



Broadcast Newsletter

IN THIS ISSUE...

HCCB AT NAB LAS VEGAS	1
NAB AND SOUNDEXCHANGE REACH DEAL ON STREAMING RATES	1
FCC WARNS ALL NCE STATIONS IN LATEST UNDERWRITING ANNOUNCEMENT FORFEITURE ORDER.....	2
COMMERCIAL FM AUCTION SCHEDULED FOR SEPTEMBER 2009	2
DTS RULES AND REVISED APPLICATION NOW IN EFFECT	3
TEST BARS INSUFFICIENT TO INTERRUPT 12-MONTH SILENT PERIOD	3
FCC INITIATES NOTICE FOR IMPLEMENTATION OF CHILD SAFE VIEWING ACT	4
WHITE SPACES LITIGATION	4
DTV TRANSITION RULES CHANGE AGAIN	4
DATES TO REMEMBER.....	5

HCCB AT NAB LAS VEGAS

Hardy, Carey, Chautin & Balkin's managing partner Joe Chautin will be attending the NAB Convention in Las Vegas from April 18 to 23. If you or any of your staff, including technical staff, would like to arrange a meeting with Joe in Las Vegas, please contact him via at jchautin@hardycarey.com.

NAB AND SOUNDEXCHANGE REACH DEAL ON STREAMING RATES

The National Association of Broadcasters and SoundExchange have reached a deal under which radio stations that stream their signals on-line will end up paying a little less than the rates set by the Copyright Royalty Board. For the years 2009 and 2010, there will be a reduction of about 16% from the CRB rates. While the new rates increase through 2015 to \$0.0025 per performance, this is still likely less than what the CRB would have set for that time period. As part of the new rates, though, webcasters would be required to do census reporting, which means that they would have to report all songs, all year to Sound Exchange. Under the regular rates, webcasters are only required to report two weeks' worth of streaming every quarter.

These new negotiated rates, however, only apply to commercial webcasters. Non-commercial webcasters, which are any non-profit organization or public entity that streams (i.e., not just NCE broadcasters), are still subject to the rates set by the Copyright Royalty Board. Remember, though, that those rates do not kick in for non-commercial webcasters unless and until they exceed their monthly allowance of 159,140 aggregate tuning hours that they receive in exchange for their \$500 annual license fee. The per-performance rates only apply to streamed performances that exceed this monthly allowance.

If you are streaming your station on-line, remember that you need a license to do so and you must pay royalties on that web stream to SoundExchange. You may also have to pay extra licensing fees to the performance rights societies, ASCAP, BMI and SESAC. Failure to properly license your stream could result in liability for copyright infringement.

FCC Warns All NCE Stations in Latest Underwriting Announcement Forfeiture Order

In March 2009, the FCC assessed a \$20,000 monetary forfeiture against the licensee of non-commercial educational low power station, KXPW-LP, Georgetown, Texas.

The case originated based on a complaint originally filed in 2003 alleging the broadcast of prohibited underwriting announcements on the stations. During the pendency of the first complaint, the same individual filed an additional complaint alleging further violations of the underwriting announcement rules.

According to the forfeiture order, the announcements aired universally invited or urged business patronage, distinguished the underwriters from their competitors by stating or implying that the underwriter offered superior service, products or price, and describing underwriters through comparative and qualitative references made either directly or by customer testimonials. Most of the announcements exceeded 30 seconds in length, and while the Commission noted that it has not imposed quantitative limits on the length of underwriting announcements, it has found that the longer the announcement, the more likely it is to contain material inconsistent with the "identification only" purpose of such an announcements.

Citing the broadcast of eight separate announcements as part of thousands of separate broadcasts, the Commission concluded that a substantial forfeiture was necessary because of the lengthy period of time over which the announcements aired and the large number of such announcements, most of which were blatantly promotional.

Of particular note, the FCC included a paragraph in the order directed not only to the licensee of KXPW-LP, but to all non-commercial educational licensees. The Commission stated that "in future cases, violations of the type encountered here may result in even harsher sanctions that we propose in this case. Licensees have an ongoing duty to

understand and carefully abide by the limitations in the Act and in our rules on advertising on non-commercial stations. The multiple longstanding and blatant nature of the violations here reflect an unacceptable disregard for that duty and we intend to deter such behavior in the future by appropriate necessary means, including substantially higher forfeitures."

It is unusual for the FCC to issue such warnings in association with monetary forfeiture orders against specific stations. However, as this newsletter has noted, the Commission has recently issued 5-7 decisions assessing monetary forfeitures against NCE licensees. The Commission' statement appears related to this trend. NCE licensees should carefully evaluate underwriting acknowledgments to ensure they comply with the Commission's rules and policies. The fine assessed against this low power FM radio station is substantially higher than typical forfeitures for violations of the underwriting rules.

Commercial FM Auction Scheduled for September 2009

The FCC has announced that it will auction approximately 130 commercial FM broadcast station construction permits starting on September 1, 2009.

As has traditionally been the case, the FCC has announced this auction in conjunction with proposed rules for its competitive bidding procedures to be used in the auction, along with an opportunity for parties to comment on those procedures. It is unlikely that the Commission will modify the procedures, which have been used successfully in several other auctions.

Under the Commission's auction rules, parties must file short-form applications specifying which permits they are interested in bidding upon. In the event that at least one other party files to bid on the same permit, the short-form applications are deemed mutually exclusive and the parties will then use the Commission's auction procedures for purposes of determining the highest bidder and winner of the permit. In the event that a short-form application is

filed and no other competing application is filed for that permit, the Commission will award the permit at no charge to the single interested party.

A complete list of the permits available in this auction are included with the FCC's Auction Notice, which can be found on the Wireless Bureau's auction website. The permits are located in a number of states and provide coverage to varying populations. The initial upfront bid amount is specified in the FCC's list.

Any individual or entity interested in participating in this auction should carefully review the adopted procedures to be used, as well as past FCC decisions regarding the viability of short-form applications and other matters related to auctions. Where appropriate, counsel should be consulted.

HCCB is available to assist existing or new clients in the application process.

DTS Rules and Revised Application Now in Effect

In late-February, the FCC's Media Bureau announced that its new rules for use of distributed transmission system (DTS) technology by digital television stations became effective. In the same Public Notice, the Bureau announced that it had obtained necessary approvals for the modified FCC Form 301 and Form 340 for stations wishing to apply for DTS services.

DTS transmitters are not separately licensed, but are instead part of a linked group covered by one construction permit and license. As a result, DTS applications are filed as minor modifications of an existing license. Stations must request authority to construct DTS facilities by filing a single application that includes either (1) a main transmitter and one or more additional transmitters that will collectively use the DTS technology, or (2) two or more smaller DTS transmitters.

Test Bars Insufficient to Interrupt 12-Month Silent Period

In a decision released March 12, 2009, the FCC

informed the licensee of a television station that its license had expired because its station had been off the air for more than 12 consecutive months. Under Section 312(g) of the Communications Act, all broadcast stations off the air for more than 12 consecutive months automatically forfeit the station's license.

In this case, the station endeavored to interrupt the 12-month period by returning to on air operations. Unfortunately, rather than air specific programming, the station merely transmitted test bars. The FCC obtained this information after inquiring of the station as to the specifics of its return to on air operations. In this case, the station had commenced operations for a 24-hour period and then returned to off air status.

The Commission specifically examined the definition of "broadcasting" and determined that the transmission of test bars was insufficient to exempt the station from automatic expiration of its license under the Communications Act. The Commission said that it is well-settled that conducting equipment tests or transmitting any equipment test pattern does not interrupt the 12-month off air period. As a result, the station's license was forfeited.

For any broadcast station that has temporarily ceased operations, it is critically important for the station to document the time during which it is off air and ensure that it has the means to begin broadcast operations before the passage of 12 consecutive months. When a station ceases operations, it must file a notice with the FCC. In addition, if the off air status continues for more than 30 days, the station must seek Special Temporary Authority to remain silent. The Commission typically grants such temporary authority in 6-month increments, and the forms require the station to identify the specific date on which on air operations ceased. For that reason, there is a regulatory record of the specific date when a station goes silent.

It is clear from this decision, and from others in the past, that a return to on air operations must include the transmission of actual programming over the station in order to interrupt the 12-consecutive-month time period to avoid license expiration. While the Commission has never specifically

defined the time period for which on air operations must extend in order to interrupt the 12-month period, it has not found a license to have expired where programming was transmitted for at least a 24-hour period..

FCC Initiates Notice for Implementation of Child Safe Viewing Act

In December 2008, the previously enacted Child Safe Viewing Act became effective. One of the terms of this Act was for the Commission to initiate a proceeding to examine the existence and availability of advanced blocking technologies that are compatible with various communications devices or platforms.

In early-March 2009, the FCC issued a Notice of Inquiry to examine blocking technologies that might be appropriate across a wide variety of distribution platforms and devices, including those that can filter language based upon information in closed captioning, can operate independently of pre-assigned ratings, and that might be effective in enhancing a parent's ability to protect his or her child from indecent or objectionable programming, as determined by the parent.

No later than April 16, 2009, the FCC seeks comment from the public on the availability and compatibility of parental control technologies for both video and audio programming. The FCC must issue a report to Congress no later than August 29, 2009 detailing its findings in the proceeding.

Of note, the Notice of Inquiry includes historical and current data regarding media consumption by children as well as the current rating system and its effectiveness.

White Spaces Litigation

The Association for Maximum Service Television and the National Association of Broadcasters recently filed a petition with the Federal Court of Appeals for the DC Circuit requesting that the FCC's recent decision allowing unlicensed devices within the television band to be unlawful and

requesting that it be set aside. The organizations argue that white space devices will interfere with digital television transmissions and point to evidence that the FCC's own engineers reached the same conclusion.

In the FCC's White Spaces Order issued last November, it promised to take whatever actions might be necessary to avoid any interference that might occur from the operation of white space devices. Broadcasters have argued that correcting the interference after the fact is insufficient to prevent the interference from occurring. Broadcasters also argue that white space devices should have the capability to automatically locate television signals in order to avoid operations that might cause interference. Without this, broadcasters claim that white space devices will cause interference and interrupt the transmission of broadcast television signals.

DTV Transition Rules Change Again

In mid-March 2009, the Commission issued a Third Report and Order and an Order on Reconsideration regarding its implementation of the DTV Delay Act adopted by Congress in early-February. Among many changes made to its existing DTV transmission rules, the FCC revised its analog service termination and reduction procedures, required stations still broadcasting in analog to notify the FCC by March 17, 2009 of their anticipated date for ceasing analog operations, required modifications to viewer notifications, and substantially modified its DTV consumer education requirements to add rescanning, antenna, and loss of service announcement requirements. Finally, the FCC globally extended all issued phased transition STAs for an additional two months until October 18, 2009.

Most significantly, the Commission's new DTV consumer education rules contain an imbedded date of April 1, 2009 as the trigger for revised procedures. If your station is still broadcasting an analog signal, it is critically important for you to review this order and understand your station's specific obligations. Questions should be directed to the FCC or to your communications counsel.

DATES TO REMEMBER

April 1, 2009

Class A TV Stations in Delaware, Indiana, Kentucky, Pennsylvania, Tennessee & Texas: if employee threshold is met, complete annual EEO public file report, place in your public inspection file and post on website, if station has one.

TV Stations in Indiana, Kentucky & Tennessee: If employee threshold is met, complete and e-file mid-term FCC Form 397 EEO Report. Also, complete annual EEO public file report, place in your public inspection file and post on station's website. In addition, unless exempt, complete and e-file biennial ownership report on form 323 or 323-E, and place copy in station public file.

TV Stations in Delaware & Pennsylvania: If employee threshold is met, complete annual EEO public file report, place in your public file and post on station website, if station has one. In addition, unless exempt, complete and e-file biennial ownership report on form 323 or 323-E, and place copy in station public file.

TV Stations in Texas: if employee threshold is met, complete annual EEO public file report, place in your public inspection file and post on website, if station has one.

AM & FM Stations in Delaware, Indiana, Kentucky, Pennsylvania & Tennessee: if employee threshold is met, complete annual EEO public file report, place in your public inspection file and post on website, if station has one.

AM & FM Stations in Texas: If employee threshold is met, complete and e-file mid-term FCC Form 397 EEO Report. Also, complete annual EEO public file report, place in your public inspection file and post on station's website, if one exists.

April 10, 2009

Commercial and NCE AM, FM, TV & Class A Stations: complete issues/program report for first quarter of 2009 and place in your public file.

Commercial TV & Class A Stations: complete and electronically file Form 398 (Children's Television Programming Report) for first quarter of 2009 and place in your public file. Also compile and place in your public file records to show station's compliance with the children's programming commercial limits during the last quarter.

Commercial & NCE Full-Power TV Stations: E-file Form 388, DTV Consumer Education report if you aired any form of DTV consumer education on either analog or digital stream at any time between January 1 and March 31, 2009. Place a copy in your public file.

April 16, 2009:

Commercial & NCE Full-Power TV Stations Operating Analog signal post-2/17/09: complete and electronically file Form 387, DTV Transition Update.

© 2009 Hardy, Carey, Chautin & Balkin, LLP

For more information contact Joe Chautin, Mark Balkin, or Elise Stubbe.

Phone 985.629.0777

Fax 985.629.0778

www.hardycarey.com

Actual resolution of legal issues depends upon many factors, including variations of facts and applicable Federal laws. This publication is not intended to provide legal advice on specific subjects, rather, it seeks to provide insight into legal developments and issues that we feel could be useful to our clients and friends.

 Hardy, Carey, Chautin & Balkin, LLP
ATTORNEYS AT LAW
1080 West Causeway Approach
Mandeville, Louisiana 70471-3036