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Memorandum to Members



Supreme Court? Not now, maybe later

Fox v. FCC: FCC Concentrates And Asks Again

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As we reported in last month's *Memo to Clients*, the U.S. Court of Appeals for the Second Circuit overturned the FCC's indecency enforcement regime as unconstitutional. That left the FCC with only three options if it wanted to fight to defend its indecency regime. It could either: (1) go back to the three judges who rejected the policy, trying to convince them that they got it wrong; or (2) ask the entire *en banc* Second Circuit (which includes ten active-service judges) to reverse the three-judge panel's decision; or (3) go for broke and ask the U.S. Supreme Court to review the case. (Obviously, abandoning the indecency regime was also a fourth option, albeit not one the FCC was likely to embrace).

Late in August, the FCC made up its mind: it's going for Options (1) and (2), leaving for another day (and maybe another case) the possibility of Supreme Court review of

indecency enforcement.

According to the FCC's petition for rehearing, the Second Circuit panel's *Fox* decision went too far in overturning the entire indecency enforcement regime. The Commission asserts that the panel's conclusion – that the FCC's overall indecency policy is unconstitutionally vague – is inconsistent with earlier decisions by the Supreme Court, the D.C. Circuit, and even the Second Circuit itself. The Commission argues that the *Fox* decision rejects the "contextual approach" to indecency analysis the FCC has used in the past – and that, by so doing, leaves the Commission with no way to enforce the federal laws prohibiting indecent broadcasts.

The Second Circuit went too far in overturning the entire indecency enforcement regime, says the FCC.

As the FCC sees it, the Second Circuit panel should have focused narrowly on the particular facts of the case before it and should have assessed the FCC's analysis of those facts, nothing more and nothing less. Instead, at least according to the Commission, the panel considered other facts and circumstances involving other cases to reach its conclusion that the overall indecency policy – not merely that policy as applied to the *Fox* facts – was too vague. But, the Commission argues, there is nothing vague about the notion that "fuck" and "shit" – the words uttered by Cher and Nicole Richie in the *Fox* broadcasts at issue – are indecent; accordingly, even if there might be some question about whether other material might or might not be deemed "indecent", the same cannot be said of the particular material before the court.

The Commission gussies up this argument with a discussion of the standards for when a rule is "vague" as a constitutional matter, although that discussion includes, at most, only passing mention of the different "overbreadth" standard often used in First Amendment cases. Suffice it to say that, whatever the other merits of the Commission's argument on this point, it presupposes that the language at issue here was, in fact, "indecent". But since the Commission

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Tick Tick Tick . . .

Enforcement Shot Clocks Put Pressure On FCC Enforcement Actions

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Let's say you're a licensee on the wrong end of one (or more) of the several hundred thousand (or more) complaints sitting in piles in the Enforcement Bureau, awaiting some kind of action. You might be frustrated by the glacial pace of the FCC's processes – after all, many of those complaints have been pending for years.

But wait – there may be a silver lining to that slow-moving dark cloud hanging over you.

Federal law – 28 U.S.C. §2462, if you care to look it up – requires that lawsuits to enforce a civil fine, penalty or forfeiture be initiated within five years after the underlying claims accrue. In other words, if the government's got a claim against you, they've got five years to use it or lose it. The good news is that this "statute of limitations" could shield you from financial penalties even if the FCC eventually decides that you violated FCC rules.

Much of the credit for this potential benefit goes to the byzantine procedural maze the FCC must navigate before it can even start to think about suing a broadcast licensee.

The process generally starts when the Commission receives a complaint about an alleged rule violation, or possibly turns up a violation on its own during a field inspection.

The first step is for the Commission (or one of its Bureaus) to issue a Notice of Apparent Liability (NAL) describing the alleged violation and proposing a penalty amount. The NAL gives the licensee a chance to tell its side of the story. If that story doesn't convince the Commission to back off (and it almost never does), the next step is a Forfeiture Order recapitulating the facts, addressing any arguments raised in the licensee's response to the NAL, and ordering payment of the fine within 30 days.

Just because the FCC "orders" a licensee to pay, the licensee doesn't have to pony up. Instead, it can sit back and do nothing, and the FCC cannot hold that against the licensee. Rather, the burden is then on the Commission to refer the matter to the Department of Justice (DoJ) to sue the licensee for the amount of the fine. And get this – the trial is what they call "*de novo*", which means that the burden is on the government to go back to square one and prove that the licensee really did violate the rules. The licensee, in turn, gets to challenge every element of the FCC's case.

Obviously, this multi-step process tends to drag on, with extended delays possible at each step of the way. The final step – *i.e.*, convincing DoJ to sue – is often the ultimate roadblock, since DoJ tends to have better things to do with its scarce litigation resources than to file nickel-and-dime lawsuits for petty violations of obscure regulations.

Working against the FCC all along the way are two statutes of limitations.

The first limits the time within which the FCC may issue an NAL. The Communications Act (47 U.S.C. § 503(b)(6)) specifies that the FCC can **not** issue an NAL to a broadcast licensee for conduct which occurred either (a) more than one year prior to the NAL or (b) prior to the commencement of the licensee's current license term, whichever is earlier. The first aspect of that limit – the one-year cap – is straightforward. The second aspect not so much. A licensee's "current" license term extends until its next renewal application is granted. That means that the FCC can avoid the one-year limit on NALs simply by sitting on the renewal applications of stations

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Contest faux pas: a day early, \$4K short – Back in June 2008, a Maryland FM station jumped the gun on its own contest and it's going to cost them \$4,000, according to the Enforcement Bureau.

The station's heart was obviously in the right place. In the weeks prior to Father's Day, the station invited listeners to send in photos of their dads, with one entry to be chosen for the grand prize. The "official rules" and on-air promos provided that the contest would run "through June 13" (the Friday before Father's Day 2008). But the rules also provided that the winner would be selected on June 13, and promos for the contest indicated that each daily drawing would be announced at 7:20 a.m. Although the promos claiming "through June 13" suggested that entries could be submitted all day long (possibly even up until 11:59 p.m., at least as a technical matter), the fact that a drawing was to be conducted during the day on June 13 gave the contrary impression that the cut-off might be earlier in the day than that. The fact that daily winners were to be announced at 0-dark-30 indicated that the cut-off time would logically have to be no later than 0-dark-29.

So when was the real deadline on June 13? An interesting semantic conundrum, to be sure, but not one that the FCC needed to worry about. That's because the station ended up conducting the final drawing on June 12.

The FCC's rule on "licensee-conducted contests" is very straightforward. First, a licensee must "fully and accurately" disclose all "material terms" of their contests in on-air announcements, promos, advertisements about the contest. Second, a licensee must conduct their contests "substantially as announced or advertised".

The Maryland FM station's case was thus a no-brainer. Listeners had been given repeated indications that they could enter the contest at least sometime on June 13 and still be eligible to win. But that was clearly wrong if the final drawing was held on June 12. In other words, the contest was not conducted "substantially as announced". And sure enough, a would-be contestant tried to enter after 7:20 a.m. on June 13, was told that the winner had been picked the day before, and was immediately transmogrified from "would-be contestant" to "disgruntled complainant".

That'll be \$4,000, please – make your check payable to the FCC. Thanks for your business.

This case is a routine reminder of a simple but important point. If a licensee is going to conduct contests, it should plan them out, implement them, and document them carefully, with an eye to complete and accurate

disclosure of all "material terms" and implementation of all contests consistently with the announced rules. A licensee's planning must include attention to each and every seemingly mundane detail. For example, a little more attention to the practical question of exactly when the final drawing would be conducted – and, therefore, when the last eligible entry would be accepted – would presumably have alerted the Maryland station that promoting the contest as running "through June 13" was a mistake.

This is particularly important because, by their very nature, contests give rise to (a) a limited universe of "winners" and (b) a substantially greater universe of "losers". And disappointed losers are likely to direct their disappointment to the station – especially if they have reason to believe that the contest was not conducted as represented. In other words, when a station runs a contest, it is creating an army of potential complainants. And, as the case described above demonstrates, it takes only one complainant to get the FCC to punch your \$4,000 one-way ticket to Forfeitureville. That should be motivation enough to dot all those I's and cross all those T's when it comes to conducting a contest.

FM station without a studio – In February 2009, the FCC – responding to a complaint – sent an inquiry to a Florida station requesting "information regarding its EAS equipment". Who do you suppose

might complain about a station's EAS gear? Who would even *know* about a station's EAS gear? While the FCC's letter does not identify the complainant, our money is on that traditional suspect, the Disgruntled Former Employee, or possibly the Nosy Competitor. Either is more likely than Joe Member-of-the-Public, since (as we shall see below) the station did not have a studio and therefore would not have had the public passing through.

In any event, the station responded, admitting that it had not had any working EAS equipment for about two years. Needless to say, this piqued the interest of the FCC agents; a few weeks later they popped by the station to inspect its studio. Imagine their surprise when they found there wasn't any main studio to inspect. The agents tracked down the station's general manager and rang him up. He advised the FCC that the station's transmitter building was the main studio.

A couple of months later, the FCC inspected the purported main studio. When the agents arrived at the transmitter site they observed a well secured, locked gate around a building that had no people in it. The agents came back a few weeks later, but – here's a surprise – the transmitter site continued to be inaccessible

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Focus on FCC Fines

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Brilliant stratagem or craven sell-out?

The NAB's New Tack On The PRA

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Despite the fact that things on the Performance Rights Act (PRA) front remain quiet down on Capitol Hill, talk about the PRA has been burning up the trade press and the blogosphere lately. The reason? Reports that the National Association of Broadcasters (NAB) sat down with representatives from the music industry to discuss, among other things, the question of performance rights. Throw in a statement from an NAB spokesman alluding vaguely to “possible alternatives to pending legislation” (*i.e.*, presumably, the PRA), and you’ve got the grist for a blog-tastic free-for-all in which anybody and everybody has an opinion, even though most lack a complete picture of exactly what might be going on.

We have done our fair share of writing on the PRA (both in the *Memo to Clients* and on www.CommLawBlog.com), but it’s been a while. In the midst of the recent *sturm und drang*, it might be useful to clarify what we know and what we don’t know before the chatter gets out of hand.

Here’s what we know:

The PRA (H.R. 848 and S. 379) was introduced in Congress over 18 months ago. While H.R. 848 passed the House Judiciary Committee soon after introduction, neither bill has moved forward since. This is largely because there are more than 260 House Members on record as opposing a performance right applicable to over-the-air broadcasts. That’s a strong level of opposition – a factor which can be ascribed at least in part to a substantial lobbying effort by the NAB and broadcasters generally. Basically, despite years-long, high-profile efforts by the recording industry to secure some form of legislative relief on the performance rights front – efforts which have gained support from a number of influential legislators – the bill has been stalemated. That may be viewed as a success story for broadcasters.

But now the NAB appears at least to be considering compromise on the issue. Note that the NAB has *not*, to my knowledge, said that it *will* compromise on this issue, now or in the future. To the contrary, an NAB spokesperson has been quoted in the trade press as saying that the NAB has “reiterated its strong opposition to the pending bill in Congress”. But – and here’s a big “but” – the NAB *has* acknowledged “an ongoing dialogue with the Board and NAB membership on possible alternatives to pending legislation that would be devastating to the future of free and local radio . . . while agreeing that it is appropriate for NAB representatives to continue discussions with musicFirst.”

According to published reports, those discussions have

centered on:

- © a permanent, tiered royalty rate which would not exceed one percent of net revenue for any broadcast – permanent removal of Copyright Royalty Board jurisdiction over terrestrial and streaming royalty rates;
- © a reduction in those streaming rates;
- © the possibility of requiring radio chips to be installed on all new mobile phones; and
- © resolution of all ongoing issues regarding insertion of commercials into webcast.

Here’s at least some of the stuff we *don’t* know:

Let’s clarify what we know and what we don’t know before the chatter gets out of hand.

- © Would the tiered rate in the proposed agreement apply to royalties for over-the-air performances only or to over-the-air *and* internet/digital performances?
- © If the tiered rate were to apply only to over-the-air, how would the adjustment of internet/digital royalty rates occur? Would the reduction in streaming rates also be permanent?
- © If the CRB were to end up with no jurisdiction over terrestrial or streaming operations, but there was still some statutory license applicable to performances, who would oversee and implement it, especially if the rates aren’t permanent?
- © Would performance to a mobile phone with a radio chip be considered an over-the-air performance or a digital transmission (webcast)?

Obviously, these are all factors which could dramatically affect the extent to which any compromise might work to the benefit of broadcasters in the long run. It would therefore help to have a better handle on them – and many others – before we all start debating the wisdom of the NAB’s approach here.

Too late. That debate has already started.

Many broadcasters and their allies are expressing serious concern about *anything* that might be interpreted as a retreat on performance rights issues, and certainly NAB discussions with musicFirst (or any other recording reps) could be seen as a retreat. After all, broadcasters have in-

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credibly strong arguments here, arguments which they have brandished effectively. The mere contemplation of “alternatives” to the PRA suggests that the notion of *any* performance rights might be valid – and broadcasters (including the NAB) have argued convincingly that that notion is *not* valid.

Moreover, the argument goes, since when does it make sense to run up the white flag when you’re winning? If anything, the broadcast industry’s track record on the PRA front in Congress has been remarkably good. If you’ve got the enemy on the run, why try to negotiate a truce?

And finally, even if the NAB is on the right track here, some broadcasters question why the NAB hasn’t been a bit more forthright – “transparent”, to invoke a favorite FCC descriptive – with them. Having faithfully followed the NAB in its staunch resistance to the PRA, many feel seduced and abandoned upon hearing that the NAB may be getting in bed with the bad guys. This is especially so in view of the fact that many small radio licensees, in particular, may legitimately fear that any performance rights royalties could have a devastating effect on their bottom lines. Why shouldn’t they feel bitter and resentful if it looks like the NAB is now helping those fears become a reality?

While these broadcasters’ views are understandable and while I agree with their calls for transparency, let’s not lose sight of the fact that there may be some method to the NAB’s seeming madness. In particular, at the risk of appearing to defend the PRA (or any other performance rights claim) – *and let me stress here that I am **NOT** defending or endorsing anything of the kind* – I think a couple of things should be considered.

Are broadcasters’ arguments against performance rights claims valid? Of course they are. Will they stay that way forever? That’s impossible to say. Historically – up to and including today – performers and radio broadcasters have enjoyed a quasi-symbiotic relationship which has benefited both sides, thus eliminating any need for the strict debit-and-credit accounting called for by the PRA. But like it or not, technology and demographics and society all change. Let’s not forget that the FCC is pushing more and more insistently on the expansion of Internet capacity to serve as a common medium.

Suppose over-the-air radio listenership decreases and online listenership continues to increase (in part because people are listening via Internet in their cars or on their phones). And suppose that, in response, broadcasters shift their focus to more Internet-centric operations. And finally, suppose that a compromise is struck providing that performances to a mobile phone are to be considered digital transmissions (a/k/a “streaming”), rather than over-the-air broadcasting.

If the NAB were able – today, in advance of those changes – to reach an agreement with the recording industry that, in exchange for, say, 1% of net revenues for *over-the-air* performance royalties, royalties for *streaming* would be reduced significantly, that could be a boon for broadcasters in the foreseeable future. And if that decrease in streaming royalties were locked in for the long term, during which time over-the-air listenership continues to decrease and online listenership continues to increase – well, I’m not an economist, but I can envision that situation actually leading to an overall decrease in royalty rates over the long term.

What about calling a truce when the enemy’s on the run? The critics are right: it normally does not make sense to do that. But that’s not necessarily the situation we have here. What we have is more like a siege. Neither side is on the run; rather, both are deeply dug in for the long haul. Can broadcasters sustain the siege? Probably. Can the recording industry? Probably.

And that’s precisely the problem.

It might make sense for broadcasters to use their leverage to try to devise an endgame strategy that looks to the future.

A siege is expensive in many ways. It chews up resources and creates distractions that may impede progress in other arenas. And it goes on and on and on. In this case, the broadcast industry as a whole has spent, and continues to spend, an enormous amount of “political capital” in rallying legislators to its anti-PRA cause. In so doing, however, the industry has almost certainly lessened its ability to convince those same legislators to back other pro-broadcast measures. And that political capital is being spent *not* in a way which puts a permanent end to the threat, but rather in a way which merely tends to perpetuate the stalemate.

In these circumstances, it might make sense for broadcasters to take advantage of the leverage that their current superior position gives them to try to devise an endgame strategy that looks to the future. After all, there’s no doubt that the more than 262 co-sponsors of the Local Radio Freedom Act give the NAB a strong bargaining position.

To be sure, the NAB’s less-than-inclusive approach leading up to its initial talks with the recording industry has alienated a number of its erstwhile supporters. That alienation is regrettable. However, negotiations have to start somewhere, and often they require initiative from one or two players to get the ball rolling. Perhaps that’s what’s going on here. But the NAB disserves its members when it consults only with a select group on an issue of this magnitude, as it appears to have done to this point. If momentum builds, the NAB must, voluntarily or otherwise, find ways to include a more representative universe in the discussions (if you take one thing away from my particular take on the subject, I hope it is my call for increased transparency in the process and inclusion of “the

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This time, hold the stick

H.R. 5947 and S. 3756: A Couple More Orders Of Carrot

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The race is apparently on down on Capitol Hill to make sure that the FCC has the authority to share spectrum auction proceeds with licensees who are willing to give up the spectrum to be sold off, presumably for broadband purposes. Late last month we reported on S. 6310, the Kerry-Snowe bill introduced in the Senate, which includes a provision for proceeds sharing. Since then, Reps. Boucher (D-VA) and Stearns (R-FL) have tossed in the Voluntary Incentive Auctions Act of 2010 (H.R. 5947) which would accomplish the same purpose. Ditto for Senator Rockefeller (D-WV), who has offered S. 3756 on the Senate side. But, unlike the Kerry-Snowe bill, neither the Boucher-Stearns bill nor the Rockefeller bill contains word one about spectrum fees.

H.R. 5947 is short, sweet and to the point. It would give the FCC the authority (which it currently lacks) to share spectrum auction proceeds with any licensee who agrees “to participate in relinquishing voluntarily” its rights to the spectrum. While the bill leaves the precise mechanism for the sharing (as well as the amount or percentage of auction proceeds to be shared) to the Commission’s discretion, the Boucher-Stearns proposal makes one thing clear: any relinquishment of spectrum must be voluntary. The bill includes “voluntary” in its title, and then again in the heading of the new one-paragraph section that would be inserted into the Communications Act. And that paragraph includes “voluntarily” not once, but twice.

And just to make sure that there’s no doubt here, the bill contains a section that: (a) prohibits the FCC from “reclaiming” for auction purposes any TV spectrum “directly or indirectly on an involuntary basis” and (b) emphasizes that nothing in the bill “shall permit, or be construed as permitting” the FCC to do so.

Fleshing out just what he had in mind when he used the term “voluntary”, Rep. Boucher explained in his introductory statement that, in his view, imposition of “a spectrum fee that would make some licensees financially unable to keep their spectrum would make the spectrum surrender constructively involuntary and would be impermissible under the terms of our legislation.”

Rockefeller’s bill similarly doesn’t mention spectrum taxes at all. The bill’s primary goal is to provide first responders and public safety officials with additional wireless resources through the deployment of a “nationwide public safety interoperable broadband network in the 700 MHz band”. But in a brief section tucked away toward the back of the bill (on page 21 of the draft, if you’re looking), the drafters provide that

[i]f the Commission determines that it is consistent with the public interest in utilization of the spectrum for a licensee to relinquish voluntarily some or all of its licensed spectrum usage rights in order to permit the assignment of new initial licenses subject to new service rules, the Commission may dis-

burse to that licensee a portion of the auction proceeds related to the new use that the Commission determines, in its discretion, are attributable to the licensee’s relinquished spectrum usage.

And a couple of pages later, the drafters include this “rule of construction” to help us interpret the bill:

Nothing in this Act or in the amendments made by this Act shall be construed to permit the Commission to reclaim frequencies of broadcast television licensees or any other licensees directly or indirectly on an involuntary basis for the purpose that section.

In other words, there’s not much detail here. Like the Boucher-Terry bill, Rockefeller’s approach seems designed simply to make sure that the FCC *can* divvy up auction proceeds to incentivize broadcasters to give up their spectrum for auction – with the Commission enjoying broad discretion as to how that might be accomplished. The bill goes out of its way (like Boucher-Terry) to emphasize that any reclamation of broadcast spectrum must be voluntary on the part of the broadcaster.

One thing is apparent from Boucher’s statement, though: it’s not far-fetched to figure that a spectrum fee (such as the one proposed in the Kerry-Snowe bill in the Senate) might be used to squeeze broadcasters into handing over their spectrum. All the more reason to keep a careful watch on what goes on down on Capitol Hill in coming months.

The bills are designed simply to make sure that the FCC can divvy up auction proceeds to incentivize broadcasters to give up their spectrum for auction.

Muy caliente II

Million Dollar Payment In Univision Payola Probe

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Not quite two years ago, we called our readers' attention to developments on the sponsorship ID front, Spanish-style. What got our attention back then was the fact that the Enforcement Bureau had sent out a number of Letters of Inquiry (LOIs) to a number of Spanish language stations which allegedly had dealings with Univision Music Group (UMG), an entity controlled by Univision Communications, Inc. (UCI). The back-story: a former UMG executive had spread a boatload of specific factual allegations about specific payola-like conduct in a lawsuit filed out in California. Word of those allegations – along with a list of stations allegedly involved in payola-like conduct – had reached the FCC, and the Commission was interested in checking things out for itself.

We concluded that report by pointing out that we didn't know how long this regulatory telenovela would take to play out, or what the final upshot would be.

We now know.

Univision Radio, Inc. has entered into a Consent Decree with the Enforcement Bureau. No admissions of wrong-doing, mind you, but Univision Radio does agree to make a "voluntary" contribution to the Feds to the tune of \$1,000,000. Plus, it agrees to an extensive set of "Compliance Plans" and "Business Reforms" designed to discourage sponsorship ID violations.

URI gets something in return.

The Enforcement Bureau has agreed not to consider any of the alleged messiness in any regulatory context. In other words, no matter how bad the misconduct may have been – and, again, Univision Radio has admitted to no misconduct at all – Univision need not worry about it as far as the FCC is concerned.

Meanwhile, out on the Left Coast, Univision Services, Inc. (the successor-in-interest to UMG) has copped a plea to criminal mail fraud in connection with a scheme "to defraud radio stations". The fraud involved payments by UMG to various station employees in return for airplay of UMG music; the stations were defrauded because the under-the-table payments meant that the stations could not themselves get those payments in return for airplay which would, theoretically, have been

the subject of proper IDs.

While the U.S. Attorney obviously had extensive, compelling evidence of UMG's guilt, the plea documents make clear that the misconduct was limited to UMG and apparently did *not* infect the remainder of the extensive UCI operation. According to the plea agreement, "the government's investigation has not discovered evidence that any officers, directors, or employees of UCI . . . were aware or had reason to be aware of the illegal conduct occurring at UMG."

So let's get this straight. Executives and employees of UMG – which is not an FCC licensee and is technically no longer in existence – admitted to making payments in the hope of receiving airplay. And even though there's apparently no evidence linking that misconduct to others in the Univision organization, it's still worth \$1,000,000 to buy an Invincibility Cloak protecting Univision interests from any further regulatory unpleasantness potentially arising from that misconduct.

As strange as all this sounds, the deal makes sense. Putting an absolute lid on this problem before it metastasizes has considerable value. Since the available evidence of misconduct somewhere in the Univision operation (*i.e.*, *chez* UMG, in particular) was, overwhelming, it was probably just a matter of time before petitioners, objectors, and other unfriendlies would start to wield that evidence against Univision's licenses. As a matter of self-preservation, better to plunk some cash down now, get your immunity, and move on.

It remains to be seen whether the FCC will pursue this matter further against any non-Univision stations whose call signs may have popped up in the investigation. Recall that UMG, the admitted culprit, was accused of spreading pay-for-play cash around a bunch of non-Univision stations. Neither the plea agreement nor the consent decree directly absolves or condemns any other stations (although the plea deal does indicate that the UMG payola scheme was designed to keep other station owners in the dark). But since the matter is still pending at the FCC, those other stations that received LOIs will have to wait and see if this is the end of the matter.

The deal makes sense. Putting an absolute lid on this problem before it metastasizes has considerable value.



Near-term changes for distant-signal sat carriage

STELA NPRMs On Fast Track

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In late May Congress finally got around to passing the Satellite Television Extension and Localism Act of 2010, affectionately referred to as STELA. In so doing, Congress ordered the FCC to crank up a couple of rule-making proceedings, pronto, to implement changes largely dictated by STELA. As a result, the FCC hustled out two Notices of Proposed Rulemaking (NPRMs), each with very short comment periods which (with one exception) have already come and gone, and each addressing distinct aspects of satellite carriage, within a DMA, of broadcast signals from outside that DMA.

While the chance to comment on these matters has technically passed, broadcasters in particular should be aware of what's at stake here, since it could affect them in important ways.

STELA extends, with some changes, the right of satellite TV providers to retransmit the signals of local broadcast stations. That right has been around in one form or another since 1988's Satellite Home Viewer Act (SHVA), later revised in 1999's Satellite Home Viewer Improvement Act (SHVIA) and then again in 2004's Satellite Home Viewer Extension and Reauthorization Act (SHVERA). (SHVERA technically expired as of December 31, 2009 – but Congress extended it in a series of stop-gap measures, giving itself time to work out the kinks in STELA.)

In addition to extending the overall right of satellite operators to carry broadcast signals, STELA provides for several noteworthy modifications in the rules governing importation of out-of-market signals. It is those modifications that are the focus of the FCC's NPRMs. One deals primarily with questions involving satellite carriage of "significantly viewed" stations; the other focuses on technical questions in determining whether certain households are "unserved", a determination which affects carriage of distant network-affiliated stations.

Significantly Viewed Stations NPRM

Normally, a satellite operator – like its cable confrères – is supposed to retransmit only broadcast signals within the DMA where those signals originate. There are exceptions, though – including the ability to carry broadcast stations that are shown to be "significantly viewed" (SV) within the target market, even if those stations are not technically located within that market (or DMA). (The FCC maintains a list of stations that have met the SV standards.) Under the previous satellite carriage laws,

SV carriage was subject to certain restrictions. STELA eases those restrictions.

HD or no HD – That is the question. Under SHVERA, a satellite operator seeking to retransmit an SV signal of network-affiliated station could do so only if the operator afforded the local network-affiliated station bandwidth equivalent to that afforded to the SV station. The idea was to assure that the local guy wouldn't get short-changed with a "less robust" carriage format than the SV station. But the "bandwidth" approach imposed a significant burden on satellite carriers that effectively discouraged them from availing themselves of the SV opportunity.

No more. STELA shifts the focus from the hyper-technical "bandwidth" approach to a simpler "HD or no HD" approach. That is, under STELA, a satellite operator may carry a network-affiliated SV station in HD as long as the operator carries the local network affiliate in HD when that local affiliate is broadcasting in HD. The FCC seeks comment on this change – but, since Congress has mandated this approach, it's a mortal

lock to be adopted. Oh sure, there may be some subsidiary issues to be fine-tuned by the Commission – Is it OK for the FCC to use the ATSC definition of "HD" (and if so, does that lead to any potential issues)? How should the rule apply to situations where a local affiliate is broadcasting network programming in HD on a secondary stream? etc. – but it seems reasonably certain that we can kiss good-bye to "bandwidth" and embrace "HD or no HD" as the operative consideration in this area.

Local-into-local doesn't mean "ALL local-into-local". Previously, the Commission specified that a network-affiliate SV signal could be provided to a satellite subscriber **only** if that subscriber also received the signal of that network's local affiliate as well. No longer. STELA abandons that approach, replacing it with the simpler concept that, if a satellite subscriber receives "local-into-local" retransmissions of local broadcast signals, that subscriber may receive SV signals as well. (Actually, Congress's previous take on this was less than 100% clear, thus allowing the FCC to interpret it as it did; STELA, however, reins the FCC in on this point.)

This change could have a significant impact on the perennial triennial question of "must carry vs. retransmission consent". A network affiliate which elects retrans but

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STELA could have a significant impact on the perennial triennial question of "must carry vs. retransmission consent".



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fails to cut a deal and, thus, finds itself not being carried will have opened the door for an SV station with the same affiliation to become the *de facto* representative of that network in the market, at least as far as satellite carriage is concerned. Under the old FCC approach, if the local network station didn't get carried on the satellite for whatever reason, then the SV network station couldn't get carried, either – which meant that failure of retrans consent negotiations simply left both the local and the SV affiliate off the menu. Now, such a failure could create a situation in which the SV station might be carried, even if the in-market affiliate is not.

Other housekeeping items. In addition to the major items described above, the Commission's SV *NPRM* addresses several minor "housekeeping" issues (like abandoning, at long last, the term "non-cable" and subbing in "over-the-air" in its place).

"Unserved Households" *NPRM*

Satellite operators are permitted to provide a distant (*i.e.*, out-of-market) network-affiliate station – whether or not that station has SV status – to subscribers who are unable to receive an adequate over-the-air signal from the local affiliate of that network. And conversely, households which *do* receive an adequate over-the-air signal from the local affiliate (whether that local guy happens to be a full service TV, LPTV or TV translator) are generally *not* eligible to get the distant signal by satellite. The devil, as is usually the case, is in the details: how exactly does one determine – whether by measurement or prediction – the adequacy of an over-the-air signal for these purposes?

STELA charged the FCC with the chore of developing a "point-to-point predictive model for reliably and presumptively determining the ability of individual locations, through the use of an antenna, to receive" a digital TV signal of specified strength. (An analog model is already in place but, in this post-DTV transition world, it's useful only for the remaining analog LPTVs and TV translators.) Additionally, Congress ordered the Commission to get a move on and wrap up a long-pending-still-unresolved proceeding looking to establish a procedure for on-site measurement of actual DTV signal reception. The "unserved households" *NPRM* is the FCC's response.

Tweaking (or not) the existing predictive model. With respect to a predictive model, the Commission proposes to use the tried-and-true SHVIA Individual Location Longley-Rice model (SHVIA ILLR model), with appropriate tweaks to address DTV considerations. For example, the Commission would use the DTV noise

-limited service contour values (check them out in Section 73.622(e)(1) of the rules) as the standard for an adequate signal. (The analog model uses the Grade B contour, a concept which does not exist in DTV-land.) The Commission would also shift to an F(50,90) service contour, rather than the F(50,50) contour historically used for the SHVIA ILLR model – but that change is a function of the DTV transition. The F(50,50) curves are utilized for analog measurement, while DTV service is measured with F(50,90) curves.

(What the heck is this all about, you ask? The two values – *i.e.*, 50 and 90 in F(50,90) – refer to location and time variability factors, respectively. That is, within the area encompassed by an F(50,90) contour, at least 50% of the locations can be expected to receive a signal that exceeds the field strength value at least 90% of the time.)

Perhaps more importantly, though, the Commission is *not* inclined to alter the model with respect to the type of antenna assumed to be in use by the viewer. In its earlier version of the satellite carriage law, Congress's

definition of "unserved household" was based on that household's ability to receive an adequate signal using a "conventional, stationary outdoor rooftop antenna". But STELA revised that definition by referring only to "an antenna", dropping the significant limitations of "conventional", "stationary" or, perhaps most importantly, "outdoor rooftop". In most instances, an "outdoor rooftop" antenna is likely to re-

ceive a stronger signal than would a set of 1950s era rabbit ears sitting on top of the TV. Thus, deleting "outdoor" from the definition could have made it easier for any given household to assert that it was unserved.

Citing impracticability, the Commission proposes to stick with its existing approach: the predictive model would be based on use of an outdoor antenna. The FCC recognizes that this may have an adverse impact on households which *cannot* have an outdoor antenna for one or another reason, and it professes to be open to comments advocating use of an indoor antenna model. The Commission made clear, though, that anybody supporting that approach would be expected to provide "detailed technical information regarding the specific standards" that would be involved, focusing on such factors as antenna characteristics, building penetration loss, multipath effects, etc. The Commission is also worried about how an indoor antenna approach – which would necessarily entail a wide variety of differing situations – could be developed into a standard predictive model not subject to abuse.

On-site measurements – which, what, how? STELA (like its predecessors) provides that, even if the predic-

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The FCC proposes to stick with its existing predictive approach, based on use of an outdoor antenna.



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against which complaints have been lodged. Stations caught in that posture are said to be subject to an “enforcement hold” on their renewals. This happens routinely, as many TV licensees targeted by, *e.g.*, indecency complaints can attest.

The second limit is the five-year bar imposed by 28 U.S.C. §2462, mentioned above.

Importantly, it appears that that five-year limit counts down irrespective of any procedural devices (for instance, “enforcement holds”) the FCC may deploy to keep the ball in play. That is, while Section 503 may enable the FCC to delay indefinitely the issuance of an NAL, Section 2462 does not appear to be so forgiving. So while the FCC dillydallies with its own processing of alleged violations, the clock is still running against the government’s ability to collect *even if* a violation is ultimately found to have occurred.

All of this should be of interest to any licensee whose renewal application happens to be subjected to an “enforcement hold” arising from a pending complaint (or a violation which the licensee itself reported in its most recent renewal application). Licensees in that situation might want to get out the calendar and start counting the years. Even if the FCC may have tried to keep its options open by not granting the renewal application, the five-year limit in Section 2462 might still pull the rug out from under the Commission.

The first question is: when does that five-year period start for purposes of the statute of limitations? That’s not cut-and-dried. At least one federal court of appeals has as-

sumed that the five-year period begins when the violation occurs – for example, when the allegedly indecent material is broadcast by the target station. An alternate possible starting point would be the date on which the Commission officially learns of the possible violation (by, *e.g.*, receiving a complaint or inspecting the station).

Unfortunately, the date for calculating the start of the five year Section 2462 limitation in the context of FCC enforcement actions has not been definitively identified by any court, yet. But while it’s possible that the creative minds at the Commission could conceivably come up with some other alternatives, the two described above are the most obvious. And, indeed, the Enforcement Bureau seemed tacitly to suggest in a couple of high profile indecency forfeiture cases in 2008 (*i.e.*, the “Married by America” and “NYPD Blue” proceedings) that the five-year statute of limitations period begins running on the date of broadcast.

The question has recently been teed up by several licensees who were targeted back in May with five-digit fines for alleged children’s television violations. (We described the NALs in the May, 2010, *Memo to Clients*.) The licensees have asked that the FCC rescind the NAL’s issued because the supposed violations occurred more than five years ago and were reported to the FCC in the licensees’ respective renewal applications, all of which were filed more than five years ago. The argument is clear: if, because of the passage of time and the operation of Section 2462, the FCC can’t in any event collect any fines even if the violations did occur, then no purpose is served by issuance of an NAL (or Forfeiture Order) at this point. We’ll keep an eye on how that argument fares and report back as developments warrant.



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itive model indicates that a particular household receives a local network station adequately, that household can request an on-site measurement to determine whether the prediction is, in fact, correct. But STELA still requires the Commission to take another look at its existing measurement methods.

With respect to which stations are to be measured, STELA departs from its predecessors by specifying that only “local” stations are relevant. That means that only the signals of network-affiliated stations in the same DMA as the satellite subscriber are to be measured. With respect to what component(s) of the signals is/are to be measured – say, for example, a station happens to be broadcasting network programming on a multicast, rather than primary, stream – the Commission has tentatively decided simply to measure the station’s overall signal strength. Its assumption there is that the receivability of a station’s

signal will not vary from one stream to the next.

And as for how the signal is to be measured, the Commission plans to stick with *outdoor* measurement only. Indoor, moveable antennas give rise to a boatload of variables: for example, there are many different types of antennas; also, signal strengths vary from room to room, and from one particular spot to another in any particular room. Accordingly, the FCC doubts its ability to develop an indoor measurement procedure. Still, the Commission invited comments and suggestions for those supporting indoor measurements.

The comment periods (for the SV *NPRM* and the Unserved Households *NPRM*) were *very* abbreviated, but that was because Congress ordered the Commission to get its rules implementing STELA in place by November 24, which doesn’t give it much time.



FAA Throttles Back On Some, But Not All, Proposed EMI-Based Review Of Radio Applications

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Four years ago the Federal Aviation Administration (FAA) proposed to dramatically expand its influence over radio spectrum users. (For a summary of the proposals, see the related article from our July, 2006 *Memo to Clients*.) Fortunately, in a decision released last month, the FAA lowered its conceit of attainable felicity a bunch, giving up on wide swaths of its 2006 proposal. And while the FAA is still holding fast to the notion that it should have a say in the location of FM transmitters, it has now expressly committed to collaborating with the FCC and NTIA in that mission. The end result for FM licensees and applicants, though, has yet to be determined.

For decades the FAA has expressed concern about possible adverse effects of electromagnetic interference (EMI) on aviation safety. It's hard to argue with the FAA on this. Modern aviation systems – both on-board aircraft and on the ground, particularly in the vicinity of airports – use radio spectrum for a variety of important purposes, including communications and navigation. As a matter of public policy, it's a good idea to prevent interference that could impair the ability of pilots and flight controllers from doing their jobs, *i.e.*, from getting planes (and their passengers) to and from their various destinations safely.

But the FAA's interest in preventing EMI has historically led to considerable tension with the FCC and many broadcasters (as well as other spectrum users). It's one thing for the FAA to regulate the height of towers and other structures that might get in the way of aircraft landing and taking off. It's another for the FAA to assert that it can or should dictate the geographical areas in which certain radio frequencies may be operated. After all, didn't Congress confer control of the spectrum on the FCC, not the FAA?

Hold on there, counters the FAA, Congress gave *us* broad authority to promote safe air travel. And if EMI is a threat to air safety, then the FAA has some regulatory role in controlling spectrum use so as to reduce, if not eliminate, that threat. Relying on that position, the FAA famously put a hold on boatloads of FM applications a couple of decades ago. (Because of their proximity to FAA navigation signaling systems, the FAA is most concerned with FM frequencies.) The FAA's primary MO for this was to withhold Determinations of No Hazard for new tower structures that would support new or modi-

fied FM stations which, in the FAA's view, might cause a problem to air navigation systems – regardless of whether the FCC was satisfied that the proposed operations would protect other spectrum users adequately.

That inter-agency stand-off was ultimately de-fused through compromise between the two, and life has gone on smoothly since. Then in 2006, the FAA was at it again.

To guard against EMI problems, the FAA wanted to require, as part of its Determination of No Hazard process, notice of most any change to any station operating on a wide range of frequencies. New or modified structures that would hold RF generators using those frequencies, changes in channels, power increases of 3 dB or more, antenna modifications, etc., etc. – everything would have to go through the FAA first for its blessing. And without that blessing (in the form of a Determination of No Hazard), the change would not be permitted.

The potential for bureaucratic delays was huge, as was the potential for inter-agency confusion and inconsistency.

The good news is that, in its decision last month, the FAA largely backed off. It withdrew the proposal for required pre-construction notice for all frequencies *other than* the FM band (88.0-107.9 MHz). And with respect to FM, the FAA took a notably conciliatory tone:

The FAA, FCC and NTIA are collaborating on the best way to address this issue. A resolution of this issue is expected soon. Therefore, the proposals on FM broadcast service transmissions in the 88.0–107.9 MHz frequency band remain pending. The FAA will address the comments filed in this docket about the proposed frequency notice requirements and proposed EMI obstruction standards when a formal and collaborative decision is announced.

While this does not completely eliminate the threat of increased FAA intrusion into RF matters, it certainly allays immediate concerns. Further, the cooperative manner in which the last major FAA-FCC turf tiff (involving FM proposals) was ultimately resolved provides reason to believe that this will end the same way. But the FAA's order also serves to remind one and all

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The FAA's interest in preventing EMI has historically led to considerable tension with the FCC and many broadcasters.



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had determined in at least two cases more or less contemporaneous with its decision in the *Fox* case that similar language was *not* indecent, that assumption is obviously open to question.

The Commission also characterizes the panel's decision as effectively rejecting the "contextual" approach which the FCC says it has taken to indecency enforcement. Other courts – including the Supremes in the Mother of All Indecency Cases, *Pacifica*, not to mention at least one other Second Circuit panel – have repeatedly emphasized the need for the Commission to consider "context". Thus, the Commission argues, the *Fox* panel's seeming rejection of that approach should be reviewed and reversed as inconsistent with precedent.

The problem with this aspect of the FCC's argument is that it's not entirely clear that the panel rejected the importance of "context" as the FCC claims. Rather, the panel appears to have been critical not of the need to consider "context", but rather of the FCC's less than clear – opaque, some might say – approach to *how* "context" is considered. While the Commission undeniably incants the term "context" in its indecency opinions, that incantation often appears to be little more than the legalistic equivalent of "abracadabra", a rhetorical flourish with no apparent meaning or substance.

As one example – cited by the Second Circuit panel – the Commission's contextual analysis enabled it to reach diametrically inconsistent conclusions about the use of the term "bullshitter" in a single instance, each time citing an identical contextual aspect. First, the fact that that word was aired during a news interview made it indecent; but on further thought, the Commission concluded that, because it was aired during a news interview, it *wasn't* indecent. In the panel's words, if the Commission does have any actual indecency standard, it is a standard that "even the FCC cannot articulate or apply consistently."

The Commission's final argument is one of apparent exasperation. As it reads the panel decision, the Commission can't win because any changes to make its contextual analysis more predictable would raise further First Amendment concerns, subjecting the FCC to a Catch-22.

This argument is intriguing because, by making it, the Commission could be seen as conceding that, as a practical matter, indecency is not susceptible to regulation within constitutional limitations. To be sure, the Su-

preme Court in *Pacifica* held that the Constitution does permit *some* regulation of broadcast indecency. But the Supremes then left it to the Commission and the courts to develop, on a case-by-case basis, an appropriate analytical approach in which "context" would be all-important. If, after more than 30 years, the best that the FCC has been able to come up with is the "analysis" invoked in *Fox*, is it possible that the agency is incapable of regulating indecency – beyond the Carlin monologue at issue in *Pacifica* – constitutionally? The FCC's rehearing petition seems to imply that.

The Second Circuit now must decide whether or not to grant rehearing, either by the original panel or *en banc*. While that may sound simple, it's not. In particular, the *en banc* rehearing process in the federal courts ranks up there with papal elections when it comes to procedural quirks. The FCC's petition will first be circulated to all ten active judges on the Circuit as well as Senior Judge Leval, who sat on the original panel. Any of those 11 can ask that his/her colleagues be polled as to whether or not to consider the petition. If nobody asks for such a polling, the petition is denied. If polling is requested, then the ten active judges – but *no* senior judges (*i.e.*, Judge Leval doesn't participate) – are polled. Unless a majority of those polled vote for rehearing, the petition is denied.

If a majority of the poll votes to grant rehearing, then the case is re-briefed and re-argued in front of all ten active judges *and* Senior Judge Leval. There is no guarantee that, even if the case gets that far, the FCC would prevail. A majority of the *en banc* court could just as easily affirm the panel's decision.

In other words, the FCC has a long row to hoe.

Meanwhile, a couple of other indecency cases also continue to wend their way through the Courts.

A separate panel of three judges in the Second Circuit is currently considering an appeal of the FCC decision that the broadcast of "naked buttocks" during an episode of *NYPD Blue* was indecent. After the *Fox* decision came down in July, the *NYPD Blue* panel asked the parties for supplemental briefs discussing the impact of *Fox* on the *NYPD Blue* case. The FCC's terse, four page, brief noted the Commission's belief that the facts of the *NYPD Blue* broadcast, which involved the scripted display of adult nudity, were very different from those at issue in *Fox*, which involved the utterance of unscripted "fleeting expletives". Nevertheless, the Commission conceded that the agency's decisions in both *Fox* and *NYPD Blue* were based on the same "contextual framework" that the Court found unconstitutional in *Fox*. According to the Commission, the Court's *Fox* opinion

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*The en banc
rehearing process in
the federal courts
ranks up there with
papal elections
when it comes to
procedural quirks.*



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that the FAA's interest in having a say about FM operations is still alive and kicking, as is the FAA's apparent belief that its statutory authority gives it some say in that regard. Interested folks – particularly FM operators and tower builders – should continue to keep an eye on the FAA's regulatory activities, just in case.

One observation about the changes which the FAA *did* adopt. Under the new rules (which take effect

January 18, 2011), Determinations of No Hazard will be effective 40 days after the date on which they are issued. Previously, a Determination's effective date was reflected on the face of the Determination itself, and normally corresponded with the date of issuance. Thus, the new rules impose a 40-day lag time between issuance and effectiveness. While this change may prove inconsequential to many, if not most, folks, it would still be good to be aware of it on the off-chance that the differential between issuance and effectiveness were to come into play at some point.



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little guys" that might be the most affected by these changes).

So yes, there's a lot of buzz about the possibility of a brokered resolution of the PRA impasse. And yes, it's easy to see why many broadcasters may view that possibility with considerable alarm. And yes, very few of us currently know exactly what has been done, said or offered – by either the NAB or the recording industry – much less how any such discussions will ultimately shake out.

Two things that we do know for sure are that (a) we don't know very much of what is actually happening here, and (2) none of us can be sure of precisely what the future holds for any communications operation in this era of dramatic technological change. Because of that, it may be best to keep an open mind for the time being, with eyes fixed firmly, if warily, on the future in the broadest sense.



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to the public and had no staff working there.

The FCC's next move was to issue a Notice of Apparent Liability, imposing a \$15,000 fine. The fine was based on the facts that (a) the station had no oper-

able EAS equipment for nearly two years and (b) its main studio was neither staffed nor publicly accessible. In response the licensee did not deny the violations. It did, however, submit copies of financial information proving that the station was in financial trouble. On that basis the Commission reduced the fine to \$8,500.



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therefore "appears to suggest" that the policy would be unconstitutional as applied to the *NYPD Blue* case as well.

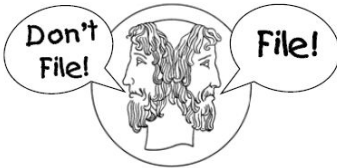
As a result, the Commission suggests that the *NYPD Blue* appeal be put on hold until after resolution of any rehearing motion (the Commission's *NYPD Blue* supplemental brief was filed several days before the *Fox* petition for rehearing went in). With both cases pending in the same court, it seems likely that there will not be any decision in the *NYPD Blue* case until the *Fox* rehearing request is disposed of.

And just down the road in Philadelphia, the Third Circuit is also dealing with indecency in CBS's appeal of the Commission's Janet Jackson/Super Bowl decision. As we reported in April, the Third Circuit, after hearing oral arguments early this year, asked for supplemental briefs on issues that could allow the court to resolve the case without addressing the constitutional questions regarding the FCC's indecency policies. While the Third Circuit does not appear to have asked the parties to discuss the possible effect of *Fox* on the Janet Jack-

son case, CBS (the appellant) did notify the court of the issuance of *Fox* decision, thus suggesting that the Second Circuit's decision was at least relevant to the Third Circuit's deliberations. The FCC responded with a two-page letter in which it observed that the Third Circuit is not bound to follow Second Circuit decisions and that, anyway, the Second Circuit decision is flawed, and, by the way, the Third Circuit is still considering issues that might allow it to resolve the Janet Jackson case on non-constitutional grounds.

While the sparring before the various circuits is important and could prove decisive, the real question is whether – and if so, when – we'll ever get to the Main Event. That would be review by the Supreme Court of the constitutionality of the FCC's indecency enforcement policy as it has developed since *Pacifica*. Such review could have implications for the FCC's authority far beyond the somewhat narrow issue of indecency. With the FCC's election to seek rehearing of *Fox* at the Second Circuit (rather than ask the Supremes to take a look at the case), that Main Event has been deferred at least a year or two.

Mid-terms, mixed signals?



Parsing Form 397

Which TV licensees have to file, anyway?

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As we reported in last month's *Memo to Clients*, the Minority Media & Telecom Council has asked the FCC to suspend enforcement of the EEO rules for three months. At this point, it's anybody's guess as to whether the FCC will grant MMTC's request. But regardless of what eventually happens, the Commission might want to take this opportunity to clean up at least one aspect of its EEO "Broadcast Mid-Term Report" (FCC Form 397) that seems oddly and unnecessarily confusing, if not flat-out inconsistent.

Form 397 is a cute little three-page form. The first page calls on the reporting licensee to provide its name and contact information and identify the stations covered by the report. No real surprises there.

But on page two, Section I consists of the following single yes/no question:

Does your station employment unit employ fewer than five full-time employees, if television, or fewer than eleven full-time employees, if radio?

Not an overly complicated question. Then the form reads:

If yes, you do not have to file this form with the FCC. However, you have the option to complete the certification below, return the form to the FCC, and place a copy in your station(s) public file.

This last instruction raises an obvious question – *i.e.*, who in his right mind would "opt" to file a form that the FCC specifically says does **not** have to be filed? – but that's not the problem. Rather, the problem arises from the fact that the "filing instructions" located immediately above Section I include the following:

If a television station employment unit employs fewer than five full-time employees, only the first two pages of this report need be filed.

Oh, and did we mention that the underlying rule (47 C.F.R. §73.2080(f)(2)) provides that

The Commission will conduct a mid-term review of the employment practices of each broadcast television station and each radio station that is part of an employment unit of more than ten full-time employees four years following the station's most recent license expiration date as specified in §73.1020.

So let's get this straight. If you're a TV licensee with fewer than five full-timers, according to Form 397 either "you do not have to file this form" or "only the first two

pages of this report need be filed". Huh? And Section 73.2080(f)(2) isn't much help sorting this out, since that could be read to say that mid-term reports are expected from TV stations with more than ten FT employees. But the 2002 Report and Order adopting the rules indicates the Commission is statutorily required to review the EEO performance of TV stations with five or more FT employees.

There is at least one possible way (*see "suggested solution", below*) to twist this regulatory Rubik's cube to make all the seemingly incongruous parts look consistent, but really, would it be that hard for the FCC to take the time to articulate its requirements clearly and consistently in the first place?

[*Suggested solution:*

Step 1: Understand that Section 73.2080(f)(2)'s clause reading "that is part of an employment unit of more than ten full-time employees" refers *only* to the term "each radio station", and *not* to "each broadcast television station". That reading is not absolutely dictated by the grammatical structure of the particular sentence in question, but it's also not clearly foreclosed by it.

Step 2: Since "television station" in Section 73.3080(f)(2) is *not* modified by the "more than ten" clause (*see Step 1*), refer back to the prefatory language of Section 73.2080(f). That language limits the reach of that section (including its subsections, such as 73.2080(f)(2)) to employment units with "five or more persons in full-time positions, except where noted". Thus, the term "television station" as it appears in 73.2080(f)(2) can be read to be limited to TV stations with five or more full-timers. That assumes, of course, that the "except where noted" phrase in the preface is intended to refer to — and except out — the "more than ten" clause in (f)(2). Again, that assumption is not absolutely dictated by the rules' language, but it's also not clearly foreclosed by it.

Step 3: Assume that the FCC really means it when it says (in Section I of Form 397) that TV licensees with fewer than five FT employees "do not have to file this form with the FCC".

Step 4: Assume that, when the form's instructions say that "only the first two pages of this report need be filed" by TV licensees with fewer than five FT employees, it really means that those pages need be filed only if the licensee chooses to go ahead and file a report even though it doesn't have to.

End result: TV employment units with fewer than five full-time employees need not file any mid-term EEO reports.]

October 1, 2010

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

EEO Mid-Term Reports - All television station employment units with five (5) or more full-time employees located in **Alaska, American Samoa, Guam, Hawaii, Mariana Islands, Oregon, and Washington** must file EEO Mid-Term Reports electronically on FCC Form 397. The report must include copies of the two most recent EEO Public File Reports.

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

Noncommercial Television Ownership Reports - All noncommercial television stations located in **Alaska, American Samoa, Florida, Guam, Hawaii, Mariana Islands, Oregon, Puerto Rico, the Virgin Islands, or Washington** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.



Deadlines!

October 11, 2010

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

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

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

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.

FM ALLOTMENTS ADOPTED – 7/20/10-8/19/10
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State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
CA	Blythe	106 miles N of Yuma, AZ	247B	08-151	TBA

Notice Concerning Listings of FM Allotments

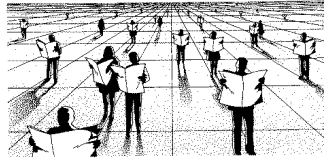
Consistent with our past practice, Fletcher, Heald & Hildreth PLC provides these advisories on a periodic basis to alert clients both to FM channels for which applications may eventually be filed, and also to changes (both proposed and adopted) in the FM Table of Allotments which might present opportunities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

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

Updates On The News

Hurricane season: Who you gonna call? — As this is being written, we have two hurricanes (Danielle and Earl) already formed, and at least one other storm system heading in that direction (next name up: Fiona) — and it's still August. All of which means that it's a good time to remind broadcasters of the FCC's Disaster Information Reporting System (DIRS) — and to encourage them to update their contact information with DIRS regularly (if they've previously enrolled in the program), or to get with the program and sign up now, if they haven't already.

DIRS enables the FCC to keep tabs on which stations are up and running during, and immediately after, a disaster or large-scale emergency. It also enables the Commission to move quickly to help broadcasters get back on-air if they're knocked off by the emergency conditions. In emergencies and disasters, obviously, it's in everybody's interest to have broadcasters up and operating so that they can provide emergency-related information and updates to the public.



If you're a communications provider (including broadcasters), you can sign up for the program online at <http://www.fcc.gov/pshs/services/cip/dirs/dirs.html#enroll>. You give the Commission some basic contact information, and you get a user ID and user password. When emergencies occur and the FCC activates the system (participants will be advised by email of any activation), you can then use the system to alert the FCC to the status of your operation — and, if you happen to need any help from the FCC, to let them know that. Participation in DIRS is purely voluntary; even if you sign up, you don't necessarily have to submit reports. But experience (think Katrina, for one extreme example) indicates that when disaster strikes, it is at least helpful, if not absolutely crucial, to have a common point for the collection and dissemination of information about what's going on in the stricken area and its environs.

At last count nearly 800 broadcasters nationwide had enrolled in DIRS.



FHH - On the Job, On the Go

Frank Jazzo has been named a Co-Chair of the Federal Communications Bar Association's Media Practice Committee.

Mitchell Lazarus will address two committees of the FCBA with a talk entitled "Engineering for Lawyers: How Understanding Basic RF Issues Can Help You Advocate Better for Your Clients" on October 6. And less than two weeks later (on October 18, to be exact), **Mitchell** will participate in a panel at the Wireless Communications Association International's 3.65 GHz Summit. Topic: "Regulatory Status and Potential Changes".

Back in May we reported that **Alan Campbell** had been given the Honorary Alumni Award by Central Michigan University. (In fact, if memory serves, **Alan** was named the *Memo to Client's Academic Darling of the Month* as a result.) It becomes official on October 1: he will get the award in hand. With characteristic modesty, **Alan** advises that he sees this as "CMU giving me an award for not attending their school." We know differently. Congrats again, **Alan**.

And this year's NAB Radio Show (September 29-October 1) will be in Washington, so it's a home game for all of us at FHH. Keep an eye out for **Anne Crump, Jeff Gee, Kevin Goldberg, Frank J, Scott Johnson, Dan Kirkpatrick, Steve Lovelady, Michelle McClure, Matt McCormick, Frank Montero, Lee Petro, Jim Riley, Davina Sashkin, Dick Swift, Peter Tannenwald, Kathleen Victory** and **Howard Weiss**. Mr. Copyright, **Kevin G**, will be appearing on a panel on (what else?) "Copyright Compliance: The Next Generation" on October 1 at 10:30 a.m. And even if they're not listed here, the rest of the FHH gang will be joining in in some or all of the Show-related festivities.

Another month, another bunch of websites linking to www.CommLawBlog.com. Siliconinvestor.advfn.com, Mediabiz.com, Commonfrequency.org and Telecomregulation.net all joined the ranks. And hey, even Gabe's Guide to the E-Discovery Universe (Gabesguide.com) liked one of **Kevin's** blogs enough to link to it. Who knew?

From our "When It Rains, It Pours" file, check out **Mitchell L**. Not only is he a featured participant at two (count 'em, two) prominent confabs in October (*see above*), but he was also quoted in Comm Daily this past month, waxing eloquent — as always — this time about the FCC's wireless backhaul rulemaking . . . and his article on the coming shortage of radio-frequency capacity for new consumer services is scheduled to appear in the October issue of IEEE *Spectrum* magazine. That'll be the second time his work has graced those prestigious pages in the last 13 months. Yikes! Somebody ought to alert the media—no, wait, they probably already know. After all, **Mitchell's** our *Media Darling of the Month!* (If your subscription copy of *Spectrum* is late, or if you happen not to be an IEEE member, his upcoming article should be available online. We'll provide a link when it's posted.)