



Broadcast Newsletter

IN THIS ISSUE...

NEW FCC DTV OUTREACH INITIATIVE.....	1
ANNUAL REG FEES DUE	1
INDECENCY SETBACK FOR FCC....	2
FCC SET TO CLARIFY DIGITAL MUST CARRY FOR CABLE OPERATORS.....	2
LOCALISM AND CLASS A MUST CARRY	2
WHAT TO REMOVE FROM YOUR PUBLIC INSPECTION FILE.....	3
PENALTY BOX	3
DATES TO REMEMBER.....	4

New FCC DTV Outreach Initiative

In addition to the numerous requirements imposed upon television stations to educate the public regarding the digital television transition in February 2009, the FCC recently announced a new nationwide initiative to increase awareness about the upcoming transition. The focus will apparently be in television markets with the highest percentage of off-air reception.

The FCC's plan involves travel to those specific markets by the five FCC Commissioners and other Commission staff, where a public event, such as a town hall meeting workshop or roundtable will highlight the transition and be available to local press.

The FCC's news release about the initiative includes the statement that the FCC will "work with local broadcasters and radio stations to increase the broadcasts of radio and television DTV public service announcements." That statement suggests that stations may encounter additional requests from the FCC to air further announcements beyond those already required under the FCC's adopted policies. At this time, there is no rule requiring the airing of additional PSAs, and therefore, any such additional efforts by broadcasters would be strictly voluntary. Stations should not confuse such voluntary efforts with any required announcements under current FCC rules/policies.

Markets being visited by the FCC during September include Baltimore, MD, San Francisco, CA, Austin, TX, Houston, TX, Memphis, TN, New York, NY, Boise, ID, Atlanta, GA and Missoula, MT. FCC Commissioners will be traveling to those cities. In addition to those cities, the FCC's notice lists an additional 81 markets that will be visited by Commission staff conducting similar activities. There are no specific dates for visits to those additional 81 markets, but all such markets will be visited by the February 17, 2009 transition deadline.

Annual Regulatory Fees Due

The FCC has adopted the final amounts for regulatory fees for fiscal year 2008. With that action, the Commission has begun to send annual regulatory fee notices to stations. Those notice include information regarding fee payment but do not set forth a

deadline for making regulatory fee payments. The reg fee deadline has not yet been set by the Commission. Historically, the deadline is usually set for mid-September. We expect a deadline to be set in the next several days by Public Notice.

Should you have any questions regarding payment of your station's annual regulatory fees, please contact us. Failure to pay regulatory fees on time will result in a 25% late-fee.

Indecency Setback for FCC

The U.S. Third Circuit Court of Appeals has recently overturned the FCC's decision to fine several CBS stations for the "wardrobe malfunction" incident involving Janet Jackson in the 2005 Super Bowl halftime show, which involved exposure of one of her breasts during ours when children were in the audience. The Court unanimously vacated the decision and remanded it back to the FCC for further Action.

In the decision, the Third Circuit concluded that the FCC had not made clear to broadcasters – before issuing fines -- that it had changed a prior policy of not holding fleeting nudity indecent. The FCC argued that it had not changed its policy, but the Court found the explanation implausible. Finally, the Third Circuit reasoned that the FCC could not find broadcasters strictly liable for actions they did not foresee or for actions by independent contractors. In that context, the Court concluded that Janet Jackson and Justin Timberlake, who were involved in the incident, were independent contractors as opposed to CBS employees.

The Third Circuit's decision follows an earlier decision by the Second Circuit Court of Appeals in Fox v. FCC fining stations for fleeting use of the F-word during a Billboard Music award show to be arbitrary and capricious. That case has been appealed by the FCC to the U.S. Supreme Court. Briefing in that case has concluded and oral argument is scheduled for November 4, 2008.

It appears likely that the FCC will also appeal the Janet Jackson decision by the Third Circuit. If that occurs, consolidation of the cases is possible, a move that would delay a decision until the spring of

2009. Alternatively, the FCC could rule in the now-pending Fox case, an action that could moot any appeal of the Third Circuit's Super Bowl ruling by the FCC, or remand the case for further consideration, depending on the outcome in Fox.

FCC Set to Clarify Digital Must Carry for Cable Operators

As of the publication of this newsletter, the FCC has scheduled a Commission meeting to clarify certain portions of the digital must carry rules for cable operators at its August 22, 2008 meeting. In that decision, the Commission is expected to refine certain procedures and obligations of broadcast stations and cable operators related to elections between mandatory carriage and retransmission consent this fall. Such elections are due to be made no later than October 1, 2008, and will cover the 3-year period from January 1, 2009 - December 31, 2011.

At the August 22nd meeting, the Commission is also expected to further clarify rules it adopted earlier this year requiring cable systems to ensure that broadcast signals are "viewable" by subscribers after the DTV transition in February 2009. Those rules required cable systems operating digital/analog hybrid systems to down-convert broadcasters' digital signals to analog in order to ensure that analog subscribers continued to receive broadcast signals after the transition.

Preliminary news reports suggest that the FCC will exempt small cable operators with 5,000 or fewer subscribers from the "viewability" requirement. That ruling would allow smaller cable systems to carry digital must carry signals in analog, as opposed to delivering both a digital and analog signal, an action that would strain channel capacity for small operators.

Localism and Class A Must Carry

As part of an ongoing localism proceeding at the Commission, the FCC has requested comment on its proposed suggestion of granting full must carry rights to Class A television stations. At present, Class A television stations only qualify for must

carry if they meet the six criteria outlined in the Commission's rules for carriage of low power television stations.

As part of the FCC's ongoing proceedings, cable operators recently filed comments opposing the grant of full must carry rights to Class A stations. The cable operators argued that federal law precludes granting full must carry rights to Class A stations. In addition, the cable industry claims that such a requirement would place further demands on cable bandwidth that would violate the First Amendment.

FCC Chairman Kevin Martin has endorsed the proposed new rules that would require cable operators to grant full must carry rights to Class A stations. Martin's intent is to assist in increasing the value of Class A stations and making it easier for them to raise capital to finance digital transition upgrades. In addition, Class A stations are required to broadcast a certain amount of local programming each week, a centerpiece of the FCC's localism efforts. Chairman Martin has not yet brought the issue up for a vote at the FCC.

What To Remove from your Public Inspection File

Whenever you hear the words "public inspection file", they are usually associated with the question of whether something has properly been placed in the file. Rarely is there a discussion or direction to remove something from the public file. The result is often an overstuffed public file occupying a few file cabinets.

Keeping outdated and unnecessary documents in the public file only increases the number of ways that it can be scrutinized. Take a moment this month to remove a few things from the public file. Here are a few items to consider removing:

- all but the most recent complete ownership report
- letters/emails from the public regarding station operations that are more than three years old
- any application to the FCC (i.e., for construction permit, assignment of license, special temporary

authority, license renewal) if the application has been acted upon and become final, except for any application granted pursuant to a waiver showing

- time brokerage or joint sales agreements that are no longer in effect
- political file materials that are more than two years old.

Penalty Box

\$5000 Fine for Improper EAS Tone

The FCC has recently fined a station \$5,000 for violation of the FCC's Emergency Alert System (EAS) rules. The violation described by the decision is unique, and therefore bears careful attention by all broadcast stations.

In this case, the FCC's Enforcement Bureau received a complaint alleging that an FM station interrupted a regular broadcast program with an EAS tone that was followed by the same commercial program instead of an actual EAS message or EAS test. In responding to the complaint, the FM station licensee explained that the failure to transmit the EAS message or test resulted from an employee of the station listening to an EAS weekly test on studio backup equipment. At the time, the employee was unaware that a data connection linked the backup studio equipment to certain live studio equipment, which resulted in the inadvertent broadcast of the EAS tone.

The Commission concluded that the station licensee was charged with the responsibility of complying with the EAS rules, including requirements in place for preventing accidental operation of the equipment. The Commission then concluded that the station had violated the EAS rules by not protecting the controls that initiate the automatic generation of the EAS tone in a manner that would prevent accidental operation.

Broadcasters should take extra precautions in operating EAS equipment while conducting appropriate tests or airing EAS tones. The EAS Operating Handbook and Section 11.32(a)(9)(v) of the Commission's rules are cited in this decision by

the FCC as the source for the requirement to prevent accidental operation of the equipment used to generate the EAS tones. A review of those procedures by broadcasters is recommended.

Failure to Include Documents with Assignment Application

The FCC recently fined two broadcasters \$3,000 each for failing to provide required information in a license assignment application submitted to the FCC.

Parties seeking to assign FCC authorizations are required to certify in an application that any written agreements related to the application have been provided and constitute the complete agreement between the parties. In this case, the assignor and assignee on the application only supplied an asset purchase agreement and an escrow agreement between the parties and then certified that the assignment application was complete as filed. As part of those submissions, the parties omitted some schedules attached to the APA, a practice that is permitted provided that such schedules are legitimately not relevant to the FCC's approval.

After investigation, the FCC learned that there were separate purchase and shared services agreements with other related entities that, among other things, explained how studio space and station equipment necessary to operate the station were going to be made available to the assignee. The Commission concluded that the assignment application certification without mention of the other agreements violated its requirements for applicants to provide required information in an application submitted for Commission review.

Proper counsel should be obtained in determining what agreements and/or schedules should be provided to the FCC in the context of an assignment application. This decision makes clear that even a statement offering excluded documents upon Commission request will not suffice to avoid a penalty when the Commission concludes that the documents excluded were essential to their review of the application.

DATES TO REMEMBER

August 29, 2008

Reply comments are due on diversity of ownership in broadcast services.

October 1, 2008

TV Stations in Alaska, American Samoa, Florida, Guam, Hawaii, Oregon, Puerto Rico, the Virgin Islands, and Washington: complete and electronically file your biennial ownership report on form 323 or 323-E (if applicable). Also complete annual EEO public file report and place in your public file.

TV & Class A TV Stations in Iowa and Missouri: complete annual EEO public file report and place in your public inspection file.

TV & Class A TV Stations in Florida, Puerto Rico and the Virgin Islands: complete and electronically file your mid-term EEO review report via Form 397 (if applicable). Also complete annual EEO public file report, attach to Form 397, file in public file and post copy on station website.

AM & FM Stations in Florida, Puerto Rico, Virgin Islands, Alabama, American Samoa, Guam, Hawaii, Oregon and Washington: complete annual EEO public file report, place in your public inspection file and post on station website.

AM & FM Stations in Iowa and Missouri: complete and electronically file your mid-term EEO review report via Form 397 (if applicable). Also complete annual EEO public file report, attach to Form 397, file in public file and post on station website. Finally, complete and electronically file your biennial ownership report via Form 323 or 323-E (if applicable).

© 2008 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