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Memorandum to Clients

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Sale to the Chiefs!

Political Advertising 2012

A Refresher Course for the Final Month

By Dan Kirkpatrick
kirkpatrick@fhhlaw.com
703-812-0432

As what promises to be one of the busiest and most contentious general election seasons in some time takes the turn and heads into the final 30-day lap, now is a good time for broadcasters to check their policies and procedures on political advertising to ensure that their stations remain in compliance down the stretch. The broadcast of political messages is covered by a complex set of laws and regulations and ***all*** station personnel involved with programming, sales and traffic should be aware that decisions about what ads to run, when to run them and how much to charge for them may have serious consequences for the station.

A complete review of the federal political broadcasting rules is far beyond our scope here. Nevertheless, what follows is a crash refresher course highlighting a few issues that broadcasters should be thinking about, including a few new issues that are arising for the first time this year.

Who's who?

One of the first things stations need to do is determine which elections are likely to generate requests for advertising time. On November 6, 2012, the general *federal* election will include races for the offices of the President, Vice President, all of the House of Representatives and one-third of the Senate. Numerous state and local offices also will be up for election on November 6. Your local board of elections should be able to give you a list.

Once you know which offices are up for election, you will need to decide which of those races will be permitted to buy time on your station. ***All*** candidates for ***federal*** offices are entitled to "reasonable access" to your station. That is, you ***must*** sell time (within certain limits) to the candidates for President, Vice President and the U.S. House and Senate.

By contrast, candidates for ***state*** and ***local*** office have ***no absolute right*** to reasonable access – stations can refuse to sell time for such races. If, however, a station sells ads to one candidate for a particular office, the FCC's "equal opportunities" rule requires that station to sell ads to all qualified candidates for that particular office. Stations may pick and choose among the state and local races, however. For example, a station could choose to accept ads from state senate candidates but refuse them from county council candidates.

Non-candidate advertising – advertising from groups (including "public interest" groups) or individuals other than candidates or their committees – are *never* entitled to access as a matter of right. Stations are free to accept or reject "issue ads" as they see fit, although certain liabilities and record-keeping requirements may be attached to accepting such ads.

What's what?

One of the most important things each station should have done prior to the election season was to prepare its political disclosure statement – a written statement to be provided to candidates that describes the station's political ad rates, time classes, and sales practices. The disclosure statement is ***not*** technically required by the FCC's rules, but it is vitally important that every station is clear, upfront and consistent about the types of advertising time it will sell, which races will be allowed to buy time and the rates the station will be charging for the time. Obviously, a written statement can be infinitely helpful to station personnel in this regard and can also serve to avoid disputes about what information may or may not have been relayed by station personnel in less formal, oral interactions.

The disclosure statement should be kept up-to-date throughout the campaign, and all personnel involved with the sale of advertising time should be familiar with the disclosure statement and adhere to the policies set forth in the disclosure

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Inside this issue . . .

In the works: an alternative to .COM for the radio biz

.RADIO

A look at the four contenders for control of the TLD

By Kathy Kleiman
kleiman@fhhlaw.com
703-812-0476

In last month's *Memo to Clients* we reported that the Internet Corporation for Assigned Names and Numbers (ICANN) received 1,930 applications for new top level domains (TLDs) – including dozens of applications for broadcast- and media-related applications including .MEDIA, .MUSIC and .VIDEO.

But the four applicants for .RADIO caught our eye. They seek to offer services to radio broadcasters around the world, and may well change the way radio broadcasters operate, both on the Internet and offline. Their applications merited a closer look.

Before diving in, we need to define a number of terms that are central to the TLD system.

First, "Registry". In ICANN parlance, a registry is an entity which, under contract to ICANN, provides the authoritative master database of a single TLD and manages all "second-level" domain names registered within that TLD. Example: ".COM" is a TLD, and "FHHLAW.COM" is a second-level domain name registered with the ".COM" TLD. Verisign is the registry for .COM. Registries may not generally sell directly to the public. Each of the four .RADIO applicants is seeking to be the registry of .RADIO.

Next, "Registrar". A registrar is an entity accredited by ICANN and under contract to a registry. The registrar adds, deletes, updates and transfers second-level domain names. Registrars are the "salesmen" of domain names. GoDaddy is the largest registrar in the world.

When it comes to new TLD applications, there are two types:

A "community-based designation" application, in which the applicant promises to operate its proposed new TLD for the benefit of a "clearly designated community"; and

A standard application. Successful "standard" applicants may use the new TLD in any manner consistent with general requirements and criteria, but are not otherwise constrained in the way that successful "community-based designation" registries will be.

The four applicants seeking to be registries of .RADIO are **BRS Media (BRS), Affilias Limited (Afilias)** and **Tin Dale, LLC (Tin Dale)** – each of which submitted "standard" applications – and **Eurovision Broadcasting Union (EBU)** – which seeks special status as a "community-based designation." Let's take a look at each.

BRS, a "media e-commerce company", based in San Francisco, is owned and operated by George Bundy. In 1998, when the Internet was young, Bundy and BRS embarked on an innovative plan to affiliate with two country codes, the Federated States of Micronesia (assigned .FM as its country code) and Armenia (assigned .AM). With permission of those countries, BRS began offering .AM and .FM domain names and email addresses to broadcasters. Now BRS wants to add .RADIO to its portfolio. Inc. magazine's website lists BRS as one of the "5,000 fastest-growing private companies" in the U.S.

Afilias is a well-known TLD operator and service provider in the Internet Community. Incorporated in Dublin, it runs a large office in Philadelphia and has operations in Toronto and New Delhi. Afilias is the registry of the .INFO and .MOBI top level domains. It also provides "back-end services" to enable the technical operations of other TLDs (.ORG, .ASIA, .AERO (for airline and aviation)) and some country codes (*e.g.*, .MN (Mongolia), .AG (Antigua and Barbuda) and .BZ (Belize)). Directly or through affiliates, Afilias has applied for 31 new top level domains, including .BLOG, .WEB and .POKER, along with .RADIO.

Tin Dale is an affiliate of **Donuts, Inc.**, and named for one of the company's founders, Richard Tindal. Donuts, a 2010 Delaware corporation, lists its offices as Bellevue, Washington, and was founded by leaders of the registrar community (entities, such as

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FLETCHER, HEALD & HILDRETH P.L.C.

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

Co-Editors

Howard M. Weiss
Harry F. Cole

Contributing Writers

Denise Branson,
Anne Goodwin Crump,
Donald J. Evans, Christine Goepp,
Kevin M. Goldberg, Dan Kirkpatrick,
Kathy Kleiman, R.J. Quianzon
And Peter Tannenwald

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Limited liability? Think again!

Piercing the Corporate Veil, FCC-Style

By Christine E. Goepp
Former FHH Associate

(Editor's Note: This article by Christine Goepp represents her last contribution to our publication. Christine has accepted a position with the FCC where we hope she will be able to contribute the same intelligence, good humor and literary craftsmanship that she has contributed to these pages. We wish her well in her new endeavors.)

Many, probably most, FCC licenses are not held by individuals. Rather, they're held by organizations – corporations, or their near relations, limited liability companies, and the like. You might assume that corporate law protects individual shareholders in the FCC's regulatory sphere in the same way that it does in the court system.

You would be wrong.

A recent Commission decision indicates that in some circumstances the FCC can – and will –look beyond the corporate form and hold shareholders personally liable for licensee obligations, even in situations where a court wouldn't ordinarily be expected to.

The principle of limited liability doesn't always comport with the FCC's idea of regulatory justice. Take the case of telecom company Telseven.

Whether you love them or hate them, corporations are a prominent feature of the American economic landscape. A corporation is a legal "body" – an entity separate and independent from the individual people who own and control it. A corporation's debts and liabilities come out of the company coffers; investors and owners can lose only as much as they put in.

The protected investors are not the only beneficiaries of this system. The broader economy, which affects everybody, wins, too. The centuries-old theory is that "limited liability" stimulates investment and keeps the economy bustling; would-be investors know that no matter how bad things go at the corporate level, their personal bank accounts (and houses, and cars) won't be snatched up to cover the liabilities of the corporation.

But the principle of limited liability doesn't always comport with the FCC's idea of regulatory justice. Take the case of telecom company Telseven, a limited liability company.

Under FCC investigation for various alleged Universal Service Fund (USF) violations, Telseven declared bankruptcy. So the FCC disregarded the Telseven entity and held its sole owner and director, Mr. Patrick Hines, personally liable for a proposed $1.7 million fine. (You can read about how USF fines get so large so fast on our blog (www.CommLawBlog.com).) In doing so, the FCC applied a legal standard unlike the strict standard used by the courts in those exceptional circumstances when they opt to "pierce the corporate veil".

While the law varies by state, a court that "pierces the corporate veil" generally tries to determine whether a corporation is anything more than an "alter ego" of its dominant shareholder. The court typically checks to see whether corporate formalities (holding of board meetings, etc.) have been ignored, personal and business funds have been commingled, and/or the company has been unduly under-capitalized. The court also considers whether strict adherence to the concept of "limited liability" would promote fraud or produce an inequitable result.

In the courts, at least, it is difficult to justify "piercing the corporate veil". According to the U.S. Supreme Court, the corporate veil is to be pierced only in "exceptional circumstances."

Historically, the FCC has not engaged in corporate veil piercing in the sense utilized by the courts, *i.e.*, to impose personal liability on an individual shareholder for a business organization's obligations. While the Commission has occasionally used the term "piercing the corporate veil", it has done so in various regulatory contexts (*e.g.*, attribution analysis) separate from the way the courts have traditionally used that term.

Indeed, when the FCC discussed imposing liability on a licensee shareholder in a 2010 decision, it expressly distanced itself from that traditional usage. In that case, Sprint and ICO were involved in a long-running dispute over whether ICO would help pay to relocate various broadcast incumbents from the 2000-2020 MHz band (a story for another day). Woops-a-daisy, said ICO, the subsidiary that holds our FCC licenses has gone bankrupt. Even if it does owe the money, it can't pay. Not so fast, said the FCC. The Commission was prepared to hold the subsidiary's owner (*i.e.*, ICO) liable for the sub's obligations, but *not* because the corporate veil could or should be pierced. Rather, the FCC coined a new phrase – "enterprise liability" – to describe its regulatory approach. According to the Commission:

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The Online TV Public Inspection File

Some How-To's

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

[*Editor's Note: Our crack paralegal, Denise Branson, contributed to the preparation of this post.*]

As readers should know by now, the FCC's online public inspection file system for television (including Class A) licensees went live in August. (If you didn't know that, check the several posts about the "local public inspection file" on our blog at www.CommLawBlog.com to get up to speed.) For the majority of affected licensees, the new system has thus far been largely a non-event. That's because the primary impact of the new system, at least initially, has fallen on a relatively small universe of stations – *i.e.*, affiliates of the Top Four commercial networks in the Top 50 markets – who have to upload all new political file materials. The rest of the TV world won't have to worry about uploading political files until 2014, at the earliest.

Of course, *all* TV licensees (for convenience sake, we'll include Class A licensees within the meaning of that term in this post) can still go ahead and start uploading material from their paper files to the new online system. But the deadline to get that particular chore done isn't until early February, 2013, so it's entirely possible – the temptation to procrastinate being what it is – that many, if not most, TV folks haven't yet even taken a quick glimpse at the system, much less test-driven it to any significant degree.

Heads up, though: the public-file-uploading chores for ALL TV licensees will for sure kick in no later than October 10. That's the next deadline for the preparation of quarterly issues/programs lists, which have to be placed in the public file by October 10.

That being the case, we figured it would be a good idea to introduce the Great Unwashed to the FCC's online TV public inspection file system. This first installment of that series is designed to: (1) get you into your station's public file for uploading purposes; and (2) provide some tips on uploading your issues/programs list. We intend to follow this up with additional primers on related matters in due course.

The first order of business: Getting into your file.

The FCC has thoughtfully imposed a two-tiered system that you've got to negotiate before you can access the business end of your online public file. Although at first blush this might seem a bit cumbersome, it really is a thoughtful approach designed particularly with the multi-station owner in mind.

The goal is to allow licensees to make individual stations' passcodes available to relevant station personnel *without* forcing the licensee to make generally public that super-secret combination, the licensee's FRN and related password. So the licensee gets to keep under close control its master key – *i.e.*, the FRN combo – that allows it to determine what each station's passcode is; the licensee can then distribute station passcode information to relevant staff at each station for their particular use.

Figure 1

Let's assume that you're a licensee with two TV stations in different communities, and you want to get both stations working on their respective public files. For a station to get into its own public file for uploading purposes, it will need to know (a) the station's FCC Facility ID Number (FIN) and (b) the station's online public file passcode. You, as the licensee, can give them that information.

How?

First, go to https://stations.fcc.gov/. That's the home page for the TV online public file system. It looks like ***Figure 1,*** above.

If you want to see what your current online public file looks like to the public-at-large, insert your call sign in the "Find A Station" box at the bottom and hit "enter".

If, instead, you want to get into the non-public, "back-end" of your file in order to upload new stuff, click on the "sign in" button in the upper right corner. (As an alternative, you can get there directly to https://stationaccess.fcc.gov/.) That takes you by default to the "Facility Sign In" page, which looks like ***Figure 2*** (on the next page).

If you already had your stations' passcodes, you would proceed from this page to each station's public file simply by inserting the correct FIN and pass. But we're assuming that you're starting from scratch and haven't yet figured out the passcodes.

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No problem. Click on the very last live link on this page – titled "Sign in using FRN and password". That takes you to the "FRN Sign In" page, which looks like ***Figure 3***, below.

(Note that you can get to the FRN Sign In page directly at https://stationaccess.fcc.gov/login/.) Enter the licensee's FRN – that would be the FRN associated with the stations whose files are to be uploaded – and related password. Click on "Sign In" and the next thing you should be seeing is the "My Stations" screen that looks something like this ***Figure 4*** (on the next page — we've highlighted with descriptive boxes the two line items that you'll be needing in particular).

Figure 2

We have smudged out the specific details of the particular licensee's two stations whose information we used to access these screens for demonstration purposes. Yours should clearly identify each station by call sign, FIN, community and channel. (It may also include a station logo.) The last datum listed for each station is that station's passcode.

Copy and paste each station's passcode into a separate document for future reference. Yes, yes, Luddites may choose to transcribe them by pencil and paper, the old-fashioned way, but be careful – each passcode is a combination of letters and digits, and it may not be all that easy to tell, say, a zero (0) from a capital O, or a lower case L from Arabic numeral 1. Copying and pasting avoids any misreadings.

Figure 3

With the passcodes, you're now ready to go back to the Facility Sign In page and get started.

Before moving ahead to uploading issues/programs lists, permit us a couple of observations about the passcode system.

As noted above, the FCC has designed the system, with input from multi-station licensees (among others), to provide licensees with a reasonable measure of security. Presumably, at the station level there will be multiple staffers – including management-level and, possibly, non-management-level folks – who you'll be counting on to get necessary materials uploaded. Obviously, each of them will need to have relatively easy access to the necessary passcode.

But the need may arise to change a station's passcode – for example, an employee familiar with the code leaves the station's employ, and you want to make sure that his/her access to the file is immediately terminated. All the licensee need do in that case is get back to the "FRN Sign In" page, from there access the "My Stations" page, find the station whose passcode you want to change, and click on the "Generate New" button at the bottom of the station's information list. The FCC's system will immediately give you a new passcode for that station. Copy/paste and distribute that new code to employees who still should have access to the file, and you're all set.

The Commission's system does not permit licensees to designate their own personalized passcodes. That's probably for the best. The apparently random passcodes generated by the FCC's system are likely far more secure than whatever a licensee might come up with. And in this case, security should be an overriding concern.

Under the old non-online public file system, anyone trying to mess with the contents of a station's file would have had to deal with physical barriers (doors, locks, file cabinets, etc.) and personal barriers (receptionists, other personnel) before he/she had any hope of actually getting to the file. Under the new online system, someone bent on mischief needs only two pieces of information – the station's FIN and its passcode – to get into the file from anywhere, any time of the day or night. The FIN is easily obtainable (through CDBS and elsewhere). So heavying-up on the security of the passcode is obviously the desirable, if not necessarily the most convenient, approach.

Now, how about uploading an issues/programs list?

If you're a TV licensee (at least as we're using the term here), you'd better get used to it: your quarterly issues/programs lists, once consigned to the comfortable privacy of your on-site local public inspection file, will soon be available for review anywhere, anytime, by anyone with an Internet connection. If you're absolutely, positively 100% confident that

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your lists would pass muster if subjected to rigorous scrutiny, congratulations. You may not need to read further.

But if you haven't really thought too much about your lists for a couple of years and are concerned that they could use some spiffing up before their online debut, read on. Our goal here is to provide some guidance about (a) the Commission's specific requirements relative to issues/programs lists and (b) how to get your next list uploaded to the FCC's online TV public file system.

Important reminder: for TV licensees, the next issues/programs list is required to be uploaded to the FCC's online public file system no later than OCTOBER 10, 2012.

What goes into an issues/programs list?

The specifics, such as they are, are set out in the Commission's local public inspection file rules (Section 73.3526 for commercial licensees, 73.3527 for noncomm's). Here's what the rules require TV licensees to place in their public inspection files:

> [E]very three months a list of programs that have provided the station's most significant treatment of community issues during the preceding three month period. . . .The list shall include a brief narrative describing what issues were given significant treatment and the programming that provided this treatment. The description of the programs shall include, but shall not be limited to, the time, date, duration, and title of each program in which the issue was treated.

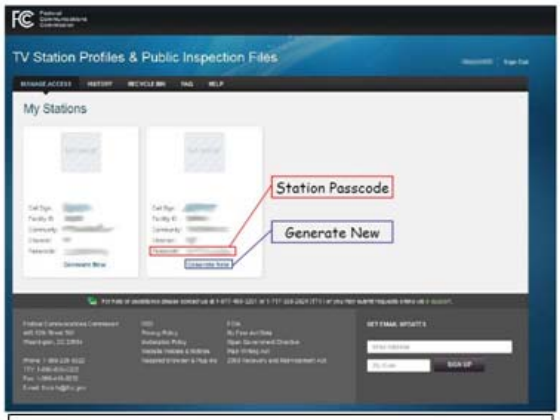

Figure 4

So your list must include, at a minimum, a "brief narrative" describing (a) the "issues" to which the station gave "significant treatment" during the preceding quarter and (b) the programming that "provided this treatment". The description of the programming must include, *at a minimum*, certain nitty-gritty specifics about the broadcast of the programming – time, date, duration and title.

Note that, according to the rules, the issues/programs list need not include ***all*** of a station's issue-related programming, but rather just the "programs that have provided the station's most significant treatment of community issues." What does any of that mean – "significant treatment", "community issues", "programs"? That's generally your call to make as licensee, but be prepared to be second-guessed by critics who may have other ideas about what you coulda/woulda/shoulda been doing.

While the rule refers to "programs", it does not prohibit inclusion of PSA's which, in the eyes of some, may not amount to full-fledged "programs". If a station has devoted a considerable number of PSA's to one or more "community issues", it would probably be well-advised to include reference to those PSA's in the list. Historically, the Commission has suggested that a station may not rely solely on PSA's to meet its supposed obligation to address local issues, but that doesn't mean that a licensee with a substantial PSA effort cannot and should not claim credit for that effort.

Along the same lines, the term "programs" would *not* necessarily bar you from relying on news coverage of particular issues, including election campaign coverage.

The rules do not mandate any particular format for the presentation of these data. You can use lists or narratives or collections of documents or any other mechanism you like, as long as the end result contains the specified information. How long should the list be? That, too, is your call – but bear in mind that the list is supposed to reflect the programming through which the station devoted the "most significant treatment" to community issues. The shorter the list, the easier it will be for critics to suggest that the station hasn't really been serious about "treating" community issues, whatever that means.

Once you have your list compiled, what do you do with it?

First, you will need to have the list in some digital format. If you simply type it up using Microsoft Word, you'd have it in as a .DOC document. If your list includes copies of programming records prepared in the course of production and broadcast, those might need to be scanned into .PDF documents, or possibly assembled into a single .PDF item. Some licensees may prefer using an Excel spreadsheet (*i.e.*, .XLS) approach. The FCC's system is supposedly designed to accept documents in any of the following file formats: .DOC, .DOCX, .HTM, .HTML, .PDF, .PPT, .PPTX, .RTF, .TXT, .XLS or .XLSX. Whatever format you use, make sure that you can locate the component file(s) on your local computer drive(s) easily.

According to the FAQ page at the FCC's online public file site,

> [s]tations must upload electronic documents in their existing or native format to the extent feasible. For example, if a required document already exists in a searchable format - such as the Microsoft Word .doc format or a non-copy protected text-searchable .pdf format for text filings, or native formats such as

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spreadsheets in Microsoft .xml format for non-text filings - broadcasters are expected to upload the filing in that format unless they are technically unable to do so.

It's hard to tell exactly what that means, and it's also hard to say that the FCC is in a position to enforce whatever it might mean – since the regulatory impact of an FAQ presumably lacks at least some to the clout of, like, an actual rule. Still, it appears that the Commission expects uploaded documents to be "in a searchable format".

Note that the FCC has *not* mandated any particular file-naming convention. However, it's always good to name your files in a way that allows the reader to figure out easily what's in the file. (For example: [CALL SIGN].Issues-Programs List.[Quarter].[Year] should do the trick.)

Once you've got the list ready to upload, access the station's online public records file. When you have successfully logged in, you'll see a screen that looks like ***Figure 5.***

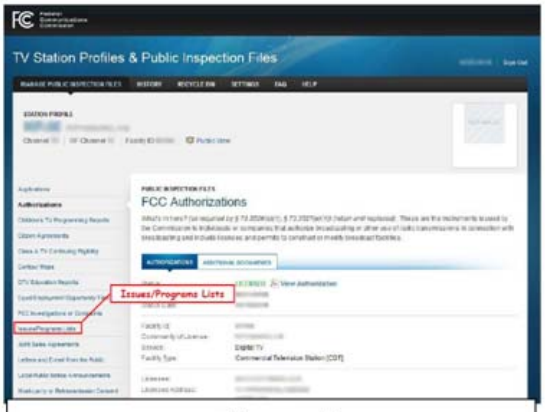

Figure 5

In the menu options running down the left-side of the screen, click on "Issues/Programs Lists". (We've helpfully highlighted it in red in *Figure 5*.) That should take you to a screen that looks like ***Figure 6.***

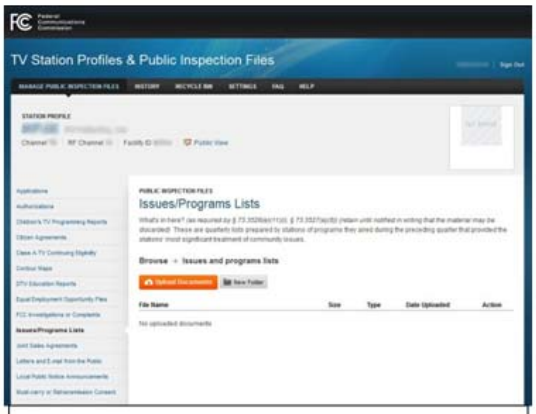

Figure 6

Click on the red/orange-ish "Upload Documents" button in the middle of the screen. That should take you to a screen that looks like ***Figure 7.***

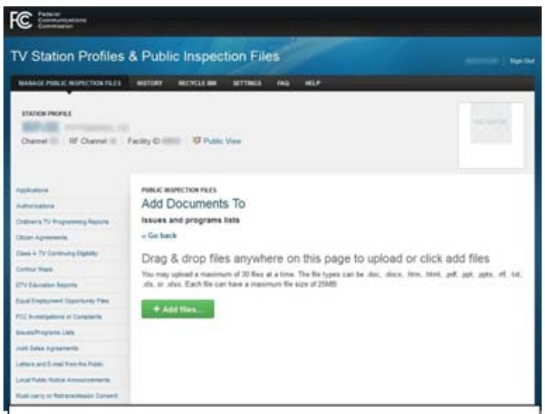

Figure 7

Click on the green button labeled "+ Add files . . ." in the middle of the screen. The system will then allow you to browse through your local computer drives to locate the file(s) that will comprise your quarterly issues/programs list. Once you have located those files in your local drives, you can simply drag and drop them into the page on the FCC website.

We understand that the FCC's system will then take a couple of minutes to process your upload. Exactly what that processing entails is not entirely clear, but don't be surprised if the uploaded file does not instantaneously show up in your online public file. Still, it would be prudent to check back in on your station's file – from either the public or non-public side – within a couple of hours to confirm that the upload was completed and that the file(s) you meant to upload did in fact get successfully uploaded.

Good luck.

A couple of miscellaneous observations about uploading issues/programs lists.

This is the first deadline that requires ALL TV licensees to upload a particular item by a particular date. There will be others down the line, but this is the first time that the Commission's online public system will be tested with an industry-wide in-rush of uploads. Because of that, some hiccups in the system may occur. Be patient.

Also, note that, on the FCC's online public file homepage, there is a constantly updated list of materials that have been uploaded to the system. When there is lots of upload activity going on, any particular station's upload will likely appear on that list for just a couple of minutes. When activity is lower, uploads may remain on the list for a couple of days. Our guess is that, on October 10, the amount of time any station's upload will stay visible on the FCC's online list will be minimal, if that makes a difference to you.

Finally, let's not lose sight of the oddity of the issues/programs list. While the rules do indeed require the quarterly preparation of those lists, the rules do ***not*** require that stations in fact air programs that "treat", significantly or otherwise, "community issues". While the Commission has historically asserted that some such obligation exists, in fact you will look long and hard – and unsuccessfully – to find any such requirement in the

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Gettin' back down to bid-ness

Auction 94: 117 FM Allotments on the Block

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

If it's September, it's time to gear up for the next FM auction. In keeping with that recent tradition, the FCC has announced that, come ***March 26, 2013***, 117 new FM construction permits will be up for grabs through the usual auction process. Heads up, though: March 26, 2013 also happens to be the first day of Passover, and the Tuesday of Holy Week, and maybe even the probable day before regular season Major League baseball begins. So there's at least a chance that the date might move some (and if you'd support some such movement, you can file comments letting the FCC know). But one way or another, the gears have begun turning for the next FM construction permit auction.

You can find a link to a list of the available allotments on our blog (www.CommLawBlog.com). While the Commission refers to 117 "new" permits, that's not an entirely accurate description. Of the 117 permits, 26 are re-treads from earlier auctions: 22 are back again from Auction 93 (conducted last spring), two are from 2011's Auction 91, one hearkens back to Auction 70 (vintage 2007), and one goes all the way back to Auction 62 in 2006. The last two were sold back when, but the buyers defaulted. The other 24 didn't move off the lot when they were first put up for grabs.

Of the 117 permits, 26 are re-treads from earlier auctions. One goes all the way back to Auction 62 in 2006.

If you've followed the Commission's auction process, you know that there's plenty of paperwork to get out of the way before the bid paddles start going up on March 26 and the gavel starts coming down some time later. The first step? A request for comments on proposed procedures, upfront payments and minimum opening bids. Comments are due by ***October 10, 2012***, replies by ***October 24, 2012***.

It appears that the procedures the Commission has put out for comment don't contain anything different from past FCC broadcast spectrum auctions. Still, true auction aficionados should take a close look at the fine print to make sure that they're on top of the details. Also, if one or another permit on the list catches your eye but you think the minimum opening bid for that permit is too pricey, you can let the FCC know in your comments. (Be prepared to support your thoughts with "valuation analyses" and don't forget to include in your comments suggested amounts or formulas for reserve prices or minimum opening bids.) The FCC has created a special e-mail address – auction94@fcc.gov – to which comments or reply comments should be sent in addition to the standard FCC filing procedures.

True to form, the FCC's notice includes the standard four-paragraph disclaimer warning potential bidders that the government cannot guarantee that the spectrum at auction will actually work. While such disclaimers are regrettable – hey, if the government's going to sell you spectrum to use for a broadcast station, shouldn't you be able to assume that the spectrum will in fact serve that purpose? – *caveat emptor* is the way to go here: you don't want to end up like the guy in Auction 37 who spent more than $4 million on a permit in scenic Pacific Junction, Iowa, only to discover that the spectrum couldn't be used because it would interfere with nearby FAA communications. Oops. (Happy Ending, sort of: The Pacific Junction applicant ultimately got his money back, about six years *after* he paid it to the Commission.)

Given the FCC's bold-faced disclaimer, potential bidders should take the time and make the effort ***now*** to investigate thoroughly any permits they may have their eye on. As it has in previous, similar, notices, the Commission suggests that prospective bidders watch out for "anomalies such as site restrictions or expense reimbursement requirements", and that they also check out the availability of potential sites. A word to the wise: bidders should also be familiar with the rules regarding the National Environmental Policy Act, which can throw a monkey wrench into the best-conceived of plans.

Proposed starting bids go all the way from $500 (for Channel 240A in charming Dickens, Texas) to $75,000 (Channel 262A in scenic Lake Park, Florida). Gone, apparently, are the days of the six-figure opening bid. The vast majority of proposed openers come in under $10,000, and 14 of the permits are priced to move at a low, low $750. Don't assume, though, that the final bids will necessarily be in the same ballpark as the opening bids: it only takes two determined bidders to goose the price of any permit skyward.

Exactly one-third of all the permits are located in Texas or Oklahoma. But the remaining permits spread from Alaska to Florida and from California to Erie, New York (sorry, Hawaii and New England, no markets this time).

In assessing the potential of any of the CP's on the block,

(Continued on page 9)

FHH - On the Job, On the Go

October's shaping up to be a busy month.

On October 3, **Frank Montero** attended the Hispanic TV Summit in New York.

On October 4-5, **Kathy Kleiman** attended the Grace Hopper Women In Computing Conference in Baltimore, where she served as a facilitator in a Special Tech Entrepreneur's Lab Workshop. She also dispensed advice on trademark and incorporation to entrepreneurs.

If you missed **Kathy** in B-more, don't worry. You'll have another chance to catch her. She'll be in Toronto October 12-19 for ICANN45. On October 12 she'll be on a panel ("ICANN & Internet Governance: Security and Freedom in a Connected World"), and on Oct 17 she'll co-moderate a panel featuring Legacy Internet Protocol Address Owners (IP) and ICANN's Address Supporting Organization (ASO).

On October 4, **Kevin Goldberg** participated in the Legal Super Session at the Kentucky Broadcasters Association Annual Conference. **Kevin** (who was joined by the NAB's **Ann Bobeck**) helped impart "an extravaganza of information you need to know!" We bet you're sorry you missed it.

Next up on **Kevin**'s dance card: on October 27, he'll be appearing on a panel (Title: "The Devil's in the Contract") dealing with key provisions in freelance writing contracts. This is part of ScienceWriters2012, the conference of the National Association of Science Writers in Raleigh, North Carolina.

Frank Jazzo will participate in the "Ask a Lawyer: Legal & Regulatory Update, and the View from D.C." session at the Maine Association of Broadcasters 2012 Convention in Bangor on October 20.

And if you're already planning your end-of-year holiday schedule, don't forget to pencil in the Westmoreland Players' upcoming production of *A Christmas Carol*, set to run from November 30-December 16. Sure, Callao, Virginia (in scenic Northumberland County, convenient to Virginia's Northern Neck *and* Middle Peninsula) might not be right next door, but the troupe's website helpfully lists the theater's geographical coordinates (N 37.954388, W -76.578533 - no indication of whether they're NAD27 or NAD 83), presumably for those coming from afar. As you savor "Virginia's Best Community Theatre" (that distinction awarded by readers of the authoritative *Cooperative Living* magazine), be sure to keep an eye out for "Old Joe" and, separately, "Portly Gentleman 1". Our own **Alan Campbell** will be demonstrating his theatrical versatility (or maybe that would be his versatile theatricality) by taking on *both* of those plum roles. Yo, Alan – if you've got two roles, does that mean we're supposed to tell you to break *both* legs?

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don't forget the possible effect of the revisions to the "move-in" rules that took effect last year. Historically, an FM auction provided an opportunity for creative folks to figure out how an up-for-grabs channel in some obscure and distant community might be leap-frogged or hop-scotched into a more populous, and thus lucrative, situation. But in its "rural radio" decision in 2011 the Commission sought to slam the door on such things. As a result, FM auctions nowadays tend to be "what-you-see-is-what-you-get" affairs, with little if any post-auction jockeying of channels and communities.

The FCC's release doesn't mention bidding credits for new entrants, but in any FCC auction you must figure that such preferences will be available. Generally, a 35% bidding credit is available to bidders who own no other broadcast stations and a 25% credit is given to bidders who own three or fewer stations (provided that none of those stations is in the same market as the target auction permit).

Check back with CommLawBlog for updates.

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Commission's rules or in the Communications Act. (Indeed, a strong argument can be made that the Commission could *not* in any event impose such a programming requirement.)

In this context, the issues/programs list may be seen as a regrettable effort by the Commission to indirectly regulate that which it does not – and arguably cannot – regulate directly, *i.e.*, broadcast program content. Of course, the vast majority of broadcasters ***do*** provide plenty of important and useful programming devoted to local, regional and national issues, even though they are not technically required to do. And as long as they're doing that, stations should be sure to use their issues/programs lists to highlight their efforts.

Commission kiboshes hybrid digital/analog TV transmitter

No-Pix Six Nixed

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

Video-less TV, an idea embraced by a number of Channel 6 LPTV stations, has suffered a set-back. In August the FCC rejected a proposal by two Channel 6 LPTV licensees to use a digital transmission system that would have permitted them to transmit – in addition to their digital TV service – a separate audio signal receivable by analog FM radio receivers.

Spectrum-wise, TV Channel 6 sits immediately below the FM radio band. In pre-DTV NTSC analog technology, the video and audio components of the TV signal were separately generated (sometimes even through separate transmitters), with the audio located near the top of the band and using FM modulation. That meant that the audio of an analog Channel 6 station could be heard easily on most FM radios (which can normally tune down to 87.7 MHz).

Analog Channel 6 TV stations, both full and low power, reportedly enjoyed a boost in their audience size thanks to drivers tuning in on their car radios and joggers listening on their arm band radios. In fact, some Channel 6 LPTV operators found the FM radio audience so attractive that they programmed primarily to that audience, paying little attention to video. How little? We suspect that some didn't even have working video transmitters. (Cautionary note: It's not at all clear that audio-only transmission – or even audio with only a dribble of a video signal – complied with FCC requirements.) The Channel 6 audio business prospered in a few major markets, with a few stations reaching reportable Arbitron ratings levels.

Didn't the FCC tout digital TV as a way to introduce both more services and new services to the public?

The audio-only TV business has foundered in recent times, presumably because it was based on analog technology and could not co-exist with digital video. (That's because: (a) under the ATSC digital standard, the analog signal is no longer separate from the video; and (b) digital TV audio can't be received on FM radios – not even digital "HD" FM radios.) With virtually all full-power TV stations converted to DTV operation since 2009, and with a fast-approaching end-date for analog LPTV broadcasting, future prospects for video-less Channel 6 operations are not good. LPTV licensees recognize that it's difficult, if not impossible, to make a viable business plan when you're likely to hit a brick wall in only three years.

But where there's a will, there's often a way.

Transmitter manufacturer Axcera came up with something they call Bandwidth Enhancement Technology (BET), which combines a digital TV signal with an analog audio signal. A Channel 6 station operating with a BET transmitter can broadcast a DTV signal (combined audio and video) using most of its 6 MHz bandwidth, but still insert an analog audio signal in a little slice at the top of the band. Digital TV sets can receive full TV service, while analog radios can receive a separate audio service. Audio programming service can even be transmitted two ways at the same time – on the TV dot 2 stream (Channel 6.2) in digital format *and* on the BET stream in analog.

This innovative approach sounded like a winner to Venture Technologies Group (VTG), which proposed to install BET at two of its stations. After all, didn't the FCC tout digital TV as a way to introduce both more services and new services to the public? And doesn't the ancillary services rule (that would be Section 73.624(c)) encourage TV stations to "offer services of any nature, consistent with the public interest, convenience, and necessity, on an ancillary or supplementary basis." VTG saw its proposed use of BET as a win-win, increasing service to the public while providing a much-needed additional revenue source for LPTV stations struggling to survive without carriage rights on cable or satellite.

Sorry, the FCC responded, no deal.

According to the Commission, it has yet to adopt technical standards for the "hybrid" operation of a BET transmitter. The FCC claims that its rule (*i.e.*, Section 74.795(b)(1), which in turn references Section 73.682(d)) require that digital LPTV stations comply with ATSC standards, and ATSC standards require the use of 8VSB transmission throughout the entire 6 MHz bandwidth of a TV channel. Since the BET system uses part of that bandwidth to transmit an analog signal, it doesn't comply with the ATSC standard and thus can't be licensed, as the FCC sees it.

On top of that, the FCC was skeptical of VTG's claim that no interference would be caused to any other station. The Commission's skepticism arose because there is no established desired-to-undesired (D/U) signal ratio for hybrid-into-DTV operation – without that ratio, how can interference (or lack thereof) be determined? The FCC also noted that the probability of interference to co-channel DTV operations is higher than VTG let on, because VTG's proposal would not decrease digital power to offset the analog audio power and so could increase the total power of its Channel 6 operations

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by as much as 33%.

And all that stuff about favoring innovation and ancillary services? That doesn't matter to the Commission when you run the risk of interference. Application dismissed!

We checked out the FCC's reasoning. As far as conforming to all ATSC standards goes, that requirement appears in Section 73.682(d). We think the FCC's reasoning is a bit stretched, though, because Section 73.682(d) comes into play here only through Section 74.795(b)(1), and *that* section requires only that digital LPTV systems be "satisfactorily viewed" on consumer digital TV receivers that operate based on Section 73.682(d). In other words, while Section 73.682(d) is indeed mentioned in Section 74.795, that mention does ***not*** require the LPTV transmission system to comply with all aspects of Section 73.682(d). The whole point of the BET technology is to preserve satisfactory DTV viewing. The compression of the digital TV signal to carve off a sliver for analog audio is not supposed to impact TV reception on consumer digital receivers. If Axcera is right about that, then where is there any violation of Section 74.795(b)(1)?

We think the FCC's reasoning with respect to the effect of Section 73.682(d) here is a bit stretched.

Don't take our word for this: the FCC itself has expressly stated that digital LPTV stations do ***NOT*** have to comply with all aspects of Sec. 73.682(d). In the Report and Order adopting digital rules for LPTV stations, the FCC said:

> LPTV and TV translator stations are not required to comply with either Section 73.682(a) or (d). [That appears at Paragraph 163.]

and

> Digital companion channels to Class A stations will be licensed on a secondary, LPTV basis and at this juncture operation of companion channels will not be subject to the requirements of Section 73.682(d) of the rules. [This one's at Paragraph 165.]

(By contrast, the Commission also observed, also at Paragraph 165, that "Class A TV stations that choose to convert to digital on their existing analog channel will be licensed on a primary, Class A basis and their converted digital facilities will be subject to the requirements of Section 73.682(d).")

So it seems that, while digital Class A stations must comply with all aspects of with Section 73.682(d), LPTV stations only have to be receivable on consumer receivers.

What about the argument that there are no standards for measuring interference from hybrid stations? There the FCC is on stronger ground. There has never been a rulemaking on hybrid standards, so hybrid operation is not mentioned in the interference rules.

But what might happen in real life? The BET technology was designed to be compatible with digital TV operation. We talked to one of the leading industry engineers who helped develop the technology. We learned that, while there is little possibility of any damage to the host hybrid station itself (*i.e.*, the analog audio won't interfere with the digital TV signal of the same station), it is not as clear that there won't be any increase in interference to *other* Channel 6 stations. To avoid co-channel interference, more distance between Channel 6 stations might be required than would be the case without the analog carrier.

In our view, the FCC ought to give hybrid DTV technology like the BET system a closer look. That's particularly so given the FCC's relentless quest for more efficient use of all spectrum everywhere. The hybrid here is a "two-fer" – one TV station can provide two kinds of service. Why stifle that kind of creativity, innovation, and efficiency?

And, if the technology does work, it would not necessarily be limited to LPTV. At least one full-power station in Schenectady, New York found that its audience enjoyed listening to the audio from TV newscasts and talk shows that they could pick up in cars and while "puttering around the garage." That station pulled the plug on the service, however, because the licensee "didn't want to risk annoying" the FCC. Since 73.682 (d) plainly applies to full-service stations, approval of hybrid gear for such stations would require some adjustment on that end – but if the result is an increase in innovation and service, why not?

We hope that proponents of BET will conduct the necessary tests to show how much analog audio power is possible without adversely affecting any other station. Convincing the Commission that hybrid technology does not pose a serious threat of interference could open the door for that innovative technology. And that, in turn, could allow LPTV stations that have experimented successfully with some kind of audio-only service to continue to develop both that service and digital video programming, unthreatened by the impending end of analog LPTV. Moreover, enabling hybrid operation could provide analog Channel 6 LPTV stations an incentive to convert to digital operation sooner rather than later and to bring to the public the increased quality and quantity of services available with digital TV technology.

(Continued from page 2)

eNom, which sell domain names). Donuts raised $100 million in venture capital and applied for a whopping 307 TLDs, including .SHOP, .COMPUTER AND .FILM, in addition to .RADIO.

European Broadcasting Union (EBU) describes itself as a "well-known professional association of national broadcasters that negotiates and advocates for interests of public broadcasters in Europe." Created in 1950 and based in Switzerland, it is chartered as a not-for-profit association and an international non-governmental organization. It is also one of 700+ "sector members" of the International Telecommunications Union, which advise the ITU on technical standards.

In its application, each applicant is required to describe the mission and purpose of the proposed TLD as envisioned by the applicant. On that point the various applicants' respective proposed uses of .RADIO have a similar ring:

BRS would "provide all those interested, worldwide, in disseminating or seeking information, whether non-commercial or commercial, issues, news, culture, lifestyle, entertainment, sports or any other topic with a convenient & recognizable domain name that associate them and/or their information with On Air & Online (net) Radio."

Interestingly, the National Association of Broadcasters is not listed as supporting the EBU application.

Afilias proposes "an Internet space which will become the easily recognizable gathering place for existing and planned radio stations and podcasters to create trusted and easily accessible online content, and ease of access for people searching for specific topics or radio formats."

According to Tin Dale, the .RADIO TLD would be "attractive and useful to end-users as it better facilitates search, self-expression, information sharing and the provision of legitimate goods and services. . . . This TLD is a generic term and its second level names will be attractive to a variety of Internet users."

EBU would operate .RADIO "on behalf of the global Radio community, in order to provide it with a trusted and secure name space to facilitate its transformation into the next generation radio industry."

Despite any similarities, though, the offering of the domain names – a process ICANN calls the "roll-out" – would be quite different, depending on which of the four applicants prevails. Afilias, Tin Dale, and BRS all propose "open registrations" which would allow *any* company, organization or individual to register its second-level domains within .RADIO, for a fee. The EBU application, by contrast, promises a much more restrictive registration policy. Its initial registration period would be limited to existing broadcasters, trademark owners and others already engaged in "radio"-related activities. Specifically, EBU will consider the "radio community" to be:

1. Broadcasters' Unions
2. Licensed Radio Broadcasters
   - 2.1 International Broadcasters
   - 2.2 National Broadcasters
   - 2.3 Regional Broadcasters
   - 2.4 Local Broadcasters
   - 2.5 Community Broadcasters
3. Trademarks
   - 3.1 Trademarks used for radio related activities for example companies providing specific services, equipment, radio programmes, etc.
   - 3.2 Defensive registrations by non-eligible applicants
4. Internet radio
5. Licensed amateur radios and clubs
6. Radio professionals
7. Above categories for expanded name selection when not protected by trademarks.

Who will ICANN award the .RADIO TLD to?

In most TLD contests, ICANN's policies provide for an auction. However, the .RADIO situation is different. As noted, EBU opted for a "community-based designation" to represent and serve the worldwide community of radio broadcasters. This choice exposes EBU's application to close scrutiny by ICANN's special evaluation panel, but offers potentially high rewards. If EBU's application survives that scrutiny, its community application will take priority over other competing applications. No auction – .RADIO will be awarded to EBU.

But while EBU will allow US broadcasters to register in the .RADIO top level domain, is the EBU – and the governance it will be bring to .RADIO domain names and policies – truly serving, and representative of, the worldwide broadcasting community? According to ICANN's Applicant Guidebook, a community-based applicant must "substantiate its status as representative of the community it names in the application by submission of written endorsements in support of the application". All of EBU's members submitted letters of support, as did the Association for International Broadcasting and other international groups. But interestingly, the National Association of Broadcasters did *not* send a letter of endorsement and is *not* listed as supporting the application.

This absence raises questions. Is EBU the best representative of the U.S. broadcasting community? Will EBU serve U.S. and world broadcasters fairly and equally? These are key questions for U.S. broadcasters to be asking as soon as possible – and sharing their answers promptly with ICANN.

(Continued from page 3)

> [Enterprise liability] is distinct from the standards for "piercing the corporate veil" or finding an "alter ego" under common law . . . [E]nterprise liability does not seek to make a parent corporation liable for the actions of its subsidiary, but rather recognizes in appropriate cases that the parent is liable for its own actions as part of the overall enterprise that it has created and operated.

In reaching that decision, the FCC relied on a 40+ year old case (*Federated Publications, Inc.*) in which it had declared that a parent corporation was responsible for fines against the subsidiary licensee. There the FCC found that a parent entity should be deemed a statutory "holder of the radio station license" – in other words, a "licensee" in and of itself, simply because the parent was the sole stockholder of the licensee. Powerful stuff, but it gets worse. The Commission went on to say that

> [w]here absolute control over a subsidiary licensee corporation resides in a parent, the parent must be prepared to assume full responsibility for the operation of the station in accordance with the Communications Act. Power and responsibility cannot be separated for our purposes, whatever the particular rule may be in different fields of law.

So much for limited liability.

But the *Federated Publications* case went largely ignored, even by the Commission, for more than 40 years. And even when the FCC cited it in the 2010 Sprint/ICO "enterprise liability" decision, neither case became a standard part of the FCC's enforcement repertoire. During this time, "piercing the corporate veil" as used by the FCC meant "taking cognizance of the existence of a shareholder", not "holding the shareholder liable."

But now we have the *Telseven* case.

In justifying its decision to tap Telseven's individual owner for the obligations of the organization, the FCC – apparently abandoning its "enterprise liability" approach – described its action as "piercing the corporate veil". But the difference between the agency and judicial approach to "piercing the corporate veil" is not just semantic.

The FCC standard is dramatically lower than the typical judicial standard. For the FCC's purposes, in order to "pierce the corporate veil", all the Commission had to consider was whether: (1) there was a common identity of officers, directors, or shareholders; (2) there was common control between the entities; and (3) piercing the veil was necessary to preserve the integrity of the Communications Act and prevent the entities from defeating the purpose of statutory provisions.

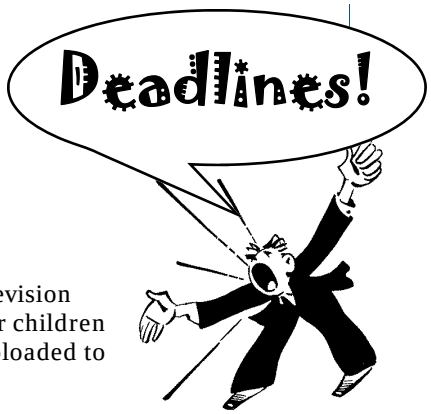
Mr. Hines satisfied the first two elements of the test simply by owning and controlling the company. The third element was satisfied, said the FCC, because the USF rules would be "circumvented" by Mr. Hines unless the Commission "looked through Telseven's corporate structure." But under this standard, pretty much *any* sole owner of a licensee entity, whether that owner is an individual or organization, would be vulnerable to "piercing the corporate veil" so long as the FCC can claim some regulatory interest in doing so. The FCC might not *choose* to do so, but after *Telseven* there does not appear to be much of a legal brake on its *ability* to do so.

Could poking holes in limited liability discourage investment in FCC-regulated companies, particularly if the hole-poking is performed pursuant to a less-than-crystalline standard?

To be sure, the FCC's patience may have been sorely tested by the facts of *Telseven*. Not only did Telseven dash down the bankruptcy hole shortly before the FCC could snag it, but Telseven's numerous violations appeared to be the result of bad faith rather than inadvertence. Furthermore, Telseven's business model had more than a whiff of the forbidden practice of "cramming" – placing unauthorized, misleading, or deceptive charges on a consumer's telephone bill. (The company offered "directory assistance" to consumers that called out-of-service numbers and then charged the call, at long distance rates, separately from the consumer's regular carrier charges—adding on, ironically, an additional charge for Universal Service Fund compliance costs.)

Perhaps, therefore, the *Telseven* case can be viewed as just a particularly strong reaction to a single apparently bad actor, and not the start of a trend. Nonetheless, the case raises questions that go to the very heart of corporate law and the legal meaning of what it means to be an FCC "licensee." It also raises policy concerns: Is it fair to expose sole owners of small and closely-held companies to personal risks that their larger corporate counterparts don't face? And, if limited liability is meant to encourage investment, couldn't poking holes in that limited liability discourage investment in FCC-regulated companies, particularly if the hole-poking is performed pursuant to a less-than-crystalline standard? An action that produces expedient results on the ground may have more far-reaching effects than intended.

October 10, 2012



Children's Television Programming Reports – For all commercial television and Class A television stations, the third quarter reports on FCC Form 398 must be filed electronically with the Commission. These reports then should be automatically included in the online public inspection file, but we would recommend checking. Please note that the FCC 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 uploaded to the TV online public inspection file.

Website Compliance Information – Television and Class A television station licensees must upload and retain in their online 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 during the past quarter must be placed in the station's public inspection file. Radio stations will continue to place hard copies in the file, while television and Class A television stations must upload them to the FCC's TV online public inspection file system. 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.

December 1, 2012

Digital Ancillary/Supplementary Services Report – Each licensee of a (1) *digital commercial or noncommercial educational full power television broadcast station*; (2) *digital low power television broadcast station*; (3) *digital translator television broadcast station*; or (4) *digital Class A television broadcast station* must file a Digital Ancillary/ Supplementary Services Report on FCC Form 317 by December 1 of each year to report whether it provided any such services during the past fiscal year, ending September 30, 2012. If so, the licensee must remit an appropriate fee, together with FCC Form 159.

Radio License Renewal Applications – *Radio* stations located in **Colorado**, **Minnesota**, **Montana**, **North Dakota**, and **South Dakota** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

Television License Renewal Applications – *Television* stations located in **Alabama** and **Georgia** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

Radio Post-Filing Announcements – *Radio* stations located in **Colorado**, **Minnesota**, **Montana**, **North Dakota**, and **South Dakota** must begin their post-filing announcements with regard to their license renewal applications on December 1. These announcements then must continue on December 16, January 1, January 16, February 1, and February 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be placed in the public file within seven days.

Television Post-Filing Announcements – *Television* and *Class A television* stations located in **Alabama** and **Georgia** must begin their post-filing announcements with regard to their license renewal applications on December 1. These announcements then must continue on December 16, January 1, January 16, February 1, and February 16. Please note that with the advent of the online public file, the prescribed text of the announcement has changed slightly. Also, once complete, a certification of broadcast, with a copy of the announcement's text, must be uploaded to the online public file within seven days.

Radio License Renewal Pre-Filing Announcements – *Radio* stations located in **Kansas**, **Nebraska**, and **Oklahoma** must begin their pre-filing announcements with regard to their applications for renewal of licenses on December 1. These announcements then must be continued on December 16, January 1, and January 16.

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Brrr - The Auction 94 FM Freeze is On

With Auction 94 now in the works (*see* related story on page 8), the Commission has – ***as of September 11, 2012*** – frozen:

- All applications proposing to modify any of the 117 vacant non-reserved band FM allotments scheduled for Auction 94 (currently slated to kick on next March 26);
- All petitions and counterproposals that propose a change in channel, class, community, or reference coordinates for any of the Auction 94 allotments; and
- All applications, petitions and counterproposals that fail to fully protect any Auction 94 Allotment.

Filings in any of the above categories that happen to be submitted after the release of the FCC's public notice will be dismissed. (Can't remember what channels are up for grabs in Auction 94? Check out www.CommLawBlog.com for a link to the full list.) This freeze will remain in effect until the day after the deadline for Auction 94 long form applications – which will likely be sometime in early Summer, 2013, at the earliest.

The freeze notice does ***not*** announce a freeze on any and all minor mod applications (for commercial *or* noncommercial stations) during the filing window for short form (Form 175) applications for Auction 94. (The Form 175 filing window hasn't been announced yet – look for that announcement in a month or two.) Such blanket freezes barring ***all*** minor mods during the Short Form window have been standard operating procedure in the last four FM auctions. Given that precedent, if you have a minor mod you'd like to file that doesn't fit into any of the three freeze categories noted above, you might want to plan on getting it filed before the opening of the Form 175 filing period, just to be on the safe side. Otherwise, your ability to file could be delayed by a month or more. Check back here for updates on the auction schedule.

Freezes like this are routine when it comes to broadcast auctions. The goal is to avoid the creation of any conflicts (unforeseeable or otherwise) with auction proposals that could muck up the auction process.

(Continued from page 14)

Television License Renewal Pre-filing Announcements – *Television* and *Class A television* stations located in **Arkansas**, **Louisiana**, and **Mississippi** must begin their pre-filing announcements with regard to their applications for renewal of license on December 1. These announcements then must be continued on December 16, January 1, and January 16. Please note that, with the advent of the online public inspection file system for TV and Class A TV licensees, the prescribed text of the announcement has been changed slightly from that of previous renewal cycles.

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. TV stations must upload the reports to the FCC's online public inspection file system. 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.

Noncommercial Television Ownership Reports – All *noncommercial televisio*n stations located in **Alabama**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island**, and **Vermont** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically.

Noncommercial Radio Ownership Reports – All *noncommercial radio* stations located in **Colorado**, **Minnesota**, **Montana**, **North Dakota**, and **South Dakota** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

(Continued from page 1)

statement at all times. Sophisticated political campaigns keep a close eye on how much time their opponents buy and how much they pay for the time.

In addition to information on the classes of time that may be purchased and the rates that will be charged for each class, the disclosure statement should include information on how and when preemptions may be made, payment policies, and any other station policies that could reasonably affect political advertising buys.

Any discrepancies between the rates or access given to different candidates will almost certainly subject a station to complaints. For those stations already subject to the FCC's new online political file rules – those would be the affiliates of the Big Four Networks in the top 50 markets – this is all the more true this year. With this information being posted online, it is more readily available than ever. Stations also may now be subject to complaints not only about the rates and access they are granting but also about the sufficiency of the information they are posting to their online political files.

At this late stage of the game it's also important for stations to keep up with the paperwork burden involved with political advertising.

How much?

As part of preparing the disclosure statement, each station of course needs to determine the "lowest unit charge" (LUC) to which qualified candidates are entitled. Calculating the LUC can be tricky. Simply stated, the LUC is "the lowest rate of the station for the same class and amount of time for the same period." Put another way, it is the rate for any given class of time granted to the station's most favored advertisers once all discounts, bonuses and other considerations have been taken into account. Keep in mind that most stations will have several different LUCs because they sell several different classes of time (different day parts, preemptible/non-preemptible, etc.).

Not all political advertising is entitled to LUC rates. As a threshold matter, LUC rates apply only during the "LUC windows". For this year's general election, the LUC window is currently open, and will run through the day of the general election (November 6, 2012). During the LUC rate window, the LUC rates must be offered to all qualified federal candidates and their authorized committees and all qualified state and local candidates and their authorized committees (assuming the station has decided to run ads for that particular state or local office).

To qualify for the LUC rate, the advertising must include a "use" of the broadcast station by a qualified candidate (a "use" is defined as any "positive appearance of a candidate whose voice or likeness is either identified or is readily identifiable"). In addition, to qualify for LUC rates, federal candidates must meet the "stand by your ad" certification requirements described below. Advertising that is not sponsored by a qualified candidate (*e.g.*, issue ads run by political action committees, "Super-PACs," so-called 527 groups, or other organizations) is ***not*** entitled to LUC rates.

The job's not over until the paperwork . . .

At this late stage of the game it's also important for stations to keep up with the paperwork burden involved with political advertising. Stations must keep a political file (which is an essential component of the station's public inspection file) that includes records of ***all*** requests for political time made by or on behalf of any candidate. As noted above, starting this year, Big-4/Top 50 stations must maintain their political files online as part of the FCC's new online public file system (other stations will not need to post the political portions of their files online until 2014).

The political file records (whether maintained on paper or online) must include:

the name of the candidate and office involved;
whether or not the request was accepted;
the schedule of time provided;
the spot length;
the classes of time purchased;
the rates charged;
the date and time the spots actually aired;
the name, address and telephone number of a contact person for the candidate/committee, along with the name of the authorized committee treasurer; and
the rebates paid to the candidate (if any).

As the station is obligated to keep these records and make them available for public inspection, it must be certain that all relevant staff members are aware of the obligation to collect and keep this information starting when an inquiry for political advertising time is made (although mere rate inquiries do not need to be recorded). Moreover, these records must be continually updated as relevant information develops (*e.g.*, when the spots are run, etc.).

In addition, broadcasters must now keep records of all paid political advertising that "communicates a message relating to any political matter of national importance." This requirement applies to ***all*** political advertising, not just candidate advertising. Thus, even though non-candidate advertisements are not subject to reasonable access, equal opportunities or LUC rate requirements, they ***are*** subject to this recordkeeping requirement.

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The records of such ads must include:

a record of each request to purchase time;
whether or not the request was accepted;
the rate charged;
the date and time the ad(s) aired;
the class of time purchased***;***
the issue covered by the ad(s);
the name of the candidate and office to which the ad(s) refer(s) (if applicable); and
the name of the purchaser, the name, address and telephone number of a contact person and a list of chief executive officers/board of directors.

Again, relevant station personnel must be made aware of their responsibility to collect the relevant information when requests for air time are made.

Finally, candidates for ***federal*** office must provide to the station a particular written certification ***at the time the advertising time is purchased.*** In this "stand by your ad" certification, the federal candidate must certify whether or not the advertising will refer to another candidate for the same office. If the ad will refer to an opposing candidate, the certification must also state that at the end of the ad a statement will be included in which the candidate identifies himself or herself as well as the office being sought and affirmatively states that the candidate has approved the broadcast. Television ads also must include an image of the candidate and a printed statement that the candidate or the candidate's committee paid for the broadcast, the name of candidate, and that the candidate approved the broadcast. The FCC has advised that stations may (but are not required to) deny LUC rates to federal candidates that do not meet the "stand by your ad" certification requirements.

The political advertising rules are notoriously complex and a station's compliance with the rules typically depends on the specific facts at hand.

Recent Developments

As discussed above, the most important recent development in political broadcasting, at least for those stations to which it applies, is the limited implementation of TV online public file requirements. Another issue that appears to raise its head every year is the issue of who is a "legally qualified candidate." As noted above, stations must accept ads from such candidates and, important, they cannot edit or censor the content of these ads. A number of candidates in recent years have attempted to take advantage of these provisions to force stations to sell them time to air highly controversial advertisements. In a decision earlier this year related to advertising in the Super Bowl®, (which we described in the February, 2012 *Memo to Clients*), the FCC reiterated its policy that to qualify for "reasonable access," a candidate must make a "substantial showing" that they are a legally qualified candidate.

At this point, many states have their ballots already set, which may presumptively qualify a candidate, but stations should be aware of the requirements for legally qualified candidates, and, most importantly, should keep in mind that regardless of the content of those "legally qualified candidates" advertisements, they cannot censor or edit them (although they can run a disclaimer before and/or after the ad noting the station's inability to edit it). Stations should also keep in mind that even for candidates who are not entitled to "reasonable access" (*i.e.*, state and local candidates), the "no censorship" requirements apply, although the station in those cases may be free to refuse to run the ad entirely, subject to equal opportunities requirements.

Another recent development that probably will not have a significant impact this year but could in the future is a decision from the Ninth Circuit United States Court of Appeals, released in April, that overturned the longstanding ban on political advertising on non-commercial television stations. (We reported on that decision in April, 2012 *Memo to Clients*.) That decision, however, has not yet gone into effect, so non-commercial stations should still abide by the prohibition on advertising. The ultimate resolution is also still up in the air, as the FCC and Justice Department have requested rehearing. Even if advertising is ultimately approved, non-commercial stations should remember that they are not required to accept such advertising – the "reasonable access" requirements do not apply to non-commercial stations. If they ultimately do decide to accept political advertising, however, stations will need to familiarize themselves with the other myriad and complex rules governing such advertising.

There's more where that came from . . .

As mentioned above, the political advertising rules are notoriously complex and a station's compliance with the rules typically depends on the specific facts at hand. Many of the areas discussed above give rise to their own subsets of particular questions which can generally be answered only with specific reference to specific factual settings. This summary of the station's requirements is, necessarily, brief and superficial. It's intended to provide a mid-campaign reminder of the various considerations on the table when it comes to political advertising.

As stations' managements and sales staffs review and implement their political advertising policies, disclosure statements, LUC rates, and political files, they should consult early and often with local election officials, your state broadcasters association, the NAB and, of course, their friendly neighborhood communications lawyers.

War of the Words (with apologies to H.G. Wells)

Coalition Urges Greater Alien Welcome

By Donald J. Evans
evans@fhhlaw.com
703-812-0430

Hot on the heels of the FCC's recent liberalization of the restrictions on alien ownership of common carrier licensees, a group dubbed the Coalition for Broadcast Investment (the Coalition) has filed a petition seeking similar leeway for broadcast licensees. (If you missed the FCC's common carrier decision, you can catch up with it on our blog at www.CommLawBlog.com.) The Coalition is an ad hoc group comprised of minority-oriented station owners as well as some of the largest multi-station group owners in the country. The Coalition's petition is styled as a "Request for Clarification" of the Commission's policy with respect to alien ownership of broadcast stations, but it's effectively a petition for a declaratory ruling on the issue presented.

Readers may remember that in August the FCC released an order designed to clarify the power of the Commission to authorize significant indirect, non-controlling foreign interests in common carrier licensees. The August order addressed the fact that, as interpreted by the FCC, Section 310(b)(3) of the Communications Act bars aliens from indirectly owning 20% to 50% of a radio licensee but Section (b)(4) permits indirect alien ownership – with prior FCC approval – of *controlling* interests in radio licensees. The FCC dealt with this odd anomaly by "forbearing" from enforcing the Section 310(b)(3) restriction on non-controlling alien interests.

There were two catches to this solution.

First, the FCC's authority (found in Section 10 of the Communications Act) to forbear applies only to *common carrier* licensees – not broadcasters. So even if it had wanted to, the FCC could not have ceased enforcement of the non-controlling interest prohibition as it applies to broadcasters. But there's the rub: as far as we can tell, the FCC didn't *want* to allow greater alien involvement in broadcast licensees. It has traditionally refused to countenance even non-controlling alien ownership interests of greater than 20% in broadcast licensees. This despite the fact that Section 310 (b)(4) of the Act expressly grants the Commission the discretion to make a determination as to whether control of broadcast licensees by aliens is in the public interest or not. This broadcast-specific xenophobia seems to have been rooted in the classic sci-fi conceit that aliens, through their insidious control of broadcast stations, could take over American brains and, thereby, American society – with generally unpleasant consequences for all of us.

But now the Coalition, representing a broad sample of American broadcast entities, has decided that the time has come to revisit this policy.

The relief sought would be a solid step in the direction of rationalizing and regularizing the treatment of aliens under our communications laws.

The Coalition's petition requests that the Commission declare that, rather than simply closing its ears to any petitions for alien control of broadcast licensees, it should now conduct a case by case review of whether such ownership is in the public interest – as the statute has always contemplated and allowed. In support of this change in policy, the Coalition points to a number of persuasive factors: the diversified and fragmented media market that now diminishes the potential dominance of broadcast stations; the significant benefits to the industry which would accrue from foreign investment in broadcast stations; and the current U.S. policy which in all other spheres of the economy *encourages* offshore investment in US assets.

Of course, even if the FCC were to agree with the Coalition here, aliens would still be left without the right or opportunity under any circumstances to own greater than 20% non-controlling interests in broadcast licensees, since, as noted above, the forbearance action taken by the Commission for such interests does not cover broadcast licensees. Still, the relief sought by the Coalition would be a solid step in the direction of rationalizing and regularizing the treatment of aliens under our communications laws.

The Coalition petition was filed on August 31. As of press time, the Commission had not yet requested public comment on it. Check back with www.CommLawBlog.com for updates.

Yup, we're late again — by about a week — in getting the September, 2012 issue of the *Memo to Clients* out the door . . . and we're sorry. The editorial staff encountered some unexpected medical problems that interfered with our usual timeliness, much to our chagrin.

But here it is, better late than never. We aim to get back on track with the October issue, and we thank our readers for their patience in the meantime.