



Broadcast Newsletter

IN THIS ISSUE...

FCC AUTHORIZES UNLICENSED USE OF TV BAND WHITE SPACE.....	1
CHANGES AT FCC EXPECTED WITH NEW ADMINISTRATION.....	2
FCC ISSUES PUBLIC NOTICE ON FM DIGITAL POWER INCREASE.....	2
COMMISSION ADOPTS DIGITAL TELEVISION DISTRIBUTED TRANSMISSION SYSTEM RULES.....	3
PENALTY BOX.....	3
DATES TO REMEMBER.....	5

FCC Authorizes Unlicensed Use of TV Band White Spaces

In a controversial and much contested proceeding, the FCC Commissioners recently voted 5-0 to permit certain fixed and mobile unlicensed devices to operate in so-called television band “white spaces”. In doing so, the Commissioners pointed to the benefits of such spectrum use to the public and the interference precautions that would be implemented in order to protect existing television service.

The new wireless devices authorized to operate within the broadcast television spectrum must do so on a secondary basis and only at locations where that spectrum is “open” for use – also known as “white spaces.” The devices must contain certain technologies that either greatly restrict their power so as to avoid interference, or that enable the device to “sense” existing television signals in order to avoid interference to nearby stations.

The Commission’s Public Notice announcing the adoption of these rules characterized it as a “careful first step” to permit the operation of unlicensed devices. Some of these devices will also affect wireless microphones though they, like broadcast television stations, will be protected in a variety of ways, including a registered database where such microphones are regularly used.

The Commission’s new rules will not become effective until 30 days after publication in the Federal Register. In addition, the Commission’s new rules do not permit the operation of unlicensed devices until after the digital television transition on February 17, 2009. All white space devices are subject to equipment certification procedures by the FCC Laboratory, which will request samples of the devices for testing in order to ensure that they meet all pertinent requirements.

Hardy, Carey, Chautin & Balkin will provide a more detailed summary of the Commission’s new rules to its clients in coming days. Should you have any questions, please feel free to contact us or consult your communications counsel.

Changes at FCC Expected with New Administration

President-Elect Obama's administration is widely expected to make a number of changes at the FCC as well as pushes for regulatory changes that may directly impact broadcasters.

The latest news reports have indicated that Susan Crawford and Kevin Werbach will lead the administration's FCC transition team and advise the incoming administration on policy, budget and personnel matters. Crawford is currently a law professor at the University of Michigan teaching communications law. Werbach teaches legal studies and business ethics at the University of Pennsylvania.

Various names have been circulated in the press for the FCC chairmanship, but the list has not been significantly narrowed. Currently Republican Chairman Kevin Martin is expected to resign next January and fellow Republican Commissioner Deborah Tate will be stepping down as well as her term expires. It appears likely that the new administration will ask one of the sitting Democratic commissioners, either Michael Copps or Jonathan Adelstein, to run the agency on a temporary basis until President Obama nominates a new individual to be permanent chairman. That process can take several months. Many believe that the new chairman will share the views of Copps and Adelstein with regard to broadcasters. Those two commissioners have opposed revisions to the broadcast ownership rules and urged new public service programming obligations for broadcasters. They have also supported the Commission's crackdown on broadcast indecency.

Some of the expected policy goals of the new administration will make the fairness doctrine, local programming quotas, more children's programming requirements, and product placement restrictions more likely to be adopted. In addition, some believe that new mandates for free airtime for political candidates may be proposed or adopted.

We will continue to report developments at the Commission as the new administration's views and personnel moves are made official. As is the case

at most administrative agencies, new policies and rules cannot be automatically be implemented, but must rather go through a proposed rulemaking process that is lengthy and permits input from broadcasters as well as the public. To the extent you might oppose any proposed rules that directly affect your station you will have the opportunity to independently or jointly file comments regarding the proposed rules. We urge you to stay abreast of issues affecting broadcasters and take an active role in the process.

FCC Issues Public Notice on FM Digital Power Increase

The FCC has recently issued a public notice requesting comments in response to a proposed FM digital power increase. Comments are due in this proceeding no later than November 28, 2008, and reply comments are due no later than January 4, 2009. Comments may be filed electronically.

The FCC's public notice issued in response to a proposal by broadcasters and equipment manufacturers suggesting that a proposed FM digital power increase would significantly improve digital radio coverage while not meaningfully increasing potential interference to analog radio operations. Specifically, testing conducted by CBS Radio and submitted to the FCC as part of the proposed power increase, confirmed that an increase in the digital power of an FM IBOC signal by 10dB would significantly improve indoor HD radio reception. In general, the testing significantly increased the indoor reception of IBOC radio signals, depending upon the type of construction of the building.

The Commission has not previously set a deadline by when the radio industry must convert from analog to digital operations. However, it has adopted a voluntary system enabling broadcasters to begin digital broadcasts. Many have done so, some with mixed results depending upon the location of their radio station. In some instances, analog stations have received interference or seen their coverage area reduced by the operation of these stations.

Broadcasters interested in the outcome of these proceedings should file comments.

Commission Adopts Digital Television Distributed Transmission System Rules

On November, 2008, the FCC adopted final rules for the use of Distributed Transmission System (“DTS”) technologies by broadcasters in the digital television service. In general, DTS technologies provide digital broadcasters with an opportunity to add additional transmitters within their digital coverage area in order to optimize signal coverage for their viewers. In some cases, due to terrain or broadcasters who are changing channels for their digital service, DTS provides the best option for continuing to provide over-the-air service to current analog viewers as well as viewers that have historically been unable to receive a good signal.

Under some circumstances, DTS transmitters can be located outside of the station’s authorized service area if such location meets the requirements of a new table of distances adopted by the commission. DTS transmitters will have primary regulatory status and will follow the Part 73 licensing and technical rules of the FCC. In some instances, interim use of DTS technology may be permitted under special temporary authority prior to the new rules going into effect.

Hardy, Carey, Chautin & Balkin will be providing a more detailed summary of the Commission’s new DTS rules to its clients in coming days. Should you have any questions, please feel free to contact us or consult your communications counsel.

Penalty Box

Commission Upholds \$9,000 Forfeiture for Underwriting Violations

The FCC recently issued an order denying a petition for reconsideration by WCVZ (FM) South

Zanesville, Ohio, challenging a previous finding by the FCC that it violated the FCC’s underwriting rules for NCE stations. In that earlier decision, issued in May 2008, the Commission imposed a \$9,000 forfeiture against the station for willful and repeated broadcast of advertisements in violation of the Communications Act and the Commission’s rules prohibiting NCE stations from airing promotional announcements on behalf of for-profit entities in exchange for consideration of any kind.

In its petition for reconsideration, the station argued that the Media Bureau had misapplied applicable precedent in reaching its legal conclusion that advertisements had been aired. Specifically, the station argued that the Bureau found announcements made on its stations by underwriters Tastee Freeze and GMAC Real Estate violated the Commission’s underwriting rule even though an earlier decision had characterized similar phrases as descriptive and therefore permissible.

The Bureau disagreed, finding that both the Tastee Freeze and GMAC Real Estate announcements contained promotional, qualitative characterizations that rendered them unacceptable. In the Tastee Freeze announcement, the announcer characterized the underwriter’s ice cream products as “tastefully decorated” and asked whether listeners were “planning a special occasion.” In the GMAC Real Estate announcement, phrases “we’re all about family,” and “we love selling real estate” were found to refer to favorable qualities possessed by the underwriter and sought to distinguish that business from similar enterprises. As a result, the Bureau found the phrases to be prohibited qualitative characterizations and impermissible because they invited patronage rather than merely describing a range of services or products available from the underwriter.

The Commission also disagreed with the station’s argument that an earlier decision characterizing the phrase “daily lunch specials” in a restaurant’s underwriting announcement did not dictate a different result. In that case, the FCC had found the phrase simply denoted the fact that there were varied offerings each day, and that its inclusion did not go beyond the underwriting limitations. The FCC distinguished it from the station’s announcements, which were promotional in nature.

In recent years, the FCC has issued 1-3 decisions annually regarding underwriting issues for NCE stations. That number has dwindled from previous years where 6-8 decisions were the norm. The number of decisions issued by the Commission does not necessarily reflect a less enforcement-minded approach by the Commission in the underwriting arena. Often, NCE underwriting complaints are made and handled informally directly with licensees, and those decisions are never published.

NCE stations should continue to diligently monitor their underwriting announcements to ensure they meet the requirements of the Communications Act and the FCC's rules and policies. Questions should be directed to your communications counsel.

Sick Employee Does Not Lower Fine for Tower Fence Violation

The FCC's Enforcement Bureau recently considered a request for a reduction of a \$4,200 monetary forfeiture against a broadcaster previously found to have repeatedly violated the Commission's rules requiring AM towers to be fenced.

In its original finding, the FCC's district office conducted an inspection of an antenna structure for KRAE, Cheyenne, Wyoming. During the inspection, a single wooden panel section of the base fence, approximately 6' in width, was lying on the ground and allowed access to the structure, a series-fed antenna with an insulated base. At the time, the agent issued a verbal warning and reported the base fence violation to two station employees that were present for the inspection. Despite having earlier received a call from a prior owner of the station regarding the fence, the station had not visited the site to confirm the condition of the fence. The FCC issued a fine in the amount of \$7,000, but reduced it based upon a history of compliance to \$4,200.

In its further request to reduce the forfeiture, KRAE argued that its employee responsible for the tower

site had undergone surgery around the same time that the fence fell into disrepair and was recuperating at the time of the inspection. The station argued that this was an "exculpatory factor". The Commission disagreed, finding that the station had an obligation to ensure that its antenna structure was enclosed within effective locked fences or other enclosures. The fact that an employee had fallen ill was not relevant and not supportive of a further reduction in the forfeiture. The Commission has long held that licensees and other Commission regulatees are responsible for the acts and omissions of their employees and independent contractors, and has "consistently refused to excuse licensees from forfeiture penalties where actions of employees or independent contractors have resulted in violations." Despite the employee's illness, that licensee duty remained.

Tower Light Outage Results in Forfeiture

The FCC has issued a forfeiture order against the owner of an antenna structure in Kansas for violating the FCC's rules requiring tower owners to make observations of antenna structure lights at least once each 24-hours, either visually or by observing an automatic indicator designed to register any failure of tower lights.

The Commission first took action in this case in response to a complaint of a tower light outage from the local city manager, who reported the light outage to the Commission's local district office. The district office then determined that the structure in question did have a tower light outage, and contacted the tower owner, who stated they were unaware of the outage. After properly filing a notice to airmen to report the outage, further discussions by the tower owner with the FCC's district office personnel ensued. During those discussions, one of the tower owners stated that the automated monitoring system for the tower had not been operational for 1-1/2 years and that no person had been assigned or contracted to monitor the tower lighting visually. Instead, the tower owner relied on a sheriff from a nearby county to inform him of all light outages on the tower.

When the sheriff was contacted, he informed the FCC's agents that he did not observe the tower regularly and was unsure how long the lights on the tower had been out. In response to these actions, the tower owner took actions to replace its alarm monitoring system, simultaneously asserting that there had only been a total of two light outages for the tower during the past two years. The Commission initially assessed a monetary forfeiture for \$2,000. The tower owner responded, requested a cancellation or reduction of the proposed forfeiture.

The FCC ultimately reduced the forfeiture by \$400 due to the tower owner's history of compliance. However, it specifically pointed to the admissions regarding the automatic alarm system and a failure of the tower owner to take other measures to ensure proper monitoring.

Broadcasters who own towers should double-check their procedures to ensure that proper mechanisms are in place to monitor lights daily. In the event the method of monitoring is an automatic monitoring system, it should include an ability to send a message regarding its outage so that the failure of such equipment does not result in a monetary forfeiture, as with the case here.

Towers, tower lighting, and tower fencing continue to be an emphasis item for the FCC's district offices.

DATES TO REMEMBER

November 28, 2008

Deadline for filing comments in response to FCC Public Notice regarding increase in power of FM digital radio stations.

December 1, 2008

ALL full power TV stations operating licensed digital facilities, or holding a permit but operating pursuant to temporary reduced power digital authorizations during the period from October 1, 2007 – September 30, 2008: complete and electronically file FCC Form 317 (Annual DTV Ancillary/Supplementary Services Report) setting forth whether the station provided any

ancillary/supplementary digital services at any time during the 12-month period ending September 30, 2008, **and**, for any ancillary/supplementary service for which a payment or subscription fee or charge is required in order to receive the service, or directly/indirectly paid by a third party in exchange for programming transmission, remit to the FCC 5% of gross revenues derived from such fees, charges or payments. Certain exceptions apply to the fee payment requirement – consult your counsel.

TV & Class A TV Stations in Colorado, Minnesota, Montana, North Dakota and South Dakota: complete annual EEO public file report, place in your public inspection file and post on website, if station has one.

TV Stations in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont: complete and electronically file your biennial ownership report on form 323 or 323-E (if applicable). Also complete annual EEO public file report, place in your public file and post on station website, if station has one.

TV Stations in Alabama and Georgia: complete and electronically file your biennial ownership report on form 323 or 323-E (if applicable) and place copy in public file.

TV & Class A TV Stations in Alabama and Georgia: complete and electronically file your **mid-term EEO report on Form 397** (if applicable). Also complete annual EEO public file report, attach to Form 397 (if applicable), file in public file and post copy on station website, if station has one.

AM & FM Stations in Alabama, Georgia, Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont: complete annual EEO public file report, place in your public inspection file and post on station website.

AM & FM Stations in Colorado, Minnesota, Montana, N. Dakota and S. Dakota: 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, if station has one. Finally, complete and electronically file your biennial ownership report via Form 323 or 323-E (if applicable) and place copy in public file.

© 2008 Hardy, Carey, Chautin & Balkin, LLP
For more info, contact Joe Chautin, Mark Balkin, or Elise Stubbe.
Ph 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