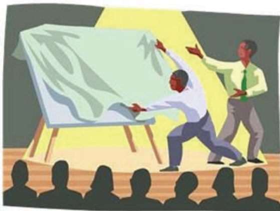
October, 2010

Fletcher, Heald & Hildreth
The Law of Communications

Memorandum to Clients



Just in time for Renewal-Palooza 2011!!

FCC Takes Wraps Off Revised Broadcast Renewal Form

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

With the first batch of the next round of broadcast renewals due by June 1, 2011 – less than eight months from now – the FCC has announced plans to tweak the renewal application form (FCC Form 303-S) in five discrete ways. (In last month's *Memo to Client* we told you all to be on the lookout for such an announcement.) A copy of the form with the proposed revisions is posted on our blog at www.CommLawBlog.com.

The five proposed changes include the following:

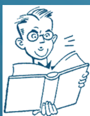
The lifting of the RF exhibit requirement relieves one and all of an irksome chore.

- ✓ The revised form's instructions will include a new definition of "eligible entity" designed to reflect the Commission's "Equity Debt Plus" standard for determining the attributability of certain interests. The version of that standard currently in effect was announced in the Commission's Diversity Order adopted back in 2007. Presumably the language in the new renewal form will track corresponding language in Forms 301, 314, 315 and 345, all of which were revised about 18 months ago to address the same issue from the 2007 Diversity Order. (Why Form 303-S wasn't taken care of at the same time as those other forms is not clear – perhaps the Commission felt no need to revise the renewal form at that point because no renewal applications would be due before 2011.)

- ✓ Section II of Form 303-S will contain a required certification that the licensee's "advertising sales agreements do not discriminate on the basis of race or ethnicity and that all such agreements held by the licensee contain nondiscrimination clauses." (The form's instructions will also be revised to address that certification.) This, too, is a response to the 2007 Diversity Order, which for the first time imposed the explicit obligation that advertising contracts contain nondiscrimination clauses. As we observed back in 2008, the Diversity Order technically became effective in 2008, but the certification requirement reaches back to the beginning of the license term, *i.e.*, considerably ***before*** then. That could create some practical difficulties (although Steve Lovelady's October, 2008 post on www.CommLawBlog.com might provide guidance around those difficulties).

- ✓ Section III of the form will include a new question (Item 4, with accompanying instructions) requiring the licensee to certify that, during the preceding license term, its station was neither silent, nor operating on less than the required minimum schedule, for any period of more than 30 days. If the licensee can't so certify, it will have to provide an exhibit specifying "the exact dates . . . on which the station was silent or operating for less than its prescribed minimum hours." If you don't know what this is about, check out the article on page two of last month's *Memo to Clients*. Note also that the proposed revisions to Form 303-S make clear that, for purposes of this certification, the "transmission of 'test signals' does not count toward a station's minimum operating hours."

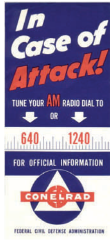
(Continued on page 14)



October, 2010 **No. 10-10**

Inside this issue . . .

CAP Conversion Countdown Commences 2
Focus on FCC Fines 3
Congress: Bringing Digital Eyesight To The Blind? 4
Longley-Rick Dependent Studio Site? 5
Free Press Putting The Squeeze On A Free Press? 6
Danger, Danger, Danger, Will Robinson!!! 7
Tennis Channel Raises Racket Against Comcast... 8
Another Online Service Hoists "Cable" Flag of Convenience..................................... 9
FCC Re-shuffles (Cable)CARDs.................................. 10
Low Power FM Standoff: An Update 11
Qualifying "Qualified Entity" 12
Video Description 101..15
Deadlines 16
BAS Application Coordination Clarification1...............19
Updates On The News..21



EAS Update

CAP Conversion Countdown Commenced

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

That muffled noise you might have heard in the distance at the very end of September was the starting gun in the race to comply with new Emergency Alert System (EAS) standards announced by the Federal Emergency Management Agency (FEMA). With FEMA's September 30 announcement of the applicable Common Alerting Protocol (CAP) standards, all EAS participants now have 180 days to prepare themselves to accept CAP-based EAS alerts.

There's something of a handicap for the racers, though: the FCC still hasn't amended its own rules to provide for CAP-based emergency messaging.

Our colleague Davina Sashkin saw all this coming last Spring, when she reported on an inquiry issued by the Public Safety and Homeland Security Bureau (PSHSB). (Check out her article in the April, 2010 *Memo to Clients*.) The Commission itself had, back in 2007, announced that all EAS participants would have to get on board the CAP train within 180 days of FEMA's announcement of the applicable CAP standards. Aware that FEMA was looking to make that announcement as early as the third quarter of 2010, last March the PSHSB sought comments on how the FCC's EAS rules would have to be modified to accommodate new CAP standards. (According to a quick check at ECFS, a relatively small handful of commenters responded to PSHSB's invite.)

But since then, we have heard nothing from the Commission in the way of a formal proposal for amended rules to address the conversion to a CAP system.

(Still unsure what that CAP thing is? CAP is "an open, interoperable, data interchange format for collecting and distributing all-hazard safety notifications and emergency warnings to multiple information networks, public safety alerting systems, and personal communications devices." It's part of the federal government's deployment of the Integrated Public Alert and Warning System (IPAWS), the goal of which is to allow governmental officials (FEMA, the National Weather Service, State Governors, etc.) to get the word out to the public about emergency situations as efficiently and comprehensively as possible through as many communications devices as possible (think radio, TV, cellphone, text, computer, etc.). The CAP system will also enable alerts specifically formatted for people with disabilities and non-English speakers.)

In any event, the PSHSB initiated its informal proceeding in March because it couldn't start revising its own rules until FEMA set the ball in play by formally adopting CAP technical standards.

Well, the ball is in play, so be on the look-out for some fast action on the Commission's end.

FEMA got the ball rolling with its September 30 announcement of the adoption of a new CAP standard. This gives all EAS participants until March 29, 2011, to become prepared to accept CAP-based EAS alerts. FEMA's September 30 announcement indicates that FEMA has adopted the Organization for the Advancement of Structured Information Standards (OASIS) Common Alerting Protocol (CAP) v1.2 Standard (OASIS CAP Standard v1.2). It also alludes to a CAP to EAS Implementation Guide that might shed some light on things.

As CAP is designed to cross all technical boundaries, everyone from broadcasters to cellular phone operators to MVPD providers should be on the lookout for a fast-tracked (in light of the ticking clock) Notice of Proposed Rule Making (NPRM).

(Continued on page 17)

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 Branson,
Anne Goodwin Crump, Jeffrey J. Gee,
Christine Goepp, Kevin M. Goldberg,
R.J. Quianzon, Lee G. Petro
and Peter Tannenwald

Chief Geographer
Matthew McCormick

Editor Emeritus
Vincent J. Curtis, Jr.

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

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

Copyright © 2010 Fletcher, Heald & Hildreth, P.L.C.
All rights reserved
Copying is permitted for internal distribution.

Focus on FCC Fines

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

Who's in charge here? – A noncommercial FM licensee entered into a buy-sell deal with another party which was looking to acquire the station. The two parties entered into a management agreement somewhere along the way, but (as can often happen) things apparently went too far. Next thing you know, both sides in the deal are having to fork over $5,000 to the government for implementing an arrangement which, in the FCC's view, amounted to a transfer of control of the station – even though the Commission hadn't authorized such a transfer. Readers are reminded that, while the FCC has long tolerated management agreements, time brokerage agreements, local marketing agreements and the like, the Commission still insists that a licensee is and remains the licensee, with all that that entails.

The licensee here was a university which had found a buyer for its FM station on Long Island, New York. Seller and buyer submitted an application for FCC consent to the assignment of the station for $850,000. But the buyer was anxious to begin running the station sooner rather than later, so the parties entered into a management agreement which would allow the buyer to manage the station pending FCC grant of the assignment application. However, someone tipped off the FCC that the buyer might just be exerting too much management over the station.

The FCC investigated the situation, serving inquiries on both the buyer and the seller. Perhaps the parties got nervous about how the case was shaking out; perhaps they were just impatient to get the investigation over and done with so they could move on. Whichever may have been the case, buyer and seller inked a "consent decree" with the Enforcement Bureau, agreeing to adopt a "compliance plan" designed to assure that, for at least the next three years, each party would be a bit more sensitive to Commission policies in this area. In addition, buyer and seller each agreed to pony up $5,000, payable to the U.S. Treasury. (The consent decree refers to this as a "voluntary contribution". You can be the judge of just how voluntary these payments really were.) In turn, the FCC granted the assignment application and the buyer was allowed to legally operate the station.

This incident serves as a reminder to readers that a licensee must always retain control over its station's policies. Notwithstanding any management agreements, LMAs or the like, the licensee invariably bears ultimate responsibility for its station's operations and must retain ultimate authority over personnel, programming and financial decisions. In addition, even though an agreement may be in place, a licensee must be ready and able to step in and take back control of the station in the public interest.

Carefully drafted management, brokerage and marketing agreements are commonplace in the broadcasting industry. However, they are acceptable only if they are followed carefully. Because the above case involved non-commercial licensees and a short time period of control, the FCC set the fine at a relatively low $10,000 (split $5,000 each for the parties).

Your mission, should you choose to accept it – With the next round of broadcast renewals right around the corner, and with the renewal form (*see* related story on page 1) still requiring each applicant to certify whether or not its public file has been properly (and timely) maintained throughout the license term, it's a good time to remind one all about the penalty you face for public file delicts disclosed in the course of the renewal process. That penalty would be about $3,000 per violation . . . no, wait, make that $10,000. . . at least for now . . . check back regularly, because the price seems to be going up.

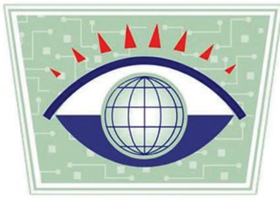
That's the take-home lesson from a recent case in which an Illinois AM station got whacked $10K for a public file violation the licensee copped to in its renewal application. Several years ago, when the Media Bureau started the process of fining folks for such miscues disclosed in renewals, the going rate was about $3,000. The Illinois AMer was thus unpleasantly surprised when it got rung up for $10,000. It challenged the fine, arguing that the fine today shouldn't be appreciably more than the fine imposed on similarly situated licensees in the recent past.

The Bureau, however, was unmoved. It acknowledged that, yes, a number of public file fines had fallen in the $3,000 range, but it then "disavowed" some of those decisions, tried to distinguish others, and ended up pointing to a few cases where the magic number had turned out to be $10,000.

Of course, the Commission has considerable discretion to impose fines. But one would think that that discretion should be exercised in a consistent manner. So if two licensees are guilty of essentially the same infraction, fairness (not to mention due process) suggests that they should both be on the hook for the same penalty. And if, over some extended period, the Commission were to decide that it should ratchet up the fines for certain violations, that's probably OK, too, as long as it does so in a way that explains what it's doing and gives everybody reasonable notice.

But if this case (along with a couple of other recent cases) is representative, the Bureau appears to feel that it's enough for the Bureau simply to declare that earlier

(Continued on page 18)



21CenComVidAccAct comes into focus

Congress: Bringing Digital Eyesight To The Blind?

By Christine E. Goepp
goepp@fhhlaw.com
703-812-0478

Brace yourself for a new set of sweeping changes cutting across all components of the communications universe, broadband and broadcast alike. On October 8, President Obama signed the Twenty-First Century Communications and Video Accessibility Act of 2010 (21CenComVidAccAct) into law. The new law dramatically expands disability access law to include accessibility requirements for a wide range of equipment and services, such as VoIP phones, browser-enabled smartphones, email and text messaging services, webcasts of TV programs, video and navigation devices, and others.

While the debate over the FCC's authority to generally regulate broadband rages on, in this area at least the discussion is over. As one FCC official noted during a panel discussion on broadband adoption, the 21CenComVidAcAct "ventures into broadband access like no legislation ever has" by giving the FCC an "enormous mandate" to ensure that various communications are accessible to people with disabilities.

The implications of the Act may go beyond communications-for-the-disabled policy.

And the implications of the Act may go beyond communications-for-the-disabled policy.

The Act provides a mandate separate and apart – *and in addition to* – the Commission's general regulatory authority over telecommunications common carriers, broadcasters, and cable services. As a result, the FCC will now be able to regulate many different types of entities and activities, but *only to the extent* that they entail communications for the disabled. Could this trailblazing measure open the door for other types of regulation not necessarily tied to disability? That remains to be seen, but the potential cannot be denied.

Don't look for any changes to happen right away, though – even the changes specifically addressed in the Act. The statute lays out a number of timelines for the Commission, all of which expect the FCC to get started right away, but most of which do not contemplate final action for at least a year (and in many cases, several years).

Virtually every segment of the broadcasting and telecommunications industries that has anything to do with broadband or video programming will be affected. Key provisions include:

- The Commission is required to reinstate its video description regulations (which were struck down by the D.C. Circuit in 2002 – *see* companion piece on page 15). Video description is a service that provides a voice-over description of the visual components of a video program ("as Bambi stands alone in the forest, a light snow starts to fall."). The Commission's initial video description rules, adopted in 2000 and tossed by the Court in 2002, were ginned up by the FCC without Congressional authorization. The lack of such authorization was fatal, according to the Court. That should not be a problem this time around, as the 21CenComVidAccAct expressly provides the FCC all the authority it should need.

- Manufacturers and service providers of "advanced communications services and equipment" – that is, interconnected *and* non-interconnected VoIP, electronic messaging services (e-mail, text messaging), and video conferencing – must ensure that their equipment or service is accessible to individuals with disabilities.

  - Internet browsers provided by a manufacturer or provider of mobile phones must be usable by the blind or visually impaired, including the ability to launch the browser.

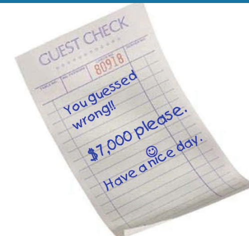
- TV programs that are re-broadcast over the Internet must retain closed captioning. This provision may be more feasible now that software is becoming available to automatically convert existing closed-captioning for webcast versions of television shows. Internet-only TV shows and user-generated content are *not* required to have closed captioning. As an aside, however, it is getting easier for users to voluntarily provide closed captioning. Google has just introduced a YouTube feature that will enable content creators to add voice-recognition closed-captioning (we note that viewers can also use this feature to translate captions into various languages – extending its usefulness well beyond the disabled community). Google closed-captioning and translation functions are fresh out of beta and amusingly glitchy, but are a glimpse of things to come.

- Hearing aid compatibility requirements are extended to anything that remotely resembles a telephone – that is, equipment "designed to provide 2-way voice communication via a built-in speaker intended to be held to the ear in a manner functionally equivalent to a telephone". (It will be interesting to see how the Commission squares this provision with its own proposed method of extending HAC to VoIP: *i.e.* defining a "telephone" as "anything that is commonly understood to be a telephone".)

- The Commission must require video programmers and

(Continued on page 14)

Longley-Rice Dependent Studio Site? No Prior Authorization? $7K, Please!



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

The Media Bureau's Audio Division has shone a light on a question relating to the placement of a broadcaster's main studio. The question: what is the proper procedure for relying on Longley-Rice calculations to assure compliance with the main studio location rule?

SPOILER ALERT: For those of you who prefer to cut to the chase, here's the answer. According to the Audio Division's latest pronouncement, broadcasters MAY rely on Longley-Rice to confirm that a site is within the appropriate contour for main studios, ***BUT*** FCC review and approval of the underlying calculations ***MUST*** be sought ***BEFORE*** the main studio is relocated to that site. Oh, and by the way, if you happen already to have jumped the gun and moved your main studio to a Longley-Rice-justified site without first having received the Commission's blessing, get your checkbook out: if this decision stands, you're probably looking at a $7K fine if and when the Commission finds out about your premature relocation.

The story starts back in 2002.

In October of that year, Station WULF(FM) relocated its main studio. According to the licensee, before the relo the licensee commissioned a Longley-Rice study that established that the new site was within the station's city-grade contour. The main studio rule then required (as it still does) that the studio be located, among other possibilities, at "any location within the principal community contour of any AM, FM, or TV broadcast station licensed to the station's community of license". And since 1997 the Commission has permitted the use of Longley-Rice to confirm the suitability of main studio sites. So the licensee was confident that that condition was met, and the only thing left to do was to notify the FCC of the move – which the licensee did.

The next year a complainant alleges that the studio location didn't comply with the rules. The Enforcement Bureau (EB) asks the licensee for a response and the licensee explains that, according to Longley-Rice, the studio site complies. The EB asks for further demonstration, and in early 2004 the licensee provides a detailed Longley-Rice showing. In August, 2004, the EB closes the books on its investigation without issuing any fines. However, the EB cryptically cautions the licensee that the closing of the investigation should not be "construe[d] . . . as a determination that a violation did not occur."

When the licensee sent the EB its detailed Longley-Rice analysis, the licensee also sent a copy to the Media Bureau (MB), along with a request that the MB confirm that the challenged studio site complied with the rules. (Alternatively, the licensee also asked for a waiver of the main studio rule, if necessary.)

The MB then sat on that request for nearly seven years, only to address it now.

The MB's resolution? The good news for the licensee is that, sure enough, its main studio ***is*** within the station's city-grade, as established by the Longley-Rice showing. The bad news? Since the licensee was (according to the MB) supposed to ask the MB for approval of the main studio site ***before*** moving to that site, and since the licensee didn't do that, the licensee violated that element of the main studio rule and is therefore getting whacked $7K for the violation.

The MB's position is not – how can we say this delicately? – unassailable.

The MB's position is not – how can we say this delicately? – unassailable. After all, the main studio rule clearly provides that a main studio may be located within a station's principal community contour, and the MB has now conclusively held that the WULF studio is indeed within that contour. The rule says nothing about having to get prior approval if you're relying on a Longley-Rice analysis.

The MB counters, though, that back in 1997, the Commission said that anyone relying on a Longley-Rice analysis for studio siting purposes would have to ask for permission to do so *before* actually moving to the new site. We've included a link to that 1997 decision on our blog (www.CommLawBlog.com) – the discussion you're looking for is at Paragraphs 69-74 (and particularly footnote 54). Maybe you can find exactly where the Commission made it "clear" (to quote the MB's charitable characterization) that prior consent was absolutely mandatory. Be sure to let us know if you do, because even with the MB's explanation in hand, it doesn't really leap off the page at you.

The EB seems to know what we're talking about. In a 2002 case eerily similar to the WULF situation, a complainant alleged that the main studio of WGRQ(FM) was outside the station's principal city contour, in violation of the rules. The WGRQ licensee countered with a Longley-Rice showing. In response, the EB held that the "Commission has approved the use of supplemental showings (including the Longley-Rice analysis) to show compliance with main studio requirements in situations involving irregular terrain." The EB then dutifully reviewed the Longley-Rice showing and concluded that, indeed, the studio's site was in compliance with the rules. End of case.

(Continued on page 18)

Renewed noise about VNRs

Free Press Putting The Squeeze On A Free Press?

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

What's in a name? Well, if your name is "Free Press", apparently not all that much. The organization describes itself as a "national, non-partisan, non-profit organization working to reform the media". How? "Through education, organizing and advocacy, [it] promote[s] diverse and independent media ownership, strong public media, quality journalism and universal access to communications."

All laudable goals, and all consistent with traditional notions of a "free press". But on the other hand, how about encouraging government intrusion into the editorial process? That would be the antithesis of "free press". But that's what Free Press seems to be advocating – to a degree – as it ramps up efforts (again) to have the FCC crack down on the alleged uncredited use of "video news releases" (VNRs).

The FCC's enforcement efforts (egged on by Free Press) have a significant chilling effect on television broadcasters.

We wrote about FCC inquiries into the use of VNRs back in the April, 2006, October, 2006, and October, 2007 *Memos to Clients*. The April, 2006 piece focused on a study commissioned by Free Press and the Center for Media Democracy that supposedly demonstrated a high rate of unattributed use of VNRs by broadcasters around the country. According to the study, "fake news" – that's the term Free Press likes to use for VNR-based news – abounded. Free Press claims that it has documented more than 100 instances of undisclosed "fake news".

By October, 2006, the FCC had reacted by issuing letters of inquiry to broadcasters asking them to disclose a considerable amount of information regarding the sources of their content and their editorial decisions. The FCC's inquiry was designed to root out violations of the "sponsorship identification" rules. (Importantly, Free Press would have the FCC go beyond mere enforcement of its existing sponsorship ID rules; Free Press had advocated, and continues to advocate, for more aggressive rules designed to highlight the "paid propaganda" which it perceives pretty much everywhere.)

Free Press remains concerned, largely because the FCC has acted on only two of the 100+ instances identified by Free Press and the Center for Media Democracy after the issuance of its report. Since the *L.A. Times* reported on the issue on September 15, Free Press has blogged on the issue not once, but twice, on September 28 and again on October 20 (check it out at http://www.savethenews.org/blog/10/09/28/fake-news-invasion). They've even drafted an online petition that supporters can send to the FCC seeking more enforcement in this area.

Both the *L.A. Times* and Free Press offer some good examples of how certain uses of VNRs *might* violate the sponsorship identification rules – mainly where a paid segment airs in its entirety with no editing, no introduction or summation and no sponsorship identification.

But our concerns follow those raised by the Radio Television Digital News Association back in 2006 (when they were known as the Radio Television News Directors Association). There are plenty of valid uses of VNRs. Cash-strapped broadcasters are increasingly using VNR content as background footage (often referred to as "B-roll") to provide some video relevant to a legitimate news story. Yes, this video may have been shot, and provided to the station, by a party whose interests are not entirely objective, but generally the station has plenty of opportunity to edit the raw footage to fit the news story. Despite its source, it's just another camera shooting boring background video, and potentially saving a television station a lot of money. There's no impact on the story and no influencing of the viewers.

However, as the RTDNA noted in its 2006 filing and an earlier set of comments filed with the Commission in 2005, the FCC's enforcement efforts (egged on by Free Press) have a significant chilling effect on television broadcasters. We summarized RTDNA's main argument in our October 2006 *Memo to Clients* article:

> Concern about second-guessing by the government may cause broadcast journalists to avoid valuable newscast elements as those journalists look nervously over their shoulders, worried more about staying in the good graces of government regulators than choosing the best material.
>
> If a problem does exist, any solution lies not in the hands of government, but in the hands of journalists, RTDNA noted. RTDNA, for instance, has a code of conduct that many newsrooms use as a

(Continued on page 17)

G.I. Joe, My Little Pony, Skechers – a new axis of evil?

Update from Planet Kidvid

Danger, Danger, Danger, Will Robinson!!!

Program-length commercial cops back on the prowl

By Anne Goodwin Crump
crump@fhhlaw.com
703-812-0426

Our children are in more danger than ever from over-commercialization, if you believe the Campaign for a Commercial Free Childhood (CCFC). CCFC has raised a howl of protests against plans for (a) a new TV show and (b) a new cable network. Of course, the real danger is likely to be to the wallets of parents unable to say no to the pleas of their children.

The show in question, which was set to premiere on Nicktoons in October, goes by the title of "Zevo-3". It features animated cartoon characters developed by the shoe manufacturer Skechers USA in connection with specific lines of shoes. According to CCFC, retailers have reported that the characters are so closely associated with particular shoe models that children often ask for the shoes by character name rather than model name. Therefore, CCFC argues, the adventures of the show's superheroes - Kewl Breeze, Elastika, and Z-Strap - as they fight the evil Dr. Stankfoot are really promotions of the shoes they represent and thus violate the FCC's commercial limits of 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays.

Children seem to have survived the extensive merchandising associated with the "Howdy Doody" show.

As CCFC sees it, if Zevo-3 is allowed to stand, soon we will be inundated with shows that feature advertising icons like Ronald McDonald or Tony the Tiger. For its part, Nicktoons has stated that it believes that the show complies with the Commission's rules, and (at least according to the show's co-executive producer) there are no overt promotions for Skechers in the show.

The network that has CCFC's knickers all wadded up is the Hub. Co-owned by Discovery Communications, Inc. and Hasbro, Inc., the Hub replaced the "Discovery Kids" channel in October. It includes a number of programs which feature central elements from Hasbro toy lines. Think, for example, of shows based on G.I. Joe, My Little Pony, and Pound Puppies. Or how about a series featuring contestants playing giant-sized versions of Hasbro games such as Twister and Yahtzee.

Even before the Hub officially cranked up, CCFC was expressing outrage at the notion that a toy company would own a cable channel in order to promote its toys (even though CCFC's director, Susan Linn, acknowledged that she hadn't yet seen any of the shows to be aired on Hub). Of course, the Hub's schedule is not limited to Hasbro-related shows: it also includes previous network hits, such as "Happy Days," "Family Ties," and "Doogie Howser" during prime time, not to mention "Meerkat Manor" (formerly aired on Animal Planet).

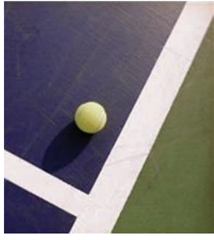
Still, all of the fuss kicked up has made the FCC take notice. CCFC has filed a petition for declaratory ruling asking that "Zevo-3" be declared a program-length commercial in violation of the Children's Television Act of 1990 and the Commission's rules. The FCC had enough qualms about the issues raised that it sought comments on the petition. Comments were due to be filed by October 22, and reply comments by November 8.

The primary reason for the angst appears to be that the shows are derived from the toy or advertising character rather than vice versa. As a practical matter, it's not quite clear why this should make a difference. Whether children want a toy because it depicts a character on a favorite show, or whether they watch a show because they have or desperately want the toy that comes to life on the show, the result is the same – children plead with their parents for toys related to a TV show. This tie-in between TV shows and toys has been around pretty much as long as there have been children's television shows. And, judging from a quick and unscientific check of colleagues and acquaintances, I observe that children seem to have survived the extensive merchandising associated with the "Howdy Doody" show, or the vast universe of Disney-related programs.

Nor is it clear why toys and other merchandise promoted by noncommercial shows – such as Sesame Street, Barney, Teletubbies, and Thomas & Friends – might be deemed acceptable, while products promoted by shows with commercials are not. Just think of the staggering numbers of "Tickle Me Elmo" figures, Barney pajamas, and Teletubbies lunchboxes that have been sold to hapless parents whose children have begged for them. This author shudders to think of the hundreds – maybe thousands – of dollars worth of Thomas the Tank Engine toys that currently reside in her basement.

Further, no one has mentioned the possible benefits to children of having a show based on a long-availabe toy such as G.I. Joe (first marketed in 1964) or the somewhat more recent My Little Pony (circa 1983). Perhaps a child can watch the show, then take his or her toy away from the TV to engage in some imaginative play to re-enact or embellish the story line he or she just saw. Isn't imaginative play away from the TV supposed to be a good thing?

In any event, we will keep an eye on how these issues play out and will let you know the outcome. For the Hub network, though, the biggest problem may be breaking into the already crowded field of children's programming.



Mediation anyone?

Tennis Channel Raises Racket Against Comcast

By Lee G. Petro
petro@fhhlaw.com
703-812-0453

It's ad in, with the Tennis Channel serving against Comcast at the FCC. The Media Bureau has designated for hearing the Tennis Channel's program carriage complaint against the cable giant (and would-be NBC merger partner). While that doesn't necessarily mean that the Tennis Channel will ultimately prevail in the match, it's a good step in that direction. But there's still plenty of in-court – or, as it turns out, off-the-court – action on tap before the final call will be made.

The Tennis Channel put the ball in play by serving up a complaint against Comcast. According to the Tennis Channel, Comcast has insisted on carrying it on Comcast's Premium Sports Tier, even though Comcast carries several of Comcast's affiliated cable channels – channels that happen to compete with the Tennis Channel – on more broadly distributed tiers. From the Channel's perspective, this is a bad call: broader distribution means access to larger audiences and more potential revenues.

The Bureau saw enough to decide that the matter warranted further review.

While Comcast struggled in the early rounds to counter the Tennis Channel's volleys, the Bureau concluded that the complaint established a "*prima facie*" showing that Comcast had unreasonably discriminated against the Tennis Channel.

(A "*prima facie*" case here means that the allegations made by the Tennis Channel, if ultimately proved to be true, would be sufficient to support a conclusion of unreasonable discrimination. In other words, nothing has been proven yet, but the Bureau has decided that some investigation is warranted.)

The Communications Act (47 U.S.C. §536(a)(3), to be exact) prohibits multichannel video program distributors (MVPDs), like Comcast, from discriminating against "unaffiliated" programmers in a way which makes it hard for those unaffiliated programmers to compete fairly against programmers that happen to be "affiliated" with the MVPDs. The concern, obviously, is that an MVPD affiliated with a programmer is likely to favor that affiliated guy over any unaffiliated competitors, giving rise to possible unfair competition.

The Tennis Channel, which started in 2003, has been carried on Comcast systems since 2005. Comcast, which provides cable service in seven of the ten DMAs (and 24 of the top 30 television markets) has ownership stakes in several regional sport networks, as well as the Golf Channel, the MLB Network, the NHL Network, and NBA TV. Comcast carries all of those affiliated sport networks on its Expanded Basic or Digital Starter tier – *i.e.*, the tiers likely to enjoy the most subscribers. The program carriage agreement between Comcast and the Tennis Channel didn't specify on what tier the Tennis Channel would be placed; that was left to Comcast's discretion. As noted, Comcast has exercised that discretion in favor of putting the Tennis Channel on a premium tier. The Channel has been trying since at least 2009 to get moved to a different tier, without success.

In reviewing program carriage complaints of this sort, the Commission looks to the treatment of the complainant programmer as compared to similarly-situated cable-affiliated programmers, *e.g.*, the NHL Network. If such similarly-situated programmers are being treated differently than the complainant, then the Commission considers whether the dissimilar treatment has unreasonably restrained the complainant from competing fairly.

In this case the Bureau determined that Comcast's affiliated sports channels were being placed on a tier with higher viewership than the Tennis Channel. The Bureau also found that: (a) the disparity in tiers could be affecting the Tennis Channel's ability to compete for national advertising; and (b) the Channel's subscription fee revenue was lower than Comcast's affiliates due to the lower viewership of the premium sports tier. The Bureau also focused on the fact that the channel placement decision was made unilaterally by Comcast, and had not been the result of negotiation with the Tennis Channel.

That was enough for the Bureau to decide that the matter warranted further review. It gave the parties a choice. They could either thrash things out in a trial-type hearing before an administrative law judge, or they could try to resolve their differences through the FCC's Alternative Dispute Resolution (ADR) processes. (Again, the Bureau's action here does *not* mean that Comcast is definitely guilty as charged; rather, it simply means that there's enough smoke to warrant checking to see if there's any fire.)

(Continued on page 20)

FilmOn joins ivi TV

Another Online Service Hoists "Cable" Flag Of Convenience

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

Online service = cable company? The concept has yet another proponent – FilmOn.com, Inc. (FilmOn). Launching an online service featuring over-the-air content (in late September, just in time for the start of the new TV season), FilmOn has joined ivi TV in the fray over the alleged right of the upstart online companies to webcast broadcast programming to subscribers. And already FilmOn is on the wrong end of a lawsuit brought by folks looking to nip that claim in the bud.

The result could accelerate a final and authoritative disposition of the issue, one way or the other.

When I wrote about the ivi case in last month's *Memo to Clients*, I tried to be clear that ivi's approach to copyright could radically alter the broadcast carriage landscape. It's not that ivi's approach is a sure-fire winner – far from it. But in its request for a declaratory order (filed in a Federal court in Washington State), ivi has squarely posed an important question: is an online video delivery system the legal equivalent of a cable company for purposes of retransmission rights under the Copyright Act?

There are potential endgames aplenty here. Expect to see them played out in the near term.

Earlier this month, broadcast networks (*i.e.*, ABC, CBS, Fox, NBC) and other content providers opened their own offensive: they sued FilmOn for copyright infringement in Federal court in New York. (The networks have sued ivi in New York as well.) Their claim is essentially the polar opposite of ivi's: according to the broadcasters, online streaming of over-the-air television programming without the specific consent of the copyright holders constitutes infringement.

The legal issues may be the same as in ivi's Washington case, but the roles have changed. In the FilmOn litigation, the broadcasters are the ones who are affirmatively seeking the court's blessing of their position – as well as an injunction preventing FilmOn from continuing its service and an award of damages and attorneys' fees.

There may be some differences between the services ivi offers and those that FilmOn offers, but those differences are essentially trivial. Basically, we've got two companies each charging a subscriber base for access to copyrighted broadcast network programs being streamed over the Internet. Though they may ultimately advance different legal arguments in support of their respective claims, each company's business model will ultimately depend on their obtaining some governmental imprimatur – from the courts, or the Copyright Office, or Congress – that online distribution is the functional equivalent of a cable system.

If either ivi, or FilmOn, or both succeed in getting such an imprimatur, the result will have far-reaching repercussions for the redistribution of broadcast programming.

And even if both ivi and FilmOn end up striking out, that's ***not*** likely to put an end to the argument. More and more television is being consumed online. As a result, even if ivi and FilmOn both bite the dust, I won't be surprised to see other pop-up entrepreneurs – or even cable companies themselves – adopt similar online delivery methods under the general "cable system" rubric. And if either ivi or FilmOn eventually prevails with its position, it's an odds-on mortal lock that other companies will be jumping on the bandwagon.

In other words, the bell announcing the ivi/FilmOn approach has been rung, and it's impossible to un-ring it. The argument that online distribution is the equivalent of a cable system for copyright purposes is not likely to go away unless and until it is finally resolved in some manner. Such resolution could possibly be achieved, or at least jump-started, by negotiation among the various interest-holders – programmers, broadcasters, would-be online services, etc. Such private resolution would, however, require major league moves by all parties away from their currently dug-in positions. It might happen – particularly if the general video audience continues to embrace Internet delivery of programming – but for now all sides have staked out their positions in their respective court cases, and they'll probably be inclined to let those ride for a while.

There is one intriguing aspect of the ivi and FilmOn lawsuits, though, which could move things along some. Recall that the ivi-initiated suit for declaratory relief was filed in Washington State – in the Ninth Circuit – while the broadcasters' suits again ivi and FilmOn were filed in New York, *i.e.*, the Second Circuit. If both cases wend their way through the trial and appellate processes in the ordinary course, we are looking at the likelihood of two separate Circuit Court decisions on essentially the same issue.

Imagine, just for a moment, that one of those circuit courts rules for the broadcasters while the other circuit says that the online service *does* qualify as a cable system under Section 111 of the Copyright Act, just like ivi and FilmOn claim. With that you would have the classic "circuit split" situation that often justifies Supreme Court

(Continued on page 20)

Shut up and deal

FCC Re-shuffles (Cable)CARDs

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

Would you like a cable box that (a) you don't have to pay the cable company to rent, (b) you install yourself, (c) puts the Internet on your TV and (d) has a ton of new and innovative features? Well, the FCC wants you to have one, and they've just issued new rules to try to get it for you. Of course, those new rules are actually updates on the rules that were supposed to get you that box over a decade ago. Still, hope and regulations spring eternal here in Washington.

The push to bring competition to the cable set top box universe began with the Telecommunications Act of 1996. Congress instructed the FCC to make rules that would encourage the development of third party equipment that consumers could use to access video programming and other services offered by cable companies and other multichannel video programming distributors (MVPDs). The hope was that consumers would be able to buy fully functional equipment that the consumers could move between different service providers. This, in turn, would not only make it easier for consumers to switch providers (encouraging competition, lower prices and better services from providers), but also produce new and innovative set top boxes.

After several false starts, CableCARDs became available.

Then no one bought them.

Most set top boxes, however, don't just enable navigation of MVPD services. They also restrict access to those services – unscrambling and decrypting only those services for which the subscriber has paid. Thus, to protect the security of MVPD systems while still allowing third party navigation devices, the FCC and the affected industries adopted the "CableCARD" system. The CableCARD system separated the security functions of the set top box from the navigation functions. The security functions were segregated into a credit card sized element to be provided by the MVPD that could be plugged into various set top boxes, including third party boxes.

The idea was that consumers could go out and buy any box they wanted and then rent the CableCARD from whatever MVPD they happened to choose. If the consumer moved or switched providers, they could use the same box and just switch out the CableCARD. After several false starts, CableCARDs became available and several hundred different devices were certified for use with CableCARDs.

Then no one bought them. (Well, almost no one. The FCC estimates that just one percent of all navigation devices are purchased at retail.)

There were many reasons for this lack of success. Regulatory delays, pricing issues, difficulties in ordering and installing the CableCARDs, and the limited number of "two way" and interactive services (*e.g.*, video on demand) available through third party boxes have all been suggested. The FCC identified several of these issues in the National Broadband Plan and moved to address some of them in its recent order.

Some of the new rules are highly technical and will chiefly impact cable operators and equipment suppliers – things like streamlined certification processes to approve more devices for use with the CableCARD system.

Other rules will have a more apparent effect on subscribers using third party devices. For example:

- Cable operators are now required to support the reception of switched digital video (SDV) services on third party devices. SDV systems are used by MVPDs to deliver scheduled programming in a more bandwidth-efficient manner. In an SDV system, the cable box requests specific channels from the cable system, which provides those channels only as they are requested (as opposed to the usual system of sending the signals of all the channels down to the subscriber's home and using the box to select between those channels). Most third party boxes, however, lack the two-way communication needed to request channels. The new rules require SDV support for such boxes without mandating the exact technology used to provide such support. The rules also impose new technical standards intended to encourage increased connection to home networks.
- Cable operators must now provide "multi-stream" CableCARDs by default unless a subscriber specifically requests a "single stream" CableCARD. This should help ensure that third party devices are capable of decrypting multiple channels at once, allowing the subscriber to view one channel while

(Continued on page 20)

LoPo's vs. The Translators – the battle continues

Low Power FM Standoff: An Update

Lots of proposals, not a lot of action

By Lee G. Petro
petro@fhhlaw.com
703-812-0453

Report from the front in the continuing struggles between long-pending FM translator applications, on the one hand, and would-be LPFM applicants, on the other: no change recently, check back later, maybe next year.

That, unfortunately, has been the report from the front for years now, despite efforts by various parties to devise some way to break the stalemate.

Schlerosis started setting in on this long-running situation shortly after the FM translator window in 2003, more than seven years ago. You may recall that some 13,000 applications were filed in that window, reportedly far beyond the Media Bureau's expectations. The Bureau rolled up its sleeves and managed to process almost half of those out the door by the end of 2007, but that still left more than 7,000 translator applications. (Relevant factoid: two applicants reportedly account for more than 4,000 of those still-pending applications.)

7,000 (or so) translator applications are still sitting there, threatening to spontaneously combust like a compost heap

Over and above the annoyance of having 7,000-odd applications sitting in a backlog gathering dust, the Bureau's inability to dispose of those applications has caused problems on the LPFM side of the universe. Since LPFM stations use the same channels as FM translators, the Commission is reluctant to open an LPFM application window with all those translator apps still pending. Theoretically, at least, the translators enjoy some cut-off rights which would preclude later-filed mutually exclusive LoPo applications.

But the conventional wisdom says that the current Commission might prefer to get lots more LPFMs on the air to promote localism and diversity. What's the Commission to do?

As you may recall, in December, 2007, the FCC floated a possible approach that amounted to a decimation variation: applicants with more than ten applications still pending would have to select the ten applications that they wished to continue to prosecute. The rest would be dismissed.

Tough love, for sure, but if two applicants really did account for 4,000 of the still-pending applications, that approach would presumably have trimmed the backlog by more than half. Possibly that would clear the path for a new LPFM filing window.

But several parties sought reconsideration of the Commission's application cap order, and by early April, 2008, the Commission suspended the cap order while it pondered the petitions for reconsideration.

Fast forward two years – well, not really "fast", but you know what we mean – and the Commission has still yet to resolve the impasse. Result: 7,000 (or so) translator applications are still sitting there, threatening to spontaneously combust like a compost heap, while wannabe LPFM applicants and their supporters mill around in frustration. So, in June 2010, representatives from each contingent – Educational Media Foundation on the translator side, Prometheus Radio Project on the LPFM – submitted a proposal to resolve the conflict.

They suggested that the FCC simply hold all pending FM Translator applications in abeyance while opening an LPFM filing window. Those LPFM applications that conflicted with pending FM Translator applications would be given priority, and the FM Translator applications would be dismissed. In the event that no LPFM application filed during the window conflicted with a pending FM Translator application, the Commission would utilize its existing selection process and permit mutually-exclusive FM Translator applicants to reach settlements.

While not perfect, this approach at least would have served to get some applications moving.

Not everybody was on board with the plan, however. National Public Radio, in particular, argued that eliminating the ten-application cap, as proposed by EMF/Prometheus, would harm translator applicants who had filed ten or fewer applications. (The harm would occur because their applications would be subject to (a) possible preclusion by LPFM applications and (b) further delay.) NPR also argued that the Commission would have to jump through a number of formal procedural hoops before it could even think about implementing the EMF/Prometheus brainchild.

EMF and Prometheus scratched their collective heads and came up with Plan B: the Commission would provide a limited opportunity for parties with fewer than ten translator applications to pick one of their applications and submit a technical amendment to make it grantable – after which the Commission would open the LPFM window. (Plan B included some other bells and whistles involving, *e.g.*, some limits on the transferability of translator permits or licenses, and suggestions about future window processes to prioritize translator and LoPo applica-

(Continued on page 22)

Diversity re-envisioned

Qualifying "Qualified Entity"

By Anne Goodwin Crump
crump@fhhlaw.com
703-812-0426

Look for diversity to start raining down from the skies. The FCC has finally filled in the details for implementation of the Sirius/XM set-asides which were initially approved, in non-detailed terms, more than two years ago. Those new rules are set to be implemented by April 17, 2011.

But the diversity we'll be seeing may be different from the diversity that some folks might have expected.

Back in 2008, the FCC decided to let XM and Sirius merge. In response to objections that maybe, just maybe, reducing the number of satellite radio services from two to one might reduce competition and diversity, XM and Sirius took a bold step: they made a number of "voluntary" commitments aimed at defusing those objections. (We put "voluntary" in quotes here because the Commission's 2008 order granting the merger made clear that, without those commitments, the merger would not have been approved.) One of those commitments involved setting aside 4% of the capacity on each of the Sirius and XM platforms for long-term leases for noncommercial educational (NCE) programming and programming by one or more "Qualified Entities".

The diversity we'll be seeing may be different from the diversity that some folks might have expected.

The term "Qualified Entity" was defined by Sirius/XM as "any entity that is majority-owned by persons who are African American, not of Hispanic origin; Asian or Pacific Islanders; American Indians or Alaskan Natives; or Hispanics."

The Commission approved the merger with those commitments attached; it also set a deadline for implementation of the commitments, but told the parties it would get back to them relative to just how that condition would be implemented. That was in July, 2008. Since then, the FCC has repeatedly, on its own motion, extended the implementation deadline while struggling to work out details – thereby illustrating the truth of the old saying that "the devil is in the details."

One of the thornier details confronting the Commission: the definition of "Qualified Entities".

The definition which Sirius and XM came up with (quoted above) was explicitly race-based. Not surprisingly, the constitutionality of such a provision was questioned by some and defended by others. The defenders argued that the racial/ethnic identity of programmers would promote diversity. Challengers, on the other hand, argued that such governmental race/ethnicity-based decisionmaking is very likely unconstitutional under the Fifth Amendment's equal protection clause.

The Commission decided that it would rather switch than fight. Preferring to avoid prolonged litigation on the constitutionality of the definition of "Qualified Entity", the FCC has opted instead for race-neutral criteria. Gone are references to race or ethnicity. Now, a Qualified Entity is one that does not share ownership, officers, directors, or employees with Sirius/XM and which has not had a relationship for the delivery of programming to Sirius/XM within the past two years. While certain constituencies are sure to be unhappy about this decision, as a practical matter it has eliminated further years of potential litigation-induced delay.

(An interesting aspect of the newly-announced definition: broadcast licensees are now eligible for some of the set-aside channel capacity.)

Having expanded the universe of potential channel lessees considerably, the Commission also decided to let Sirius/XM pick and choose from among the Qualified Entities to decide who the lucky ones will be. As long as Sirius/XM sticks to certain established guidelines, it gets to make the call. The Commission figures that Sirius/XM will be better able to determine whether any potential lessee might create technical issues and otherwise have the wherewithal, financial and otherwise, to follow through on its proposal. (By deferring to Sirius/XM, the FCC manages to dodge yet another potentially sticky Constitutional issue – this time involving the First Amendment.)

Among the criteria which the FCC expects Sirius/XM to use are whether:

- the lessee would provide a new source of programming or be a new entrant;
- the lessee's programming would serve historically underserved groups;
- the lessee would provide a diverse viewpoint; and,
- the lessee would, in Sirius/XM's reasonable judgment, be able to meet its obligations and delivery programming throughout the entire lease term.

Leases available for the set-aside capacity will run for at least five years. And get this – Sirius/XM can't charge lease payments for any of these set-aside channels

(Continued on page 17)

FHH Tops In Media Deals

Fletcher, Heald & Hildreth
The Law of Communications

According to SNL Kagan, recognized as one of the preeminent sources of financial analysis in the media business, Fletcher, Heald and Hildreth represented parties in 104 media deals in the first three quarters of 2010 – ***more than any other law firm.*** You've probably already read this elsewhere – like at RadioInk.com, or maybe InsideRadio.com, or Radio-Online.com, or AllAccess.com, or plenty of other places – but just in case you haven't, check it out for yourself:

SNL KAGAN: 237 MEDIA DEALS IN Q3

October 14, 2010: SNL Kagan reports that its media sector saw 237 deals announced during the third quarter, with an aggregate value of $746.2 million.

For the year so far, Bank of America is the top financial adviser on media deals. The company worked on four deals during the first three quarters, with a combined value of $860 million. CMS Station Brokerage is the year's top financial adviser by number of transactions, as it advised on 13 deals.

Among legal advisers, Fletcher Heald & Hildreth is the leader in numbers, providing advice on 104 deals in the first three quarters of 2010. Simpson Thacher & Bartlett led in transaction value, advising on four deals that added up to $736.1 million.

We're pleased that, even in these difficult economic times, our clients have continued to thrive. And we're proud that they have called on us to provide guidance and counsel in structuring their deals and navigating them through the regulatory process.

We congratulate our clients for their successes, we thank them for the confidence they have placed in us, and we look forward to providing the same quality representation to clients, old and new, that we have been providing for nearly 75 years.

FHH - On the Job, On the Go

On November 5, **Frank Montero** will give the keynote speech at a conference on "Enhancing Emergency Communication Strategies" at Texas State University in San Marcos. The conference is being hosted by the Center for the Study of Latino Media & Markets at the School of Journalism and Communication. **Frank** will be speaking on "Multilingual Emergency Alert Announcements: Advancements and Pending Challenges".

On November 9, **Paul Feldman** will be a keynote speaker on the future of the communications industry at TM Forum's Management World Americas 2010 conference in Orlando.

Meanwhile, on November 19, **Frank Jazzo** will attend the Rockefeller College Advisory Board meeting in Washington.

Frank J, **Frank M**, **Lee Petro**, **Kevin Goldberg**, **Mitchell Lazarus** all copped ink this past month, while **Christine Goepp**, **Denise Branson** and **Kevin** (yes, *that* Kevin again) saw their names splashed up on the Internet. Small potatoes, though, compared with the major league shout-out to **Davina Sashkin** by FCBA President Bryan Tramont, who effusively acknowledged (in his monthly column in the FCBA newsletter) **Davina**'s prodigious charitable activities. (Bottom line: **Davina** scored the FCBA's "Pay It Forward" spotlight for October.)

But even **Davina** comes up short this month in the quest for Media Darling status. That's because, if you happened to be in the DC area on October 15 and switched on the local news on Fox 5, you probably saw **Jeff** ("*I think my left profile photographs best*") **Gee**, serving in the role of political broadcasting guru and savant (although the station chose the more modest title "Media Attorney" to flash on the screen) in a piece about political broadcasting. Missed it? No problem — we've posted a link to it on our blog at www.CommLawBlog.com. Jeff was the obvious choice here. He regularly creates and conducts training programs for broadcasters — and just a couple of months ago he presented a webinar on the political rules. Hey, Jeff, ready for your close-up? You'd better be — you're our *Media Darling of the Month!!!*

(Continued from page 1)

✓The proposed revision of the form would eliminate the longstanding requirement that full power AM and FM licensees submit an exhibit to demonstrate compliance with RF limits. Historically, such an exhibit has been required if the renewal applicant wasn't eligible to use the RF worksheets in the old Form 303-S. Under the revised form, all applicants would still have to certify that their facilities comply with the Commission's maximum permissible RF limits – but no additional exhibit would be expected from full power AM and FM folks.

✓Finally, Section V (Item 4) of the form would be changed to clarify that LPTV stations still need to file Form 396 with their renewal application, even though they might not have to file an EEO-related public file report and post that report to their website. Previously, the form required a certification that the licensee had created the public file report and posted it to the station's website "as" required by the rules. The new form would substitute the word "if" for the word "as" because not all LPTV licensees are subject to the public file report requirement.

The good news in all this is clearly the lifting of the RF exhibit requirement from the shoulders of full power AM and FM stations. This should relieve one and all – both private sector applicants and FCC application processors – of an irksome chore, which is all to the good.

Interestingly, while the Commission did publish a notice about its proposed changes in the Federal Register, the Commission stopped short of also publishing a copy of the revised form. You'd think that the FCC would have made the new form available in the Federal Register in order to give everybody the maximum opportunity to look it over as soon as possible. Apparently the Commission doesn't think like that. While this approach harkens back to the unfortunate situation we all encountered with the FCC's effort to revise the Broadcast Ownership Report form (FCC Form 323), we need not worry about a re-play of that here. After reading the Federal Register notice, we wrote to the FCC asking for a copy of the form, and the Commission kindly sent one over within a couple of hours.

At this point we can't say for 100% certain that there aren't any additional changes lurking in the 39-page form. The ones described above are the ones the FCC has identified in its Federal Register notice. The publication of that notice kicks off a 60-day comment period. Anyone wishing to chip in his/her two cents' worth relative to the proposed changes has until ***December 13, 2010*** to let the FCC know. After that, the Commission will forward the proposed form over to the Office of Management and Budget, which should give one and all another 30 days in which to comment. Given that timeframe, we can probably expect to see the new and improved Form 303-S online and ready for filing early in 2011, in plenty of time for the first round of renewals.

(Continued from page 4)

distributors to convey emergency information to the blind and visually impaired. The FCC is also authorized to promulgate regulations to ensure access by individuals with disabilities to an IP emergency network.

- Video display apparatus must be able to display closed captioning, video description, and emergency information. Devices that record video must enable the pass-through of such information.

- Accessibility functions, including those on navigation devices such as converter boxes, must be easier to activate. Advocates of the legislation cited circumstances in which a blind user, for example, would have to navigate multiple (visual) menus before being able to activate a voice feature.

- Telecommunications Relay Service funding will be available to support programs to distribute equipment designed to make telecommunications service, Internet access service, and advanced communications services accessible by individuals who are deaf/blind.

An ambitious array of administrative errands, to be sure. But don't worry – the FCC will have some help, because Congress has ordered it to establish a couple of "advisory committees" to assist in the development of the regulations mandated by the Act. The FCC's first order of business will be to form the committees, dubbed (ruh roh – Potential Confusion Ahead!) the "Emergency Access Advisory Committee" and the separate and distinct "Video Programming and Emergency Access Advisory Committee". Both must be established by December 8, 2010. They will then proceed to investigate and survey and do the kinds of things that advisory committees do, including especially making recommendations.

As far as substantive rule changes go, 21CenComVidAccAct specifies that the video description rules must be reinstated by October 8, 2011 (although compliance will be phased-in over a period of several years). The closed captioning decoding regs are due within six months of the Advisory Committee report on closed captioning (estimate somewhere between October, 2011 and April, 2012 for those rules). Additional rules will be developed in due course.

With all these irons in the fire, the FCC is under pressure to crank through the honey-do list that Congress has thoughtfully passed along. And sure enough, it has already issued not one, but two separate requests for comments on the impact of the 21CenComVidAccAct. Comments in response to the first request, issued on October 12, were due by October 25 (replies by November 22), but never fear – a broader request was issued on October 21, with comment and reply deadlines of November 22 and December 7, respectively.

A Memo to Clients refresher course!

Video Description 101

By Christine E. Goepp
goepp@fhhlaw.com
703-812-0478

The video description rules – left for dead after being struck down by the Court of Appeals for the D.C. Circuit eight years ago – are on their way back.

Video description gives blind and visually impaired people a way to "watch" video programming by adding a spoken narrative describing the visual elements of a scene during natural pauses in dialog. (Example: "Toto pulls one of the curtains aside, revealing a small man manipulating a huge, complex machine.") A well-done video description can be engaging and evocative, like a good play-by-play commentary or book on tape. Video description can open up a world of entertainment and information that would otherwise be inaccessible to the blind. This is important, say advocates, because in modern society, full access to information is as essential as, for example, access to public transportation.

So what's the problem? Production of video description can be expensive, and the market doesn't pay for it, so there's little marketplace incentive to provide it. That's where the government comes in. In 2000, the FCC adopted rules requiring broadcasters and cable operators to provide video description. Broadcasters in the top 25 markets, affiliated with the top four commercial networks, had to provide about four hours a week of video description. All other broadcast stations had to "pass through" any video description if they had the technological capability to do so.

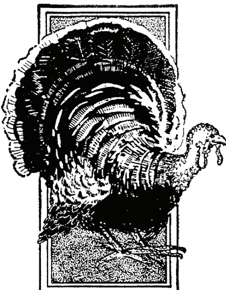
The rules became effective April, 2002 (despite multiple efforts to get them stayed), but in November of that same year, the U.S. Court of Appeals for the D.C. Circuit struck them down. According the Court, the fatal flaw in the video description regulations was lack of authority. The Commission, of course, is a creature of Congress and, as such, the Commission can do only what Congress has authorized it to do.

The Court held that the 1996 Act fell short because that Act didn't explicitly authorize the FCC to prescribe video description regulations; rather, it merely instructed the Commission to look into video description and provide a report to Congress. By contrast, the Act was very clear in authorizing the Commission to impose closed captioning requirements. The Court also observed that the legislative history indicated that the idea was considered and deliberately rejected.

And as far as the FCC's general regulatory authority goes, the Court concluded that that authority stopped short of rules "that significantly implicate program content." The Court held that video description is "content" because, unlike closed captioning, it is not automatically generated and requires some artistic input. (In fact, some content providers have claimed that video description creates copyright issues as it creates a "derivative work" of the original—but that's a story for another day).

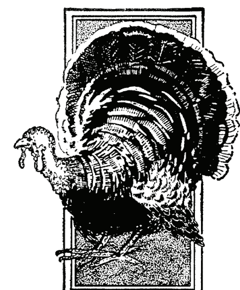
The FCC, noted the Court, was not able to cite one case in which a content regulation based on the FCC's general authority to regulate broadcasting survived court scrutiny – thanks mainly to the First Amendment. Specific instances where the FCC does regulate content, such as indecency and elections, have explicit statutory support. Without such support, the FCC is not at liberty to impose regulations on content.

Now, a decade later, the FCC has received the authority it lacked in 2000. It does not have carte blanche, however. After one year and a rulemaking, it must reinstate only its original rules, with certain modifications that appear designed to lighten the burden on broadcasters. For example, the Act requires the FCC to consider extending the original "technical capability" exemption—which previously applied only to "pass though" stations—to all providers and owners of video programming. It also allows the FCC to exempt any provider (or category of provider) who shows that compliance would be "economically burdensome." Given the potential controversy of such issues, this reinstatement may turn out to be more complicated than it looks.

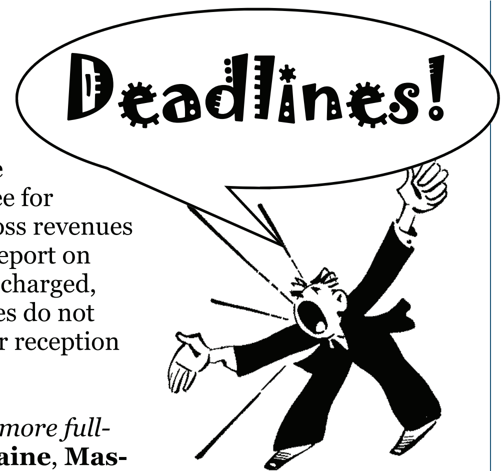


Holiday Schedule Reminder

Fletcher, Heald & Hildreth, P.L.C.
will be officially closed on
November 25-26 (Thanksgiving weekend),
December 23-25 and December 31.
We will be open on Thursday, November 11
(the federal holiday in honor of Veterans' Day).



December 1, 2010



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

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in **Alabama**, **Colorado**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **Minnesota**, **Montana**, **New Hampshire**, **North Dakota**, **Rhode Island**, **South Dakota**, and **Vermont** must place EEO Public File Reports in their public inspection files. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

EEO Mid-Term Reports - All *television* station employment units *with five (5) or more full-time employees* and located in **Connecticut**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island**, and **Vermont** must file EEO Mid-Term Reports electronically on FCC Form 397.

Noncommercial Radio Ownership Reports - All *noncommercial radio* stations located in **Colorado**, **Minnesota**, **Montana**, **North Dakota**, or **South Dakota** 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 **Alabama**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island**, or **Vermont** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

January 10, 2011

Children's Television Programming Reports - Analog and Digital - For all *commercial television* and *Class A television* stations, the fourth 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 that the FCC now requires the use of FRN's and passwords in order to file the reports. We suggest that you have that information handy before you start the process.

Commercial Compliance Certifications - For all *commercial television* and *Class A television* stations, a certification of compliance with the limits on commercials during programming for children ages 12 and under, or other evidence to substantiate compliance with those limits, must be placed in the public inspection file.

Website Compliance Information - *Television* station licensees must place and retain in their public inspection files records sufficient to substantiate a certification of compliance with the restrictions on display of website addresses during programming directed to children ages 12 and under.

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

(Continued from page 2)

Some issues we might expect the NPRM to address:

- Whether the FCC should eliminate locally delivered test scripts for EAN (Emergency Action Notification), EAS, and the EAS Handbook;
- Whether national activation with the EOM code should be eliminated;
- Whether to update broadcast EAS rules;
- Who should be responsible for translating alerts into multiple languages;
- Whether a nationwide training program should be instituted for crafting and implementing EAS messages;
- Should the "selective override" issue for cable operators be revisited?

And an obvious practical question looming over all this will be whether the 180-day deadline should be extended to give affected players – including, but not limited to, the FCC itself – a bit more time in which to get their act together. It is far from clear, for example, that equipment manufacturers will be able to (a) get their gear modified to conform to whatever new standards the FCC may adopt, and then (b) get the FCC to bless the modified gear, and then (c) get it out in the marketplace before the current deadline, now less than 180 days away. And once that equipment is available in the market, broadcasters, MVPDs, cellphone companies, etc., etc. will *all* have to buy and install it.

Whether that process can be completed before March 29, 2011, is far from clear. With that in mind, a six-month (or more) extension of the 180-day limit has been requested by an impressive array of broadcast and cable interests (including, among others, the NAB, the NCTA, 46 state broadcast associations, NPR, PBS). That request is currently pending.

(Continued from page 6)

basis for local policies. Other guides are available, as well.

Again, we're not saying that all uses of VNRs are unquestionably permissible. The FCC has relatively clear cut rules regulating sponsorship identification and at least some uses of commercial-type VNRs could violate these rules and policies. But there are plenty of uses of VNRs that do not.

Our concern is that the good will be swept up with the bad, with broadcasters being investigated, chilled and, functionally, censored as the threat of government sanction causes them to err on the side of caution. VNRs can be a valuable newsgathering and broadcasting tool. But the use of that tool will likely shrink if the FCC caves to Free Press pressure, jumps on the Free Press bandwagon, and issues another round of wide-spread inquiries which happen to snag a boatload of "good" speech in a net more appropriately cast for a far smaller pool of "bad" speech. Such an approach turns the traditional notion of "free speech" on its head: if that means anything, it's that we must be prepared to tolerate some of the bad in order to fully protect all of the good.

So, broadcasters – and other First Amendment advocates – you might want to get ready for another battle if the revivified Free Press assault on VNR use gains any traction.

(Continued from page 12)

(although it may impose "customary terms, fees and conditions", whatever those may be).

The Commission will monitor to ensure a fair and transparent decision-making process. Sirius/XM must set up a public website or similarly accessible source to inform interested entities about the application process (*e.g.,* how to apply, eligibility requirements, selection criteria). No more than half of the available channels may be leased to broadcast licensees, and no more than four channels may be leased to any one entity. Sirius/XM may divide up channels into share-time arrangements or not, as it sees fit, and may offer different deals to different programmers.

Once Sirius/XM picks lessees for the set-aside channels, it's going to have to submit its selections to the FCC's Media Bureau *before* inking any leases. The Bureau's role will be *not* to second-guess Sirius/XM's choices, but to confirm that the proper selection process was followed. If the Bureau doesn't disapprove within 45 days, then the selections will be deemed to be approved – at which point Sirius/XM may enter into the leases.

The set-aside channels, which will *not* be subject to editorial control by Sirius/XM, must be available to all subscribers. Sirius/XM must allow its lessees to advertise, but it may not require them to accept advertising from Sirius/XM other than normal cross-promotion of other channels on the system. All of the leases must be in place by the April 17, 2011, implementation deadline, although the commencement date of service is still up in the air.

Anyone potentially interested in applying for some of the set-aside capacity (and, with no lease payments payable, who wouldn't be interested?) should keep an eye out for announcements from Sirius/XM. But be aware that anyone disappointed by the FCC's order could seek reconsideration or review of it, which might gum up the works for a while longer. We'll try to keep you posted as developments warrant, both in future issues of the *Memo to Clients* and on our blog at www.CommLawBlog.com.

(Continued from page 5)

As anyone who has suffered through an inspection knows all too well, EB personnel know how to ask for evidence of prior FCC authorization when such prior authorization is supposed to have been issued. So the EB's failure to do so in the WGRQ case could reasonably be read to indicate that no such prior authorization was necessary there.

Not so, retorts the MB. "Section 73.1125(d)(2) is unambiguous" in its insistence that prior approval is *obligatoire*. Perhaps, but that particular subsection refers to studio sites located *outside* the station's principal city contour. And in the cases of both WGRQ and WULF, everybody agrees that the challenged studio sites were indeed *inside* that contour (albeit with an assist from Longley-Rice) – so Section 73.1125(d)(2) wouldn't seem to apply here.

But putting that (and some other similarly questionable aspects of the MB's decision) aside, the fact is that the MB's WULF decision reflects the Bureau's current views on the matter – which raises a thorny question. Suppose you're a licensee who didn't happen to read the Commission's 1997 decision (footnote and all) the same way the MB does now. And suppose that – much like WGRQ and WULF – you moved your studio to a site which Longley-Rice said would be OK, and that you've been operating from that site since, without any prior FCC approval.

What do you do now?

If the MB's decision in the WULF case stands, it looks like you're going to be on the hook for a $7,000 fine at some point. Unless, of course, the Bureau has a change of heart – and there are perfectly good reasons why it *should* have a change of heart.

The real problem here involves a lack of notice: while the MB would like to think that all broadcasters have long been on clear notice that they needed prior approval before moving to a Longley-Rice-justified studio site, a strong argument could be made that there was no such notice. Because of that, instead of issuing more fines, the MB might think instead about issuing a public notice clearly and unequivocally mandating the submission of showings justifying any studio site whose compliance is based on Longley-Rice (or some equivalent supplemental showing). Sites found to be in compliance would be approved retroactively, or *nunc pro tunc* (ain't Latin great?), with no fine attached. Sites not in compliance would trigger a fine. The Bureau would get what it wants – *i.e.*, the opportunity to double-check Longley-Rice predictions – while licensees would not be subjected to fines they legitimately might not have expected.

While the Bureau may think that we've all been on clear notice that prior approval is needed, a strong argument could be made that there was no such notice.

Of course, the Bureau might elect instead to stick to its guns, waiting for each Longley-Rice-dependent licensee to march in, Longley-Rice study in one hand, a $7K check (payable to the FCC, thank you) in the other.

At this point, the unfortunate reality is that the latter is probably more likely than the former. But we can dream, can't we?

P.S. – For all you Longley-Rice *aficionados* out there (and you know who you are), the MB's recent decision also officially confirms the demise of the 20-meter/100-meter threshold test – sometimes referred to as the delta-h, or Δh, test – which was snuck into FCC jurisprudence in a footnote in an unpublished letter in 2002. The full Commission pounded a stake into that test's heart in a 2008 decision. There the Commission alluded to a threshold standard first announced in 1997: a supplemental coverage showing (*e.g.*, a Longley-Rice analysis) will be considered only if it results in an extension of the predicted contour by at least 10%. In its latest decision, the MB acknowledges that its 2002 delta-h experiment is toast. Let us know if you would like further information about this.

(Continued from page 3)

precedent is being "disavowed". And with that declaration, the earlier precedent simply goes "poof", vanishing into thin air, never to be considered again.

Such an approach itself does have some quasi-governmental precedent. At the beginning of each episode of *Mission: Impossible*, Jim Phelps (or his predecessor, Dan Briggs) was routinely assured in a tape recorded message that, if they or any member of their team was caught or captured, "the Secretary will disavow any knowledge" of their actions. So disavowal appears to be a time-honored means of ignoring things that would otherwise be hard to explain.

This disavowal approach does appear to raise serious questions of fairness and notice, although whether those questions will ever get considered and resolved remains to be seen.

In light of that grim reality, as the next round of renewals screams down the road toward us, it's probably best to assume that the starting figure for a public file violation will be in the $10K range.

BAS Application Coordination Clarification

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

The Wireless Bureau has issued a declaratory ruling clarifying when prior coordination is required for Broadcast Auxiliary Service (BAS) microwave applications above 2110 MHz – facilities generally used by TV stations for studio-transmitter links or relays linking other locations. The coordination requirement is based on whether a change could affect other licensees and not whether the change is "major" or "minor."

New BAS fixed microwave links and major changes in existing links must go through a formal coordination process, where existing licensees and applicants who may be affected are notified and given an opportunity to protest, *before* a license application is filed with the FCC.

Coordination is also required for "major" changes, *i.e.*, changes in:

- location of more than five seconds of latitude or longitude;
- area of operation;
- frequency tolerance; transmission bandwidth;
- emission type (including conversion from analog to digital);
- EIRP (power), if increased by more than three decibels;
- antenna beamwidth or polarization; or
- antenna height, if increased by more than three meters.

In other words, if a change affects the extent to which your signal can cause interference to others, the change is "major", and you have to coordinate ***before*** filing for a license. Several engineering firms offer coordination services.

On the other hand, minor changes – which have less impact than the major change categories noted above – may be implemented as a matter of right. However, if there is any change in operating parameters, the FCC must be notified by a license application to be filed within 30 days after the change is made.

Disagreement apparently evolved in the engineering community recently as to whether coordination must be completed prior to implementing a minor change. The FCC's answer is "yes" – ***IF*** the proposed change "could affect or be affected by" anyone else's facilities, in which case you must coordinate first, and then implement your minor change and file your license application. The coordination process usually takes at least 30 days.

Disagreement apparently evolved recently as to whether coordination must be completed before a minor change is implemented.

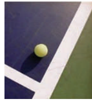
The ruling is important because the same Form 601 is used for both major and minor changes. Written evidence of prior coordination must be attached to an application for a new station or major change, but not a minor change application. Nevertheless, the FCC says, the fact that you do not have to file a prior coordination notice for a minor change does not mean that you do not have to do the coordination if any other station or earlier application might be affected.

The FCC really means that prior coordination is required if a major or minor change could *adversely* affect anyone else. There are some changes that might *help* others by allowing them to expand, but prior coordination is not required if the effect cannot be adverse. Examples include deleting a path, deleting a frequency, reducing power, or reducing occupied bandwidth, which could allow another station to improve its facilities but cannot hurt anyone else. Even in those cases, however, a license application must be filed within 30 days after the change is made, so that the FCC can update the database used by coordinators.

The formal coordination process, described in Section 101.103(d) of the FCC's Rules, is not required for fixed or mobile stations below 2110 MHz (including "2 GHz" ENG systems), mobile stations in higher bands, or short-term operation of 30 days or less under Section 74.24. In those situations, informal coordination is required with all licensees in the area. "Informal coordination" entails contacting a local frequency coordinating committee if one exists, or otherwise contacting anyone you can find who might be affected by your proposed operation.

So now we know that prior coordination is needed for almost any change except cutting back or discontinuing an operation. But how can we be sure? The FCC admits that "there may be other minor modifications that may not require prior coordination", but a "comprehensive list" is impossible to make, because whether or not a change would affect or be affected by other facilities must be decided "on a case-by-case basis". When you're planning a change, it's a good idea to chat early on with your engineer, so that coordination gets taken care of and does not turn into an obstacle that delays project implementation.

While the FCC's ruling appears directed at only TV auxiliary licenses, Section 74.502(d) of the FCC's Rules requires that the Section 101.103(d) coordination procedure by used for applications for radio studio-transmitter links in the 950 MHz band. Presumably then, the same interpretations can be applied to radio links.



(Continued from page 8)

They have opted to go the ADR route.

There would appear to be strong benefits for both parties to use ADR.

First, both parties would avoid substantial litigation costs. The hearing process is not cheap – in terms of time, money, aggravation and distraction – for either side. And the hearing process gives neither side any real control over either the length of the process or the final resolution. (How long do such hearings take to get resolved? As one recent example, the ALJ in the *Wealth TV* hearing issued his recommendation in 2009, but the matter is still awaiting a final decision from the Commission, a decision which can then be appealed to the courts.)

Another factor that might be considered here is the fact of the Commission's on-going review of the merger of Comcast and NBC. The potential for unfair, anticompetitive circumstances arising from such a merger is high, and the regulators tend to be on the lookout for such potential in their evaluation of the merger proposal. A hearing on the Tennis Channel's complaint could give Comcast's opponents an opportunity to develop an evidentiary record of *past* anticompetitive conduct by Comcast, a record which would likely not be helpful to its prospective merger efforts.

In their notice advising the Commission that they chose ADR over a hearing, Comcast and the Tennis Channel indicated that they have agreed to complete the mediation by November 24, 2010, the day before Thanksgiving. We'll report on developments as they become available.

(Continued from page 9)

review. In fact, I think the Supreme Court would ***have*** to resolve this split – 100% lock that they take the case in my mind – because of the nationwide (indeed, ubiquitous) reach of online webcasting. And, regardless of how the Supremes might rule in such a case, the losing industry would probably seek legislative reversal through amendment of the Copyright Act (as happened in the case of satellite carriage of broadcast programming).

There are potential endgames aplenty here. Expect to see them played out in the near term.

[Interesting factoid: FilmOn is the brainchild of Alki David, who is reportedly a "billionaire heir" who offered $1 million to the first person who would streak in front of President Obama with "Battlecam.com" written across the streaker's chest. Battlecam.com is a "video-sharing community" linked to FilmOn.com. At least one contestant has attempted the stunt so far.]

(Continued from page 10)

recording another. "Multi-stream" CableCARDs have been available for several years, although cable operators have not always provided them to users of third party boxes without a special request.

- In an attempt to curb price discrimination, cable operators are now required to list on their websites and annual rate cards the fee for CableCARDs separately from the "host" devices. The goal is to allow consumers to see what they are paying for the CableCARD separately from what they are paying for the navigation box. The FCC hopes this will allow consumers to (a) more accurately compare the cost of a retail box to the cost of an MVPD-provided box and (b) ensure they are not paying more for CableCARDs in third party boxes than they pay for CableCARDs in the MVPDs' boxes. The new rules also require that the prices for CableCARD lease fees be uniform and that users of third party boxes get the benefit of any "package discounts" that include MVPD-provided boxes.

The FCC also addressed the issues involved with the installation of CableCARDs. One complaint about the CableCARD system was that many companies required users of third party boxes to have the CableCARDs installed by the cable providers' technicians. This imposed numerous delays and difficulties as the boxes could not be used until the customers were able to schedule an appointment for installation. Even when technicians arrived ("Our service window is between 9 a.m. and 5 p.m., Sir"), the relative rarity of third party boxes often led to confusion about proper installation, the number of CableCARDs required, etc.

Under the new rules, customers may order CableCARDs and self-install them. For those customers preferring professional installations, new service standards for such installations are imposed. The new rules also streamline the FCC's complaint process for violations involving CableCARD services and installations.

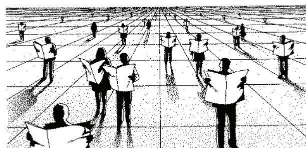
Even as it adopted these new rules, however, the FCC recognized the poor track record of the CableCARD system. In fact, the FCC's National Broadband Plan calls for an entirely new approach to connecting consumer devices to cable systems – envisioning a mandatory "gateway device" similar to a cable modem to which any television, DVR or other device can attach. While that next generation system gestates, however, the new CableCARD rules may help consumers gain a remote measure of control over their set top box.

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

Updates On The News

S. 592, Where Are You? – In the November, 2009 *Memo to Clients* we reported that S. 592 (the "Local Community Radio Act of 2009") — the bill that would eliminiate LPFM third adjacent protection requirements — had received the big thumbs up from the Senate Commerce Committee and appeared to be heading for passage, since it had already made similar headway on the House side. We suggested that it would become the law of the land sooner rather than later. Flash forward to today – and the bill is still gathering dust.

Oops. Unless your desk calendar is based on, like, geologic time (and, truth be told, sometimes we get the impression that that may be the case in some – but not necessarily all – FCC offices), a year isn't really sooner rather than later, so our prediction was (how can we say this correctly and still retain a modicum of credibility?) perhaps not as precisely accurate as we might have preferred.



What happened?

According to a report posted recently on Politico.com, a number of senators have slowed things down by preventing a full Senate vote on the bill. Politico.com says that Wyoming Senator John Barrasso currently has placed a hold on the bill, while the other Wyoming Senator (Mike Enzi) and Oklahoma Senator Tom Coburn have previously done the same. It seems that Barrasso "wants to ensure [the bill] includes language that distinguishes full-power FM stations from low-power FM stations", while Enzi objected to the bill because "New Jersey was given an exemption from the proposed changes" in the bill, according to the Politico.com.

Who knew?

Proponents of the bill are quoted by Politico.com as suggesting darkly that "corporate special interests" may be at work here, deftly deploying "procedural drag" to their presumably dastardly advantage. For its part, the NAB assures that it is "not against the concept of low-power FM stations" (*i.e.*, the target beneficiaries of the bill) . . . but cautions that "[y]ou just can't give everyone a Social Security card and a radio station at birth and think that there's not going to be chaos on the airwaves."

Once bitten, twice shy. We hereby officially decline to opine when, how, or even whether this impasse is likely to be resolved (although the end of this particular Congressional session could close the door on the bill for good, depending on – among other things – how those pesky mid-term elections turn out). But we will try to keep our readers apprised of developments as they come to our attention, sooner rather than later.

Senate Passes CALM Act (S.2847) – It's unanimous! On September 29, the Senate unanimously passed S. 2847, the Commercial Advertisement Loudness Mitigation Act (a/k/a "CALM Act"), the bill intended to force video providers to take steps to assure that commercials (and other "interstitials") are not annoyingly louder than the programming which they interrupt. That leaves just two steps to go in the legislative process before the awesome power of the federal government puts its regulatory finger to its regulatory lips and issues a regulatory "Shhhhhh".

We've written about the CALM Act before, so there's no need to re-visit the story up to this point. (For a refresher course, check out the November, 2009, *Memorandum to Clients*.) Since our last report, the Senate version of the bill (the House side's version is dubbed H.R. 1084) was amended ever so slightly and, as amended, given the overwhelming Senatorial thumbs up. The amendment, tacked on at the last minute, provides:

> *Compliance*.--Any broadcast television operator, cable operator, or other multichannel video programming distributor that installs, utilizes, and maintains in a commercially reasonable manner the equipment and associated software in compliance with the regulations issued by the Federal Communications Commission in accordance with subsection (a) shall be deemed to be in compliance with such regulations.

That's presumably intended to give video providers some assurance that, as long as they install, utilize and maintain the required gear, they'll be deemed street legal, regardless of any individual viewer complaints that might roll in.

The only hitch here is that the version of the CALM Act that the House passed didn't happen to include an equivalent amendment. That means that the next step in the March To Enactment is for the House and the Senate to get together to work out the differences between the two bills. Once that's done – and at this point there seems little doubt that that will get done – it's on to the White House for one final signature and, bingo – It's The Law. At that point there will still be some time before the new obligations kick in, since the FCC will have one year to follow up with the nitty-gritty details, like adopting new rules to conform to Congress's will.

Check our blog (www.CommLawBlog.com) for updates.

(Continued from page 11)

tions.)

Wouldn't you know it, some other parties objected to that approach as well. A coalition of commercial broadcasters urged the Commission to reject the EMF/Prometheus proposals and to get on with the processing of the pending applications. The coalition suggested that the Commission first open a settlement window among the FM Translator applicants, which would have winnowed the list some, and then proceed to an auction among the mutually-exclusive groups with commercial applicants that could not reach a settlement.

The coalition also proposed an interesting twist. The Commission is ordinarily required to dismiss translator applicants proposing noncommercial service if they are mutually exclusive with commercial applicants. That means that all NCE applications grouped together with one or more commercial applicant would be dismissed under the Commission's established auction rules. But some of those NCE applications don't really conflict with the commercial auction applicants; in many cases, the NCE's are merely tied to the commercials through a daisy-chain of applications. To help out the noncoms, the coalition proposed that Commission hold such NCE applications in abeyance while the Commission opens a window for LPFM stations. Once that window closes, if the noncommercial FM Translator applications being held in abeyance aren't in conflict with any of the newly-filed LPFM applications, the translator applications would, under the coalition's proposal, then be processed under the Commission's noncommercial selection processes.

Not surprisingly, NPR weighed in, again, opposing all the proposals. Meanwhile, both the coalition and EMF/Prometheus have been meeting with Commission staff in support of their respective positions.

And as the Brownian motion of all these quasi-developments persists, over on the Hill the word is that the long-pending bill to eliminate third-adjacent protection requirements for LPFMs remains on hold. (*See* related story on page 21.) Enactment of that bill has been anticipated by some to be a likely catalyst for agency action. But lack of enactment logically means that stasis will continue to prevail.

As of the publication of this article, the FCC has not indicated whether it will proceed with any of the various proposals at this time. The Commission is in a difficult situation, but one largely of its own making. After all, the Commission has had more than seven years to try to figure out what to do with the translator applications. If it had taken effective steps at any point prior to now – for example, if it had stuck to its guns in 2007-2008, relative to the ten-application cap – things might have been different. If nothing else, perhaps the submission of these proposals will spur action, any action, by the Commission.

FM Translator applicants have been waiting since March, 2003, to have their applications processed, and have seen more than 1,100 NCE full-power FM applications filed in October 2007 granted in the meantime. (This illustrates the classic, and undeniably true, observation made by Rush in *Freewill*: "If you choose not to decide, you still have made a choice.") Without a final decision regarding the FM Translator applications, the Commission cannot proceed to open an LPFM window, no matter how much the Commission wants to increase diversity in the marketplace.

So the conflicting forces remain, still conflicting. Perhaps pressure will build – maybe soon, certainly eventually – to push the situation to a resolution. Check back here for updates.

FM Allotments Adopted – 8/19/10-10/20/10

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
OR	Grants Pass	26 miles NW of Medford, OR	257A	10-117	TBA

FM Allotments Proposed – 6/21/10-10/20/10

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (*i.e.*, Drop-in, Section 1.420, Counterproposal)
CA	Willow Creek	48 miles NE of Eureka, CA	258A	10-189	Comment due: 11/18/10 Reply due: 12/3/10	Replacement/Drop-in

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.