record-keeping requirements. Although we will briefly review each of these areas, we highly encourage stations with questions to contact their communications counsel. The FCC's political broadcast rules are fairly complicated and the answers to many questions tend to be highly dependent on the specific facts at hand.

One concept that affects several areas of the FCC's rules is the idea of a candidate's "use" of a broadcast station. As further described below, the "use" of a broadcast station by a candidate triggers several potential obligations, so it is important to know when a candidate is considered to have made a "use" of a station.

The FCC's political broadcast rules are fairly complicated.

In general, a "use" is any positive appearance of a candidate whose voice or likeness is either identified or is readily identifiable. The appearance in question does ***not*** need to be approved by the candidate or the candidate's committee to be considered a "use" – third party ads may trigger a "use", as can appearances in entertainment programming (*e.g.*, Governor Schwarzenegger's bravura performance in *Kindergarten Cop*). The candidate's appearance on the station, however, must be "positive", so a third party attack ad against a candidate would not be considered a "use" by that candidate. Likewise, an appearance by a candidate on a "bona fide" news or news interview program is not considered a "use".

When a legally qualified candidate for office makes a "use" of a station, the station is ***not*** permitted to censor the candidate's message ***in any way***, and the station is protected from any liability that may result from the candidate's message. This "no censorship" provision, however, applies only to candidate advertising and not to third party advertising. Thus, stations need to take potential liability into account when deciding whether to accept such third party ads.

Access. The FCC's rules provide that "legally qualified" candidates for federal offices (*i.e*, Presidential/Vice Presidential, House and Senate) can demand "reasonable access" to commercial broadcast stations for the broadcast of advertising. This means that commercial broadcasters are generally obligated to sell time to candidates for federal offices. Third party advertisers and "issue advertisers" do *not* have reasonable access rights and, as discussed below, neither do candidates for state and local offices.

Although a federal candidate's reasonable access rights ensure access to a broadcast station's airtime, federal candidates do not have the right to demand time during specific programs or day-parts. In addition, stations may choose to exclude political advertising from news programming. Otherwise, the station must offer "reasonable" access to the station's full schedule. Stations cannot set flat limits on the total amount of time available to candidates. Stations, however, should do some advanced planning about the amount of time they think they will need to reasonably accommodate political advertising. Questions about what is "reasonable" in any given circumstance may need to be referred to counsel.

Candidates for state and local offices (*e.g.*, mayor, county council, school board, etc.) are not entitled to "reasonable access". Stations may refuse to sell time for local campaigns, although candidates for state office *are* entitled to "equal opportunities" (as further described below). Thus, a station can choose not to sell time for state and local elections BUT if the station does sell time to one candidate for a particular office, it must sell to all candidates for that particular office. As a result, stations should consider, in advance, which political races will be open for the purchase of advertising. Once that determination has been made, any restrictions should be included in the stations' disclosure statements (see below).

The FCC's rules also require that all candidates for the same office be treated in an equal manner. The "equal opportunities" (or "equal time") rule is triggered by a "use" of a station by a legally qualified candidate. The rule applies to both federal and state candidates and is *not* restricted to a limited period of time before the election. Once a legally qualified candidate for a given office makes a "use" of a station, all other legally qualified candidates for the same office are entitled to the opportunity to make equal use of the station. That is, the station must make the same amount and kind of time available at the same cost. This can become a serious issue when on-air talent wish to run for office. All of their appearances on the station after becoming "legally qualified" count as free uses of the station, obligating the station to give equal amounts of free time to all opposing candidates.

A candidate claiming equal time must make a request for it within seven days of the opposing candidate's triggering "use" of the station. Stations are not obligated to notify opposing candidates when a "use" is made but, as described below, stations must document all uses in their political

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files and make those files available for inspection.

Lowest Unit Charge. The most troublesome question for many stations is the question of what rates may be charged for political advertising. In general, all legally qualified candidates for political office (state, local or federal) are entitled to the "lowest unit charge" (LUC) (or "lowest unit rate") during the 45 days before a primary election and the 60 days prior to a general election. For the 2010 federal general election, the LUC "window" opens on September 3, 2010.

In general, the LUC is the lowest rate changed to any commercial advertiser for the same class and amount of time for the same time period, including all discounts and bonus spots. As a practical matter, political candidates are to be treated as the "most favored" advertiser during the "LUC windows". Only candidate ads are entitled to the lowest unit charge.

Determining the exact amount of the lowest unit charge can be tricky – stations must account for different classes of time (*e.g.*, preemptible vs. non-preemptible), different day parts, discounts given for large purchases, the value of "bonus spots", etc. Most stations will have more than one lowest unit charge depending on the various classes of time sold on the station during the LUC window. Because the calculation of the lowest unit charges can be complex, stations should begin considering the issue well in advance of the LUC window.

Disclosure Statements. In addition to planning for their lowest unit rates, stations should ensure that they have an up-to-date disclosure statement to provide to political advertisers. Although the FCC's rules do not technically require written disclosures, every station should have one to ensure compliance and limit disputes. A written disclosure statement should cover the classes of time available to advertisers, the lowest unit charge for each class, any make-good policies, policies on the preemption of ads, and any other sales practices or information that would be relevant to advertisers. Stations should provide the disclosure statement to any candidate, agency or group requesting political time (inside or outside of the LUC window).

Sponsorship Identifications. All political advertising must include some form of sponsorship identification. Specifically, when a political ad is run there must be a statement that the ad was "paid for" or "sponsored by" the group or person purchasing the ad time. If the advertiser did not include the statement, the station must add this language on its own (if necessary, it can do so over the content of the spot – no free time need be provided). For television ads, the statement must be visual, run for at least four seconds, and occupy at least four percent of the screen.

Ads for federal candidates also must meet a variety of additional requirements imposed by the Bipartisan Campaign Reform Act (BCRA). BCRA requires a statement, spoken by the candidate, which identifies the candidate, asserts that he or she approves the broadcast, and that he or she (or his/her campaign committee) paid for the ad. If the ad refers to an opposing candidate, then the statement must also include the office being sought. Television ads must show the candidate making the statement in a full-screen (80% or more), unobstructed view, or as a voice-over while displaying a clearly identifiable image of the candidate.

BCRA also requires that federal candidates or their authorized committees provide a broadcast station with a written certification stating whether or not the programming refers to another candidate for the same office. If the programming refers to another candidate, the certification must state that the programming will comply with the "stand by your ad" announcement requirements described above. This certification must be provided to the broadcast station when the programming time is purchased. If the certification is not provided, the station is not obligated to give the candidate the lowest unit rate.

If the ad is paid for or sponsored by a third party, the ad must clearly indicate whether it was or was not authorized by a candidate. The sponsor identification statement must include both the "paid for" or "sponsored by" lan-

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Another Memo to Clients Clip-'n'-Save Special!!!

Election To-Do List

Election on the horizon? Here are four projects to focus on right away to get yourself prepared:

Know Your LUC Window Dates: Candidate "use" spots are entitled to LUC for the 45 day window before the primary election and the 60 day window before the general election.

Calculate Your LUCs: Remember your station will probably have more than one LUC based on different classes of time. Also remember to include all packages sold before the LUC window that will run into the window.

Pick Your Non-Federal Races: Your local election authority can help you determine which state and local offices will be up for election. You'll need to decide which, if any, of these offices will be allowed to buy time on your station.

Update Your Disclosure: Remember to include not just the races for which you will sell time, your classes of time, and your LUCs but all other policies and sales practices that will affect political ad buyers – *e.g.*, policies on preemption, scheduling, etc.

2010 Reg Fee Surprise

Final 2010 fees bounce back up, up, up from FCC's initial lowball proposals

Remember how, back in the April *Memo to Clients*, when the FCC announced its proposed 2010 regulatory fees, we said that, historically, the final fees tend not to stray too far from the initial proposals? Silly us. The FCC has yet again proved us wrong by issuing its final 2010 reg fee schedule that strays dramatically from its April proposals.

How dramatically? Perhaps the worst case scenario involves UHF TV licensees in Markets 1-10, who will see their reg fees skyrocket up by $6,975 over the rates proposed in April. Their UHF brethren in other markets above 100 will fare little better, with increases ranging from $3,325 to $5,225 over April's proposals.

Most radio licensees will also experience increases – the sole exceptions being Class B and D AM stations, who will remain at the levels proposed in April.

A handy table of the final reg fees appears on the next page. The red figures in parentheses reflect the level of increase over the April proposals. The only fee (shown in green) that is reduced from the levels proposed last April is for AM construction permits.

The Report and Order setting forth the final fees does not shed much light on why the Commission has chosen to boost the fees far beyond its original proposals. (As we noted in our article last April, those proposals generally reflected a pleasant downward trend.) The FCC does note that it is working toward combining the reg fees for VHF and UHF TV stations. Historically those two classifications have been treated separately; with the DTV transition, however, it appears that the FCC is looking to treat them as essentially similar for reg fee purposes. The significant hike for UHF stations is partly attributable to that, although the Commission observes that it is taking a gradual approach which is easing the sticker shock that UHFs might otherwise experience.

As far as radio fees go, the Commission received a couple of comments suggesting major changes in the way those fees should be calculated. The FCC declined to follow those suggestions. It did, however, acknowledge that the grid for radio fees, first adopted back in 1998, might be in line for review in coming years.

*The deadline for reg fees this year is **August 31**.*

According to a Fact Sheet released by the Commission on July 28, the deadline for filing reg fees this year is ***August 31***. The Commission is required by statute to impose a hefty late fee amounting to 25% of any untimely fee, so now would be a good time for everyone to mark their calendars with a reminder to get their fees by August 31.

Fees can be paid on-line through the FCC's Fee Filer system. Electronic filing provides a quick and relatively simple way of getting the job done, and it provides an instant proof of payment. Fee payers who choose to use snail mail do so at their own peril.

The Commission is again sending out to broadcasters, by regular mail, notices of their fees, but this will probably be the last year for that quaint process. The FCC would prefer to move to a more digital approach to such notifications. (And perhaps for the last time, let us remind you that the paper notices that the FCC does send out may not reflect all licenses for which a fee is required. For example, the notices do not include licenses for auxiliary facilities. Be sure to double- and triple-check with your own records in order to figure out exactly how much you're on the hook for.)

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guage *and* "authorized by" or "not authorized by" a particular candidate or campaign committee. If it is not authorized, there must also be an audio statement that the name of the entity purchasing the ad "is responsible for the content of this advertising." This is in addition to relevant state law, which may require more.

Recordkeeping. The FCC's political file rule requires stations to maintain, and allow public inspection of, records of all requests for political time. These records must include details of the nature and disposition of the requests, the schedule of time provided or purchased, the classes of time involved, the rates charged and contact information of the purchaser. In addition to the FCC's political file requirements, BCRA requires that the broadcaster's political file contain all requests for time by anyone (including non-candidates) who seeks to communicate a message that refers either to a legally qualified candidate, or to any election to federal office, or to a national legislative issue of public importance. Because the political file is often reviewed by parties seeking "equal opportunities" it is important for stations to keep the political file up-to-date at all times.

As noted above, this is a thumbnail overview of the rules applicable to political advertising. In the coming weeks, stations should review the rules in detail and ensure that they have their disclosure statements and station policies in place and up-to-date. In particular, station management should take care to ensure that sales personnel are well-informed about what the rules require and the recordkeeping tasks that they will need to fulfill. And don't hesitate to call your friendly neighborhood communications counsel for help.

FEE CATEGORY	FINAL FY 2010 Annual Regulatory Fee (USD)
TV VHF Commercial Stations	
Markets 1-10	**81,550 (+$3,550)**
Markets 11-25	**63,275 (+$2,750)**
Markets 26-50	**42,550 (+$1,875)**
Markets 51-100	**23,750 (+$1,025)**
Remaining Markets	**6,125 (+$250)**
Construction Permits	**6,125 (+$250)**
TV UHF Commercial Stations	
Markets 1-10	**32,275 (+$6,975)**
Markets 11-25	**30,075 (+$5,225)**
Markets 26-50	**18,900 (+$5,150)**
Markets 51-100	**11,550 (+$3,325)**
Remaining Markets	**3,050 (+$1,025)**
Construction Permits	**3,050 (+$1,027)**
Low Power TV, TV/FM Translators/ Boosters	**415 (+15)**
Other	
Broadcast Auxiliary	**10 (No Change)**
Earth Stations	**240 (+$10)**
Satellite Television Stations	
All Markets	**1,300 (+$50)**
Construction Permits	**675 (+$35)**

Commercial Radio Stations						
Population Served	**AM Class A**	**AM Class B**	**AM Class C**	**AM Class D**	**FM Classes A, B1 & C3**	**FM Classes B, C, C0, C1 & C2**
<=25,000	**675 (+25)**	**550 (NC)**	**500 (+$25)**	**575 (NC)**	**650 (+$25)**	**825 (+$25)**
25,001 -75,000	**1,350 (+$50)**	**1,075 (NC)**	**750 (+$25)**	**875 (NC)**	**1,325 (+$75)**	**1,450 (+$50)**
75,001 -150,000	**2,025 (+$75)**	**1,350 (NC)**	**1,000 (+$50)**	**1,450 (NC)**	**1,825 (+$100)**	**2,725 (+$125)**
150,001- 500,000	**3,050 (+$125)**	**2,300 (NC)**	**1,500 (+$75)**	**1,725 (NC)**	**2,800 (+$150)**	**3,550 (+$150)**
500,001 -1,200,000	**4,400 (+$175)**	**3,500 (NC)**	**2,500 (+$125)**	**2,875 (NC)**	**4,450 (+$225)**	**5,225 (+$225)**
1,200,001- 3,000,000	**6,750 (+$250)**	**5,400 (NC)**	**3,750 (+$175)**	**4,600 (NC)**	**7,250 (+$375)**	**8,350 (+$350)**
>3,000,000	**8,100 (+$300)**	**6,475 (NC)**	**4,750 (+$225)**	**5,750 (NC)**	**9,250 (+$500)**	**10,850 (+$450)**
AM Radio Construction Permits	**390 (-$30)**					
FM Radio Construction Permits	**675 (+$45)**					

Court asks for explanation, FCC blinks

SSN Disclosure Requirement Largely Written Out Of Form 323

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

While broadcasters were finally compelled to submit biennial Ownership Reports on revised Form 323 by July 8, their attributable principals were ***not*** required to provide Social Security Number (SSN)-based FCC Registration Numbers (FRNs). In a last-minute ruling by the U.S. Court of Appeals for the D.C. Circuit, the Court expressly confirmed that the FCC has taken the position that "no individual attributable interest holder will be required to submit a Social Security number to obtain an FRN for the July 8, 2010, biennial filing deadline or for any imminent non-biennial filing of Form 323." That ruling came in response to a petition for writ of mandamus filed by Fletcher Heald and a number of broadcasters and state broadcast associations. Since the Court's denial of our mandamus petition was based on the FCC's stated position, it appears extremely doubtful that the FCC will be moving off that position soon.

As a result, any person holding an attributable interest in a commercial broadcast licensee – *i.e.*, any person who would have to be reported on Form 323 – who has not already submitted his/her SSN to the FCC in order to obtain an FRN need not do so simply to complete Form 323. This is a significant development, and a significant retreat on the part of the Commission.

A step-by-step chronology of the rise and fall of the FRN requirement.

Here's a step-by-step chronology of the rise and fall of the FRN requirement.

Behind closed doors

Back in May, 2009, the Commission announced that Form 323 would be revised. But at that time the Commission said absolutely nothing about requiring individual attributable interest holders to cough up their SSNs as part of that process. Likewise, when the Media Bureau announced, in June, 2009, that it had revised the form, it didn't mention any SSN requirement; to the contrary, the Bureau specifically said that the revised form did not give rise to any need for confidentiality and did not raise any privacy concerns. (Even though the Bureau solicited public comments on its revised form, it elected not to make the revised form available for review, which made it difficult – no, wait, make that *impossible* – to comment on the draft form.)

From behind a cloud of denial, the revised form appears

In August, the Bureau shipped its revised Form 323 over to the Office of Management and Budget (OMB) for its approval. In so doing, the Bureau – or maybe it was the Commission itself (it's impossible to tell exactly who sent the item over to OMB) – again expressly claimed that its handiwork did not present anything to worry about from a confidentiality or privacy perspective. But OMB posted the revised form for all to see, finally. Lo and behold, the revised form required that every attributable interest holder listed in any Form 323 be identified by his/her own SSN-based FCC Registration Number (FRN). In other words, in order to complete the form, licensees would have to force their various attributable interest holders to obtain their own FRNs, and that in turn would require those interest holders to hand over their SSNs to the FCC.

Accompanying the form was a "supporting statement" which again asserted that the revised form did not involve privacy or confidentiality issues.

A number of broadcast-related parties pointed out to OMB that, *au contraire*, the SSN/FRN requirement did indeed implicate serious privacy/confidentiality considerations . . . and oh, by the way, the FCC had never given anybody the opportunity to comment on that requirement in the first place. A month later, a "revised supporting statement" was submitted – presumably by the Commission, although it was unsigned and otherwise unattributed – in which the obvious privacy/confidentiality concerns were finally acknowledged.

In a separate response to the various comments, an official in the FCC's Office of Managing Director claimed that the SSN-based FRN requirement was a "vital mechanism for data quality assurance". In essence, the Commission was moving full speed ahead with its revised form, FRN requirement and all.

The FCC blinks once, or maybe twice

Despite the problematic record underlying the revised form, OMB approved it in October, 2009, and the Bureau promptly announced that the new form would have to be filed by December 15. In November, Fletcher Heald asked the Commission to stay the implementation of the form, noting (among other things) that an impressive number of shortcomings in the development of the revised form precluded its implementation. The Commission ignored our pleading, but a week or two later postponed the filing deadline into January.

In early December, the Commission made the revised form available for folks to fill in, at least for a while. But it

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also revealed a further change relating to the FRN requirement. Now parties could avoid disclosing SSN-based FRNs, *but only after the licensee had made good faith, diligent efforts* to obtain all necessary FRNs. If they had done so but still were unable to come up with the FRNs, respondents could use randomly-generated "special use FRNs" (*SUFRN*) as a temporary expedient – emphasis on the word "temporary". According to the revised instructions, use of a *SUFRN* did ***not*** relieve the respondent of its "ultimate duty" to hunt down "fully compliant" FRNs for all concerned. And the *SUFRN* was ***not*** available for non-biennial Ownership Reports (such as those filed by assignees or transferees after the consummation of their acquisition of licenses).

So the *SUFRN* option in fact did nothing to eliminate the FRN obligation.

In late December, with the January deadline fast approaching, Fletcher Heald – joined by ten state broadcaster associations – asked the D.C. Circuit to intercede. Several hours after that request was filed, the FCC announced that it was indefinitely postponing the filing of the revised form, giving rise to cautious optimism that the FCC might be re-thinking the FRN requirement. (Apparently as a result of the indefinite postponement, three months later the Court denied Fletcher Heald's December request.)

A major flaw in the revised Ownership Report has been corrected, at least temporarily.

It's baaaack

In early April, it became clear that any optimism, cautious or otherwise, was unfounded. The Bureau announced that the revised Form 323 was back on the calendar. New due date: July 8. The announcement said nothing about the FRN question. But careful review of the FRN question on the form revealed new language. Gone was the admonition that respondents had some "ultimate duty" to chase down SSN-based FRNs for all their attributable interest holders. Instead, the form now provided that

> [r]espondents who use a non-SSN based "Special Use FRN" will be deemed fully compliant with the Form 323 filing obligation for purposes of this initial filing and the lack of SSN-based FRNs in response to Question 3(a) will not subject Respondents to enforcement action.

The Commission did not provide any public notice announcing, much less explaining, this change.

The Court steps in

Fletcher Heald, along with several state associations and a number of broadcast licensees, headed back to court with a second mandamus petition. With the new deadline just weeks away, on June 14 the Court ordered the FCC to respond to our arguments by June 21 (later extended to June 23).

Here's where things got interesting.

On June 17, the FCC sent OMB yet another revision to the form, changing the instructions to the FRN question further:

> *Old language*: A *SUFRN* could be used "[i]If, after using diligent and good-faith efforts, Respondent is unable to obtain a Social Security Number".
>
> *New language*: An *SUFRN* may be used "[i]f, after using diligent and good-faith efforts, Respondent is unable to obtain, ***and/or does not have permission to use***, a Social Security Number in order to generate an FRN". (emphasis added)

In other words, even if a respondent had somebody's SSN and could theoretically have signed that person up for his/her own FRN, the respondent was not obligated to do so if the individual had not given his/her permission. Obviously, the Commission was moving away from its original notion that all respondents had an unavailable "ultimate duty" to nail down SSN-based FRNs for all attributable interest holders.

Additionally, the new instruction made the *SUFRN* option available not only for the biennial Ownership Report, but also for all other non-biennial uses of the Form 323.

OMB approved that new language on June 21, and on June 23 the Commission relied on the newly-relaxed instructions in responding to our arguments. The Commission didn't bother to issue any public notice announcing its revised instructions. More surprisingly, in its response to the Court the Commission also didn't bother to alert the Court that the language on which the FCC was relying was brand-spanking new – and that that language had been concocted only ***after*** the Court had ordered the Commission to respond.

What the Commission *did* do in its response to the Court was to provide its own gloss on the revised instruction. According to the Commission's response, that revision makes it "clear" that

> users are not required to provide SSN-based FRNs for the July 8 filing if they object to the submission of their Social Security Numbers.

To some, that gloss might go somewhat beyond the precise language of the latest revised instruction. But that's what the FCC told the Court.

The Court then interpreted the Commission's gloss to mean that "no individual attributable interest holder will be required to submit a Social Security number to

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Data'll be the day . . .

FCC Seeks Data On Data Collection

Goal is to streamline, modernize processes

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

Late last month – against the backdrop of FHH's efforts (in the D.C. Circuit – *see* related article on Page 8), to force the Commission to revise its demand for personal Social Security Numbers for persons with attributable interests in broadcast stations – the FCC launched its sweeping new Data Innovation Initiative. This program is being touted by the agency as a comprehensive, cross-bureau effort to "modernize and streamline how it collects, uses and disseminates data." The FCC has installed an uber-Chief Data Officer, Greg Elin, who will oversee new Chief Data Officers in each of the Media, Wireless Telecommunications and Wireline Competition Bureaus, as well as a new Geographic Information Officer (tasked with helping NTIA in broadband mapping).

This initiative, according to the FCC, is part of a greater effort, begun nearly a year ago, to inventory and streamline the various sets of data collected and maintained by the FCC. As we have reported previously (*see, e.g.*, the April, 2010 *Memo to Clients*), one part of this initiative is the ongoing (not yet live) effort to overhaul the Media Bureau's Consolidated Database System (CDBS) to permit a more fluid and intuitive one-stop shop for all broadcast licensing and reporting information. In this same vein, in the past year the FCC has also revamped the Electronic Comment Filing System (ECFS) to make it easier for the public to submit comments electronically and to search for submitted comments.

In concert with the announcement of the new initiative, the three bureaus are seeking comments and recommendations regarding:

> the utility and rationale for each of its existing data collections;
>
> whether there are additional data not being collected but ought to be;
>
> how data collection and analysis of the data might be improved; and, finally,
>
> how the bureaus can improve dissemination of information collected, via reports and analyses, to better meet the National Broadband Plan recommendation that the FCC make as much information public and searchable as possible.

Each of the three bureaus has prepared a spreadsheet inventory of their current respective data collections, available at http://reboot.fcc.gov/data/review.

The bottom-line goal of this "'zero-baseline' data review," says the Commission, "is to eliminate unnecessary data collection while ensuring that the FCC has the information needed for sound analysis and policy making." That sure sounds good on paper. Let's hope that it leads to true change in the amount and types of information the FCC collects from licensees and folks related to the regulated industries, change that eliminates unnecessary, duplicative and non-useful information from the wide net that is often cast, particularly with regard to sensitive personal information.

The deadline for comments is August 13; reply comments are due Sept. 13.

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obtain an FRN for the July 8, 2010, biennial filing deadline or for any imminent non-biennial filing of Form 323." And, based on that interpretation, the Court denied our second mandamus petition.

Call us crazy, but we're prepared to declare a significant (although not yet total) victory here. Yes, the mandamus petition was "denied", but only because the Commission backed off the FRN requirement. And since the Court clearly identified that retreat as the basis for the Court's decision, any attempt by the Commission to re-impose its previous, unrelaxed standard would open the door for another mandamus action. In other words, a major flaw in the revised report has been corrected, at least temporarily, as a result of our efforts.

Unfortunately, the last-minute timing of the FCC's response and the Court's action kept these developments out of the public eye just as the July 8 deadline rolled around. As a result, it's likely that a number of folks who might not otherwise have provided their SSNs did so under the misimpression that they had to. Next time, they might want to check out CommLawBlog first.

Epilog

Is the relaxation – or effective elimination – of the SSN-based FRN requirement permanent? Who knows? Since the FCC has never bothered to explain precisely why such FRNs are supposedly essential, it's hard to say whether the FCC could justify such a requirement (although many strongly doubt it). And the longer the Commission relies on *SUFRNs*, the harder it will be to justify any claim that there is no adequate substitute for SSN-based FRNs.

But the Commission clung tightly to the requirement in the face of strong arguments, and relented only when forced by the Court to try to explain its position. That suggests that we may not have seen the last of the SSN-based FRN requirement. We'll keep our eyes out for further developments – check in at our blog (www.commlawblog.com) for updates.

TV On The Move Means Less To Watch

By Peter Tannenwald
tannenwald@fhhlaw.com
703-812-0404

A big chunk is missing from the armor of the All-Channel Receiver Act, the law that lets the FCC require every television receiving device to receive all TV channels. The FCC has adopted and enforced all-channel rules in the past, applying them not only to conventional TV sets but also to any device with a TV tuner – even VCRs and DVD players that have no video screen. The rules have required reception of not only all channel numbers but also all transmission formats. A half century ago, the FCC required all TVs to have UHF tuners to receive Channels 14-69. More recently, it insisted that all receivers include digital receiving capability. The Commission even handed out hefty fines for anyone trying to dump their inventory of analog-only TVs without adequately warning purchasers they were buying soon-to-be-obsolete hardware.

Today's new video frontier is digital mobile TV that you can watch in the car, on the bus, or on your skateboard. [*Editorial Disclaimer*: The preceding sentence is not intended to promote watching TV while skateboarding, or driving, or on public transportation without adequate sound-proofing.] Manufacturers recently started producing mobile digital TV receivers that do not have analog tuners, because analog tuners mean a little more cost, more weight, and less battery life. Some versions cannot even receive conventional digital television, the kind we watch at home.

A small minority of TV stations add a special "mobile/hand-held" (M/H) bitstream to the standard digital signal for better reception in a mobile environment. Some of the new digital mobile TV devices *require* this bitstream to work – as a result, they can't receive any analog ***or*** most digital TV stations.

In other words, the new devices with those limitations violate the standards imposed by the FCC under the All-Channel Receiver Act.

Realizing they might be on the precipice of catching severe regulatory flak, Dell and LG Electronics – both of whom happen to make the devices – ran to the FCC and asked for a quick waiver so that they can move products that don't receive all TV formats. Sure enough, they got what they wanted pretty quickly.

The waiver allows omitting both analog tuners and non-M/H digital reception capability. The FCC gulped a bit before saying OK, because there are still thousands of analog low power TV and TV translator stations, some providing the only TV service to rural areas. These will be invisible to the new receivers. The FCC also considered what might happen in an emergency when people find that their new receivers can't tune in most TV stations in big and small markets. (Only 70 out of more than 1,700 TV stations nationwide have committed to implementing M/H by the end of 2010.)

Here come the new toys, able so far to receive only 70 TV stations when the weather is right.

But mobile reigns supreme with the FCC these days, rightly or wrongly mixed in the same bowl with the Holy Grail of broadband; so neither a screeching halt to production lines nor product recalls were in the cards.

The FCC required prominent labeling of waivered digital mobile TV on the outside of the packaging, so the consumer need not open anything to read it. Notices must also be displayed at points of sale, saying "Cannot receive analog low power TV" and/or "Receives only stations broadcasting Mobile DTV", as applicable. And the waiver applies only to receivers intended to be used "while in motion", a term not clearly defined. (The "not clearly defined" limitation is certainly narrower than using, say, battery power as the test, since a lot of battery-powered devices are used in the home, and not "in motion".)

So here come the new toys, able so far to receive only 70 TV stations when the weather is right. If you're a consumer, know the limitations of what you're buying. If you're a TV broadcaster, it might be time to consider shelling out the bucks for adding M/H to your signal, to enable you to reach the likely fast-growing cadre of mobile viewers. You'll be hoping all the while, of course, that the FCC does not repack the spectrum to make you share a channel with another station. The M/H stream needs room for more data bits, which repacking will put in shorter supply.

EE-Whoa!!!

MMTC Calls For Suspension Of EEO Enforcement

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

In a surprising move, the Minority Media & Telecom Council (MMTC) has requested that the Commission suspend its Equal Employment Opportunity (EEO) rules for three months. As MMTC sees it, during those three months the Commission should completely overhaul its current EEO system.

MMTC is perhaps the most prominent advocate on behalf of the interests of racial and ethnic minorities in the area of communications. One would therefore not expect MMTC to call for the suspension of rules and policies designed to assist MMTC's primary constituents. But that would assume that the FCC's EEO rules are working properly and, therefore, benefiting MMTC's interests. MMTC does *not* share that assumption. Rather, it has concluded that the FCC's EEO enforcement program "has no apparent mission, no focus, no data for evaluation, and no results except sanctioning the innocent while ignoring the guilty."

MMTC: The FCC's EEO enforcement program "has no apparent mission, no focus, no data for evaluation, and no results except sanctioning the innocent while ignoring the guilty."

In the face of that harsh assessment, MMTC proposes that the FCC put its existing EEO program on hold for three months, during which time the Commission should take a number of steps aimed at revamping the program.

Some of MMTC's proposals are relatively simple and could, theoretically, be easily handled. For example, MMTC would have the FCC move its EEO staff from the Media Bureau to the Enforcement Bureau, where it would re-gain the designation of "EEO Branch", rather than "EEO Staff". While MMTC provides no particular justification for these proposals, they are presumably intended to increase the apparent stature of the EEO enforcement efforts.

Similarly, MMTC would have the FCC's General Counsel track EEO cases to make sure that possible violators do not escape punishment because, for example, a statute of limitations is allowed to pass before appropriate enforcement action is taken. While this might require the establishment of some internal case-monitoring arrangements, it would probably not impose an insurmountable burden.

Another proposal: the FCC should work with the Equal Employment Opportunity Commission (EEOC) to update the agencies' Memorandum of Understanding (MOU) to assure, in particular, cross-reporting between the two agencies relative to situations warranting special attention by both. While the concept of effective inter-agency cooperation can't possibly be objectionable in principle, in practice this proposal might involve considerable complications both in the drafting of the MOU revisions and in implementing the additional cross-reporting process.

MMTC also suggests that the FCC adopt recommendations that were first set out in a resolution from the FCC's Advisory Committee on Diversity for Communications in the Digital Age in 2004. Those recommendations would result in limited revision of the EEO rules to include an obligation for larger employers to provide career advancement programs. Since, in the abstract, the imposition of some additional obligations would not in and of itself create new burdens for the Commission, this suggestion might not seem all that difficult or complicated. But since the proposal has already been on the table for six years without action, there may be more here than meets the eye. Also, if the FCC were to propose this change, it would require a rulemaking proceeding to implement it. Even if the proposal encountered no opposition at all – an unlikely scenario, at best – it would take a lot longer than three months to get these changes on the books.

Other MMTC ideas appear even less susceptible of easy adoption.

For example, MMTC's proposal that the size of the EEO Staff (or EEO Branch) be tripled is problematic from the get-go. It's one thing to move staff around within the agency and maybe give them a different title; it's quite another to expand that staff substantially, particularly in difficult economic times, in an agency whose primary focus is (at least for the foreseeable future) broadband, not EEO. Of course, such an expansion would likely be necessary if the Commission were to embrace another of MMTC's proposals – *i.e.*,

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that the percentage of licensees subjected to EEO audits each year be *quintupled*, with the audits to include "on-site review" and more detailed reporting requirements. If the FCC were to increase the amount of work generated by EEO enforcement dramatically, it would logically have to increase the staff available to do that work.

MMTC would also have the Commission impose a revised version of Form 395-B, the annual employment report. But the Form 395-B requirement was suspended more than a decade ago (in the wake of a D.C. Circuit decision) and, despite subsequent efforts to revive it, it remains on the shelf because of various problems which need to be resolved before it can be unleashed. In particular, the thorny issue of public access to race- and ethnicity-based information has been pending unresolved for some six years, at least. While it is theoretically possible that the Commission might be able to resolve all such issues in short order (say, three months), it seems unrealistic to expect that to happen. Moreover, if the FCC were to impose this reporting requirement, that would further add to the work load of those charged with EEO enforcement. So unless the Commission is prepared to increase the EEO enforcement staff, the prospects for re-implementing the Form 395 in the short run are doubtful.

Emphasizing procedural miscues rather than actual discrimination is like lunging at the capillaries rather the jugular.

Two of MMTC's proposals reflect what appears to be a tension in its position. On the one hand, MMTC would have the FCC undertake detailed investigations into whether licensees are engaged in "word-of-mouth recruitment from a homogeneous workforce". If evidence of such recruitment surfaces, then the FCC should drill deeper into the situation, even designating the license for an evidentiary hearing in a worst case scenario.

But on the other hand, MMTC urges the Commission to ensure that broadcasters "with very diverse workforces" be largely exempt from any EEO-related penalty because they "obviously had to have operated broad recruitment programs". In other words, in some cases the FCC should take aggressive actions to ferret out possible misconduct where none may have been alleged, while in other cases it should be prepared to ignore apparent procedural problems and, instead, hand out "Get Out Of EEO Jail Free" cards.

This tension arises from the fact that, in recent history, the FCC's EEO enforcement activities have been directed at licensee failures to jump through the various procedural hoops of the EEO rules. That is, the targeted licensees were not found to have discriminated in their employment practices; instead, they had simply fallen a bit short in one or more of their record-keeping chores. MMTC sees this as an ineffective way of policing employment practices – sort of like lunging at the capillaries rather than the jugular. MMTC is particularly concerned because several recent targets of such enforcement actions have been large, prominent licensees with extensive minority hiring.

It's difficult to argue that actual discrimination should be permitted to continue while the FCC shuffles the deck chairs by hassling licensees about record-keeping. But that assumes that actual, actionable discrimination has occurred and is occurring, with the FCC looking the other way. Such discrimination may indeed be occurring – but if it is, shouldn't there be some prima facie evidence that could be presented to the agency first, to get the ball rolling?

But that's one of the reasons why the EEO rules are set up as they are. In order to discourage the likelihood of actual discrimination and to flag its possible existence, the FCC has imposed a range of employment processes which licensees must follow and as to which licensees must maintain records. Those records provide a preliminary indication of the licensee's EEO performance, so it's not entirely unreasonable – and it's for sure a lot easier – for the FCC to want to make sure that proper records are being kept.

In short, while the MMTC's proposals along these lines are understandable, they are by no means simple to reconcile, either with each other or with the realities of the FCC's regulatory circumstances. It is particularly unrealistic to think that new rules and policies along these lines could be crafted in three months.

Finally, MMTC urges the FCC to "conduct an inquiry into how minorities came to be purged from radio journalism and why minority representation in television journalism is in decline".

The MMTC's list of proposals is a bold move, particularly in view of the accompanying suggestion of a three-month suspension of all enforcement of the EEO rules. MMTC seems to be indicating that it believes that the FCC's existing EEO enforcement program is of, at most, only limited utility, creating "the false security that comes when the constable is on duty yet asleep." MMTC may be running the risk that, in response, the FCC could simply abandon its existing program without replacing it with anything more effective for the foreseeable future. Having now taken the public position that the existing program has only very limited, if any, value, MMTC may be hard-pressed to argue in favor of retaining or reinstating that program if it were to be ditched by the Commission.

Where do we go from here?

Indecency In A Post-*Fox* World: What's Up Next?

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

Now that the initial hoopla attendant to the release of the Second Circuit's *Fox* decision (*see* story on Page 1) has quieted down, let's take a gander at legal scenarios that might be in store for us.

Most obviously is the prospect of further efforts by the FCC to convince some court, any court, that the Second Circuit panel's decision was wrong. The options available to the Commission are:

Petition for rehearing to the Second Circuit panel. This would require the FCC to convince at least two of the panel's three judges that the decision they just made was wrong. Good luck with that.

Petition for rehearing en banc to the full Second Circuit. This would require the FCC to convince at least six of the ten active judges sitting on the Second Circuit that the whole court should take a look at the panel's decision. According to the Federal Rules of Appellate Procedure, *en banc* rehearings are generally "not favored" and "ordinarily will not be ordered". So good luck with that, too.

Petition for writ of certiorari to the U.S. Supreme Court. This is the classic "taking it to the next level", and is probably the best appellate option the FCC has. But the Supremes are under no obligation to review the case; in fact, the odds are that they won't agree to review *any* case (in the term ending in June, 2009, the Court reportedly denied 98.9% of the cert petitions filed). Still, the Court heard the *Fox* case back in 2009, so the Supremes obviously have some interest in it. If the FCC wants to keep the ball alive on the judicial side, Supreme Court review is likely its best bet.

Clouding the FCC's choices is the fact that CBS's appeal in the Janet Jackson case is currently pending in the U.S. Court of Appeals for the Third Circuit. Since that case also involves the indecency policy so thoroughly trashed by the Second Circuit in *Fox*, the Commission might be inclined to hold off until the Third Circuit shows its hand before making any decisions about the next appellate step through the indecency minefield. (The FCC has 90 days to file its *cert* petition – and that can be extended another 60 days under some circumstances – so the Commission may sit back and wait at least a little while for a Third Circuit decision to roll in.)

[*Editor's Note*: *See* the article on Page 17, where Kevin Goldberg, our crack Supreme Court observer and First Amendment guru, looks into Kevin's Krystal Ball for a glimpse of what might happen if the Supremes were to take a second look at the *Fox* case.]

Of course, the Commission could also just run up the white flag and forget about appealing any further. In that case, its indecency options would be reduced to two: (1) go back to the drawing board and attempt to develop an indecency enforcement policy that passes constitutional muster; or (2) accept the fact that indecency is not susceptible to government regulation.

In view of the zeal with which the FCC has been flexing its anti-indecency muscles in recent years, (2) seems an unlikely choice. That unlikelihood is underscored by Commissioner Copps's statement concerning the Second Circuit decision. In that statement Copps expressed his hope that the FCC would appeal the case, and he called on the Commission to "move forward immediately to clarify and strengthen its indecency framework". Hmm . . . we're guessing that he would opt for choice (1).

What about all those indecency complaints which have been piling up at the Commission for years?

But so far Copps is the only Commissioner who has spoken up on this. Others might reasonably take the position that now would be a good time for the Commission to get out of the business of trying to regulate indecency. This is particularly so since the FCC could claim that such a retreat was strictly a reaction to the Second Circuit's decision. That is, if any critics tried to beat up on the Commission for giving up too early, the Commissioners could simply respond that the Court made them do it.

While the FCC plans out its next move on the litigation front, what about all those indecency complaint proceedings which have been piling up at the Commission over the last several years?

The good news is that, in the aftermath of the *Fox* decision, it seems very unlikely that the FCC would attempt to take *any* enforcement action based on pending complaints. After all, the Second Circuit told the FCC in no uncertain terms that the Commission's indecency policy is unconstitutional. With the Second Circuit's order sitting there, the Commission seems to have no choice but to stand down unless/until that order is reversed. So don't expect to see any more fines or forfeitures or notices of apparent liability or even letters of inquiry relating to allegations of indecency while the Second Circuit's *Fox* decision is alive and kicking.

And similarly, anyone who is already in the middle of an indecency inquiry – say, for example, every Fox affiliate who received the *American Dad* inquiry – is probably off

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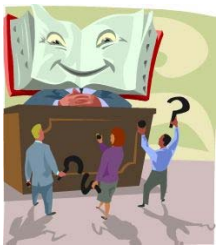
Still just another four-letter word



Renewed Call For FCC "Hate Speech" Inquiry

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

If at first you don't succeed, try, try again. Eighteen months ago, the National Hispanic Media Coalition (NHMC) filed a petition asking the FCC to open an inquiry into "hate speech". The petition professed not to be seeking actual regulation of "hate speech" (however that might be defined) – it just wanted the FCC to "collect information and data" about hate speech and "explore options for counteracting or reducing the negative effects" of such speech. The Commission has not, however, taken the bait since the first petition was filed. Accordingly, the petitioner has returned with an updated version of its request.

In May, NHMC – this time joined by more than 30 other like-minded special interest groups – filed comments in the Commission's "Future of Media project" (FOMp). Railing against the "false, misleading, divisive and dehumanizing language" which they see strewn across the "current media landscape", they have renewed their call for the Commission to "explore non-regulatory ways to counteract" the perceived adverse effects of "hate speech". (Since the FCC is a *regulatory* agency, it seems a bit odd, if not disingenuous, to be claiming to seek "non-regulatory" action from the Commission, but who are we to judge?)

The petition calls for the FCC to "explore non-regulatory ways to counteract" the perceived adverse effects of "hate speech".

As we indicated in our report on NHMC's initial petition (in the February, 2009, *Memo to Clients*), there are lots of reasons – most notably, the First Amendment – to assume that the FCC would not be enthusiastic about diving head first into this particular pool. NHMC's latest effort offers no real counters to those reasons. Rather, it urges generally that "hate, extremism and misinformation have been on the rise" since its initial petition, thus underscoring the need for FCC intervention of some sort.

In their comments NHMC and its cohorts speak in broad terms about "the media", as if there exists some monolithic thing dubbed "the media" which is capable of concerted action and susceptible to concerted control. That approach presents something of a problem, since "the media" comprise numerous separate and distinct communications modes subject to separate and distinct – but invariably limited – degrees of governmental regulation. Indeed, to the extent that "hate speech" is circulated in print media, the FCC has no regulatory jurisdiction at all. Similarly, where the Internet is involved (and Internet-distributed "hate speech" is a particular concern to the commenters), the scope of the FCC's jurisdiction is presently in something of a limbo. The same might be said even of the FCC's ability to regulate any content on the broadcast side, in view of the recent Second Circuit indecency decision (*see* related story on page 1).

But NHMC can't be faulted for its approach, because it's an approach which the FCC itself has unfortunately encouraged. In the FOMp, the Commission has invited comments on the "future of media" generally. Promoters of the FOMp, including Commissioner Copps, have tended to equate the "future of media" with the "future of journalism". Perhaps that is a correct way to see things – but if it is, then the FCC is precisely the wrong organization to be looking at it. "Journalism" in this sense involves content, and content is precisely what the FCC – and government generally – are barred from controlling.

Nevertheless, through its FOMp inquiry, the Commission has hung out the "welcome" sign, and NHMC has accepted the invitation. It's now up to the FCC to decide what, if anything, it can or should do.

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the hook for responding to the FCC's questions. (The Commission could theoretically ask the Second Circuit to stay the effectiveness of its order. The odds that such a request might be granted fall comfortably in the "good luck with that" range.)

Ironically, the FCC's likely inaction on pending complaints is bad news as well. Lack of FCC action would mean that all the stations whose license renewals have been held up for years solely because of pending indecency complaints will probably not see those renewals granted in the short term. That's frustrating: once a court has determined that an agency is acting unconstitutionally, regulatees who have suffered and are continuing to suffer from such unconstitutional activity should logically be entitled to prompt relief. While it would be nice if the Commission were to do the right thing here, you probably shouldn't count on that happening. Pending applications are likely to remain pending.

The Commission could clear up any uncertainty about all these things by issuing a public notice setting forth its plans. If that happens, we'll let you know. In the meantime it would probably be advisable not to hold your breath.

(Continued from page 1)

also noted the technological controls now available to help parents police content in their own homes.

But even within the confines of *Pacifica*, the Second Circuit concluded that the FCC's policy on indecent broadcasts exceeded constitutional limits because the policy was impermissibly vague.

Significantly, the Circuit's ruling targeted the FCC's entire indecency standard – not just the "fleeting expletives" component that was the focus of its 2007 opinion.

In a *tour de force* of First Amendment analysis, the Second Circuit took apart virtually every element of the FCC's policy and the FCC's defense of that policy. The Circuit found that the standard is so vague that neither the broadcast industry nor the FCC itself could ever be certain which words or images qualify as "patently offensive" under the existing standard. The Court also observed that the FCC's presumptive prohibition against the words "shit" and "fuck" couldn't survive because the FCC couldn't justify why some uses of those words have been prohibited and some not.

The Second Circuit's decision represents an unambiguous defeat of the FCC's current indecency policy.

For example, how could the FCC permit the broadcast of repeated uses of certain "bad" words by fictional soldiers in *Saving Private Ryan*, but proscribe the use of those same words by real life musicians in a documentary about the blues? The Commission had on occasion attempted to explain its actions on the basis of such factors as whether the words are "integral" to a particular program or whether the program is a "bona fide news interview". But in the Circuit's view, "[t]here is little rhyme or reason to these decisions".

The Second Circuit described the enormous First Amendment harms that naturally flow from "the FCC's indiscernible standards". The Court noted the inherent risk that vague standards applied on an "ad hoc" basis by government officials allowed for the suppression of particular points of view: "it is hard not to speculate that the FCC was simply more comfortable with the themes in 'Saving Private Ryan,' a mainstream movie with a familiar cultural milieu, than it was with 'The Blues,' which largely profiled an outsider genre of musical experience."

The Circuit also recognized that the FCC's vague standards force broadcasters to choose between (a) censoring controversial programs and (b) risking massive fines or loss of licenses – the unsurprising result being that many broadcasters choose to self-censor. According to the Court, concern about possible FCC enforcement efforts has prompted stations to edit or refuse to air a wide range of programming, including a documentary on the September 11th World Trade Center attack, literary readings, live news programs, political debates, sitcoms and dramatic programs.

And with that, the Second Circuit struck down the FCC's indecency policy. While the Court acknowledged that, unless and until *Pacifica* is overruled, the FCC could conceivably create a constitutional policy, the agency's policy at issue in the case did not pass Constitutional muster.

The Second Circuit's decision represents an unambiguous defeat of the FCC's current indecency policy – but it's not likely the last word on the subject. The FCC will almost certainly appeal to the Supreme Court. And let's not forget that the Third Circuit still has the Janet Jackson Super Bowl case pending – raising the possibility of conflicting decisions between the two federal courts. Such a "circuit split" would virtually guarantee a Supreme Court review.

The prospect of Supreme Court review focusing on the constitutionality of indecency regulation is particularly exciting because, in his separate opinion in the Supreme Court's 2009 *Fox* decision, Justice Thomas specifically invited reconsideration not only of *Pacifica*, but also of *Red Lion*. *Red Lion* is the 1969 Supreme Court decision upholding the Fairness Doctrine (and, by implication, special regulatory treatment for broadcasting) because of the supposed "scarcity" of broadcast spectrum. Thomas referred in particular to the "questionable viability" of both *Red Lion* and *Pacifica*. If four of his colleagues were to agree with Thomas that the scarcity rationale is no longer valid, that could cause massive upheaval in virtually every aspect of the FCC's operation.

In the meantime, broadcasters should not take the decision as a green light to start airing "R" rated movies at mid-day. The Second Circuit struck down the FCC's policy interpreting the federal statute prohibiting "obscene, indecent or profane language" but not the statute itself. In other words, it's still technically illegal to broadcast such fare, even if there is no obvious way in which the government could penalize it in the wake of the Second Circuit's decision. As has always been the case, broadcasters will need to continue to exercise good judgment in their selection of programming. We, as always, will stay tuned.

Swami, How I Love Ya, How I Love Ya . . .

Fox Going Forward: Kevin Tells It Like It Might Be

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

[*Editor's Note*: In the wake of the Second Circuit's *Fox* decision, we have asked Supreme Court observer and First Amendment guru Kevin Goldberg to take a look into Kevin's Krystal Ball and let us know what he thinks the Supreme would do if it were to review that decision. Kevin has asked that we note for the record that he: (a) accurately predicted the result in the original *Fox v. FCC* decision in the Supreme Court (well, sort of accurately – he mixed up the votes of Souter and Kennedy) and (b) correctly picked the winner in the final three games of the recent World Cup. So he seems to feel that he's on a bit of a roll . . .]

I see the Supreme Court affirming the Second Circuit – and, thus, tossing out the FCC's indecency policy – by 7-2, or maybe 6-3. Here's my thinking.

The Krystal Ball says that Fox wins in the Supremes.

Let's start with the Court's recent decision in *United States v. Stevens*. There the court voted 8-1 ***not*** to carve out new exceptions to the First Amendment in order to criminalize the production or sale of videos depicting animal cruelty. Sure, trafficking in animal cruelty videos isn't the equivalent of broadcasting indecent speech. But *Stevens* sheds light on: (a) the degree of unpleasant (or even outright disgusting) speech each Justice is willing to tolerate; and (b) the level of vagueness he or she will or will not tolerate in a law or regulation. Throw in several statements made during oral arguments the first time the *Fox* case rolled through the Supreme Court (it was argued on Election Day, 2008), and we can get some sense of how each Justice might vote on the constitutional issue.

Frankly, I don't see much change from *Stevens*. It's pretty safe to say that the "liberal block" of the Court will affirm the Second Circuit and strike down the FCC's regulatory scheme. (That would parallel the vote in the 1978 *Pacifica* case, where the four liberal survivors from the Warren Court hung together in dissent.) Let's also assume that Justice-designate Kagan will: (a) be confirmed and (b) vote the same way that Justice Stevens did in *Stevens* (no relation, obviously). So right there you've got Breyer, Ginsbug, Sotomayor and Kagan ready to slap the FCC down.

I think Fox also gets Justice Thomas. He was the *only* Justice in the 2009 *Fox* decision to flat out question the rationale for broadcast content regulation. His separate opinion there indicated that he may be itching to do away not only with the indecency regulations, but also with the scarcity doctrine underpinning all regulation of broadcast content. Plus, he voted with the majority in *Stevens*. And don't forget his vote in *U.S. v. Playboy Entertainment Group, Inc.* There the Court struck down a requirement that cable operators scramble sexually explicit content. He voted with the majority, saying "I am unwilling to corrupt the First Amendment to reach this result. The 'starch' in our constitutional standards cannot be sacrificed to accommodate the enforcement choices of the Government."

On the other side, I suspect that Justice Alito is the most likely to vote to reverse the Second Circuit and side with the FCC. He was the lone outlier in *Stevens* and has generally seemed to be paternalistic and protective of "society's morals" in similar cases.

That gets us to 5-1, with Chief Justice Roberts and Justices Scalia and Kennedy left. I think you might see one, maybe two, of them side with the FCC, but not all three. Why?

Chief Justice Roberts wrote the strong majority opinion in *Stevens* and was clearly uncomfortable with the lack of regulatory precision in that case. While it's possible that he could line up with Alito, I just don't see it. After all, the Chief was also in the majority in the most controversial First Amendment decision of the most recent term (*Citizens United v. Federal Election Commission*). There is really no comparison between *Fox* and *Citizens United*, but if the Chief is going to go that far out on a limb in favor of the First Amendment, it's going to take him a while to get back in, even if he really wants to come back.

Speaking of *Citizens United*, that decision was written by Justice Kennedy. He was also in the majority in *Reno v. ACLU* and wrote the opinion in the *U.S. v. Playboy*.

I originally had Scalia solidly on Fox's side, but I began to rethink this a little. He wrote the majority decision in 2009, when *Fox* first blew through the Court and the FCC won. (As you will recall, the Court then sent the case back down on administrative law grounds without reaching the thornier constitutional issues.) But that

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New interim deal replaces interim interim deal

BMI's Interim Fee Sinks In Sync With ASCAP's

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

At last, another piece of the ongoing ASCAP/BMI ratemaking puzzle has fallen into place – at least for a while. Last month the good folks at the Radio Music License Committee negotiated a final interim deal with BMI, good until a final non-interim deal is worked out and approved. The new interim arrangement – which replaces the old interim deal (which apparently is properly referred to as a "provisional interim" deal) – should stabilize things for the foreseeable future.

And the good news is that the new interim deal is better than the old one, so life is good for the time being.

The ASCAP/BMI ratemaking proceedings will determine just how much radio broadcasters will be paying in royalties ASCAP and BMI for performance of musical works for the five-year period beginning January 1, 2010. We've been following the goings-on closely, so closely, in fact, that we think we finally understand what's going on.

The short-term "bridge" measures weren't meant to last, and they didn't.

Let's review the bidding so far.

The most recent royalty term expired on December 31, 2009 without any agreement or court order setting the rates for 2010–2014. Past practice teaches that it takes a while to set the permanent rates. So preliminary agreements were reached to cover the period until new rates can be established by the U.S. District Court for the Southern District of New York. (That's the court that must approve all ASCAP/BMI rates, thanks to a consent decree imposed a few years back to end anticompetitive practices of ASCAP and BMI. SESAC isn't subject to that consent decree). As we reported last January, those preliminary agreements set the "old" interim rates, which amounted to a 7% reduction from 2009 rates.

Those initial preliminary agreements were really just short-term "bridge" measures designed to assure the continued flow of at least some royalty payments in the absence of any other payment arrangement. Those measures weren't meant to last, and they didn't.

Meanwhile, the RMLC continued working with the Court, ASCAP and BMI on two separate fronts.

First, looking toward the long haul, the parties negotiated – and continue to negotiate – final royalty rates for the full five-year period running until December 31, 2014.

Second, the Court, ASCAP and BMI were ***also*** working on determining an appropriate rate for the interim period lasting from December 31, 2009 (*i.e.*, when the last five-year term ended) until the rates covering the next period are set (*i.e.*, when the negotiation mentioned in the preceding paragraph are concluded). As noted above, the initial 7% reduction announced last January was understood to be a bridge rate to keep money flowing into the ASCAP and BMI coffers until the parties had had a chance to come up with interim rates. (Got it? If not, check our blog from last January where we introduced this topic.)

As we reported back in May, the District Court established the interim rate to be paid by broadcasters to ASCAP. While broadcasters had initially agreed to pay $217 million industry-wide for short-term "bridge" purposes, the District Court decreed that the interim number should actually be $192 million.

Lo and behold, BMI reached an agreement in late June that will reduce the interim royalties paid by the broadcast industry to BMI from $217 million (the initial "bridge" rate as of January) to . . . $192 million (the now-operative interim rate which will remain in effect at least through 2010). Where they got this number isn't too hard to figure out; we're not entirely sure why it took six weeks to get there.

Here's a joint statement issued by RMLC and BMI:

> The Radio Music License Committee and BMI have reached an interim fee agreement in the radio industry's rate making proceeding which began earlier this year. The interim fee agreement takes effect August 1, 2010, and calls for an industry fee reduction from $217 million to $192 million. (This follows BMI's voluntarily agreeing to provisionally lower fees paid by the industry from $233 million to $217 million as of January 1, 2010). The parties agreed to these terms in order to expedite court determination of an appropriate final fee retroactive to January 1, 2010. The agreement was reached by the parties without prejudice as to final fee consideration.

We're also happy to provide you with a potential timetable for implementation. Broadcasters should have begun seeing a 10.8% average decrease in monthly billings in June, 2010 (over and above the prior 7% decrease instituted at the beginning of the year). The agreement with BMI is effective August 1; the exact decrease has not been set, but it is expected to begin with the August 2010

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Takin' care of bid-ness

Going Once, Going Twice, Sold! Auction 88 Closes

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

In very short order the Commission brought the gavel down on Auction 88, which featured 13 radio (AM, FM, FM translator — *see* box for list of specific communities on the auction block) permits up for grabs. This was a closed auction – the participants were limited to folks who had filed applications for these particular facilities in the distant past. How distant? Some of those applications were filed as early as 1993 (in the early days of Bill Clinton's first term); the most recent (for an AM permit) were filed in 2001.

Sold!!!!

FM permits:	
Durango, CO	$20,000
Bloomfield, IN	$22,000
Santa Isabel, PR	$25,000
Two Rivers, WI	$49,000
Steamboat Springs, CO	$55,000
Idalou, TX	$75,000
Shawsville, VA	$153,000
Traverse City, MI	$224,000
Greenwood, AR	$255,000
North Madison, OH	$425,000
Rosendale, NY	$499,999
AM permit:	
Terre Haute, IN	$53,000
FM Translator permit:	
Coyote, CA	$31,000

While it took a decade or more to get things moving, it took the Commission a mere four days of auctioning to get things wrapped up. And if the FCC thought that keeping these permits on ice for so long might drive up the prices they would likely fetch, the FCC has at least one more think coming. By the time the bidding opened, four of the 13 permits had only one bidder, and so sold for their opening bid amounts which, in the aggregate, amounted to well under $200,000.

(By contrast, an FM permit in North Madison, Ohio, was hotly contested, with two bidders slugging it out through 16 rounds. The opening bid was $75,000; the winner walked away with the permit for $425,000.)

When the dust settled, the FCC got less than $2,000,000 for all the permits (less than $1.5M, once you factor in bidding credits) – and that's assuming that all the checks both (a) make it in the door and (b) clear.

The FCC will make the auction results public shortly. The release of the public notice will trigger deadlines for the winning bidders to submit their money and update their paperwork to apply for their new construction permits. The construction permits will have the standard three-year deadline by which the station must be constructed or the permit will be forfeited.

(Continued from page 17)

doesn't say much: he was very clear that he was ruling on the ***non***-constitutional issues only, and he never hinted at how he might come out on the First Amendment issue here. Some of his votes in other First Amendment cases suggest he might side with Fox here. Remember, Scalia was the swing vote (joining uber-liberal Justices Brennan and Marshall) in *Texas v. Johnson*, which accorded First Amendment protection to flag burning. He was also clearly with the majority in *Stevens*.

On the other side, he's shown that he is willing to "vote morality". In *Barnes v. Glen Theater* he concluded that the First Amendment did not prevent restriction of nude dancing. He also dissented in *U.S. v. Playboy Entertainment Group, Inc.* Ultimately, I'm hoping that he'll vote to strike down the FCC's indecency scheme because: (1) he justified the moral high ground in *Barnes* only after declaring nude dancing to be conduct, not expression; (2) he dissented in *Playboy* only after deciding that the content providers in that case were clearly providing – and intending to provide – hard core sexually-oriented material, not at all the case here; and (3) he was in the majority in *Reno v. ACLU* back in 1997 where regulation of supposedly "harmful" material on the Internet was declared unconstitutional, in part due to the vagueness of the law.

So maybe more than one of Scalia/Roberts/Kennedy drops off to join Alito in upholding the FCC's indecency policy. But I doubt it. And in any event, I clearly don't think any more than those three join Alito in ruling for the FCC.

Bottom line: Kevin's Krystal Ball says that Fox wins in the Supremes.

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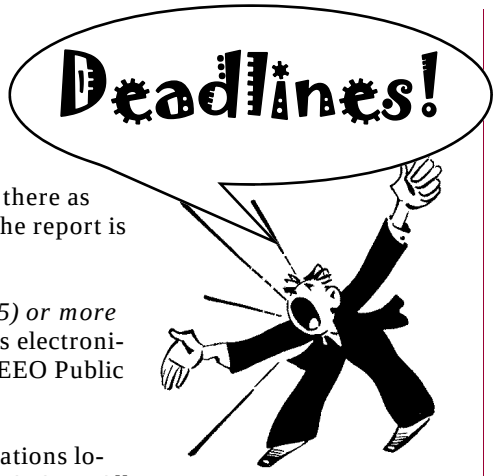
billing and be about 10% (again, over and above the prior 7% decrease).

ASCAP and BMI appear to be digging into their positions that they should be getting more money in the long haul – a circumstance which is likely to prolong the negotiations relative to establishment of final rates for the 2010-2014 term. As a result, broadcasters may want to get acquainted with these current interim rates because, "interim" or not, those rates could be with us for some time to come.



August 2, 2010

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

EEO Mid-Term Reports - All *television* station employment units *with five (5) or more full-time employees* and located in **California** 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 **Illinois** or **Wisconsin** 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 **California**, **North Carolina**, or **South Carolina** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

October 1, 2010

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Iowa**, **Mariana Islands**, **Missouri**, **Oregon**, **Puerto Rico**, the **Virgin Islands**, and **Washington** must place EEO Public File Reports in their public inspection files. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

EEO Mid-Term Reports - All *television* station employment units *with five (5) or more full-time employees* and located in **Alaska**, **American Samoa**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, and **Washington** 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 **Iowa** or **Missouri** 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 **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, **Puerto Rico**, the **Virgin Islands**, or Washington must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

October 11, 2010

Children's Television Programming Reports - Analog and Digital - For all *commercial television* and *Class A television* stations, the third 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.

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FM ALLOTMENTS ADOPTED – 6/22/10-7/20/10

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
TX	Kingsland	65 miles NW of Austin, TX	284A	09-180	TBA
CA	Amboy	129 miles S of Las Vegas, NV	284A	10-63	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 2)

And so the race toward Repurposed Spectrum lines up in the starting blocks.

Readers will doubtless recall that, as part of the National Broadband Plan, the Commission has made clear that it would like to skim some 120 MHz of spectrum from TV and auction it off for use in mobile broadband. To cushion the blow for Eligible-for-Eviction broadcasters, the Commission suggested that it might be willing to throw them a few bucks out of the auction proceeds. OK, that sounds good – but, oops, the FCC doesn't have the authority to dole out auction cash like that. To get that authority, the Communications Act would have to be amended.

Cue Senators Kerry and Snowe, who have now started that amendment process.

Of course, this is just the first step – the legislative process can be long and slow, and the end result may not look much like the initial bill. And that's probably a good thing here. After all, the Kerry-Snowe bill is a tad thin on any significant details. In fact, there pretty much aren't any details. Instead, the bill would give the FCC essentially complete discretion to dole out as much – or as little – of the auction proceeds as it feels like. And who would be getting those proceeds? "Any licensee who agreed to participate in relinquishing such auction usage rights" ***might*** get some, again if the FCC feels like it.

So the potential carrot of some payment in return for going along with the spectrum repurposing process is now at least a bit closer to reality than it was when the FCC first floated the idea.

What about the stick? That would be the annual spectrum fee. Unlike the annual regulatory fee which all FCC regulatees already pay – and which is based on covering the costs of the FCC's operations – the spectrum fee would be calculated based on (a) the "fair market value" of the licensed spectrum as the FCC determines that value to be and (b) the "public interest of the service the spectrum is being used for". Again, the FCC would be the one defining those crucial terms.

While broadcasters would be able to make a strong argument about the value of the public service they provide, their problem here is that the FCC is obviously smitten with mobile broadband as a panacea. So it would not be a huge surprise if the FCC were to conclude that, in the overall public interest balancing process, broadband might outweigh broadcast. And given the challenging economics of broadcasting just now versus the supposedly sky's-the-limit prospects for broadband, the "fair market value" of the spectrum is likely to be set based on the latter (*i.e.*, perceived broadband value) rather than on the former (*i.e.*, value of broadcast operation). That would mean that broadcasters would likely be billed based on a value bearing little or no economic relation to their business. The potential for putting a heavy squeeze on broadcasters to "encourage" them to hop on the repurposing bandwagon would be substantial.

Again, we have a long way to go before all of this plays out. But it's safe to say that the games have begun.

(Continued from page 20)

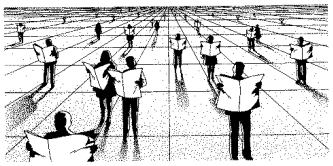
Issues/Programs Lists - For all *radio, television*, and *Class A television stations*, a listing of each station's most significant treatment of community issues must be placed in the station's local public inspection file. The list should include a brief narrative describing the issues covered and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

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

Updates On The News

Return of video description? – Just about ten years ago, the FCC imposed "video description" rules on the TV industry. Those rules required video programmers to include in their programming "video descriptions" – aural descriptions of a television program's key visual elements (such as the movement of a person in a scene). (So while watching the show, you would hear a voice telling you something along the lines of "Homer leaps across kitchen table and shakes Bart by throat as Bart's eyes bug out".) The idea was to enhance the TV experience for visually impaired viewers.

The video description rules got tossed in 2002 by the D.C. Circuit, which concluded that the FCC didn't have the necessary statutory authority to impose them.



Fast forward a decade. The House Communications Subcommittee is apparently trying to patch over that problem with HR 3101, the "Twenty-first Century Communications and Video Accessibility Act of 2009". If enacted, that Act would require the FCC to reinstate the same rules that were thrown out in 2002.

While it's never safe to predict a proposed bill's likelihood of success, we'll go out on a limb here and guess that this one won't be enacted anytime soon. Putting aside the "video description" provision, it also contemplates a variety of new and seemingly burdensome obligations on (gasp) Internet-delivered video and devices capable of receiving Internet Protocol video. One ultimate goal appears to be the imposition of closed captioning requirements on Internet video, with any video receiver with any size screen obligated to be equipped with the ability to display closed captioning. (Units with screens less than 13 inches might be exempt, if the requirements turned out not to be "achievable" for such sets.) It's hard to imagine that the free-wheeling Internet community will be thrilled at the prospect of government-imposed captioning requirements. But you never know.

Life in the trenches (redux) – Back in April we reported on the results of the 2009 Annual Employee Survey conducted at the FCC. Then earlier this month the FCC announced that it was the "most improved" agency "across the entire federal government", according to the "2010 OPM Viewpoint Employee Satisfaction Survey". So we took a gander at the 2010 survey results and compared them with the 2009 survey. (Note: the 2009 survey was titled simply "2009 Annual FCC Employee Survey", while the 2010 survey is called the "2010 Federal Employee Viewpoint Survey". It's possible that there is some meaningful difference between the two, but we couldn't see it: they both appear to have asked largely identical questions, including 45 questions prescribed by OPM.)

According to an introductory statement in the 2010 version, the 2010 responses indicate that "far more" Commission employees "have a high level of respect for their organization's senior leaders" than was the case in the "last OPM survey (2008)". It's not clear why they refer to a "2008" survey as the "last" one, since the 2009 survey was conducted in December, 2009. And the differences between the 2009 and 2010 responses don't appear to be particularly startling. For example, reacting to the statement that "My organization's leaders maintain high standards of honesty and integrity", 62.2% of the 2010 respondents agreed (with 20.1% agreeing "strongly"). The same statement in 2009 garnered 60% agreement – but 26.6% of those agreers were "strong". And how about "Arbitrary action, personal favoritism and coercion for partisan purposes are not tolerated"? In 2009, 51.0% agreed there (26.6% "strongly"), while in 2010, that number was 51.1% (with only 14.7% in "strong" agreement). On the other hand, while 16.2% disagreed with that statement in 2009 (9.2% "strongly"), in 2010 21.5% disagreed, 10.3% strongly.

It's hard to see how these results could show more improvement than any other Federal agency, but we'll take the Commission's word for it.

FHH - On the Job, On the Go

On July 16, **Frank Montero** attended a meeting of the Board of Directors of the Maryland-DC-Delaware Broadcasters Association.

Next month, **Scott Johnson** will be one travelin' man. On August 12, he'll be presenting a Regulatory Update program at the Annual Convention & Trade Show of the Texas Association of Broadcasters in Austin. And three days later, he'll be participating in a meeting of the South Carolina Broadcasters Association.

On August 20, **Frank Jazzo** and **Lee Petro** will be panelists in the Legal & Regulatory Session at the Tennessee Association of Broadcasters Convention in Murfreesboro.

Among the various FHH mavens whose names were featured in the trades this past month, one stands out. **R. J. Quianzon**, who routinely reports on the FCC's enforcement activities for the *Memo to Clients*, also happens to be our in-house auctions specialist. So it's no surprise that his recent blog about Auction 88 caught the eye of CommDaily, who quoted him as "Raymond Quianzon". What's in a name? You can call him Raymond, or you can call him Ray, or you can call him R.J., or you can call him . . . whatever — but we're happy to call him the *Media Darling of the Month!*