

December 2006

## FM Auction Filing Window Set for December 6 to 19

### Minor Change Applications Frozen

The filing window for FM short-form applications for Auction No. 70 will open on December 6 and will close at 6:00 p.m. Eastern time on December 19. The bidding will commence on March 7. Applications must be submitted electronically online. The FCC will offer 121 commercial FM allotments for sale. The complete list of communities, technical facilities and minimum opening bids for each allotment is found on page 5. The Commission originally designated 124 allotments for this auction in an announcement released in September. Since then, three have been deleted from the list for technical reasons. An applicant may apply for any number of allotments on its short-form application.

The filing window will be open for applications for both commercial and noncommercial stations. If a noncommercial application is mutually exclusive with a commercial application, the noncommercial proposal will be automatically dismissed

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## Process Streamlined For Changing Community Of License

The procedures for changing the community of license for AM and FM stations has been simplified by the FCC with the adoption of a *Report and Order* in Docket 05-210. These rule changes compress what was a two-step process into a one-time filing. Under the old rules, the change of a community of license for a commercial FM station could only be accomplished by filing a petition for rulemaking to amend the FM Table of Allotments. When the FCC granted that petition, the petitioner then had to submit a Form 301 application for a modification of the station's authorization. Licensees of AM stations had to file a major change application during a filing window for new and major change AM applications, and then go through the auction process to complete the transformation. Now all radio licensees can seek a change of community of license in the course of a simple minor change application on the appropriate construction permit application form. As with other minor change applications, these applications will be processed on a first-come/first served basis.

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## FCC Considers Tower Rules to Protect Birds

The FCC is deliberating new rules to mitigate the dangers posed by communications towers to migratory birds. The agency has adopted a *Notice of Proposed Rulemaking* in Docket 03-187 to study the effects that certain aspects of towers such as lighting, height, guy wires, and site location may have on birds.

In 2003, the Commission released a *Notice of Inquiry* in this docket to gather information on this topic. The agency asked for comment in three general areas: (1) the current state of scientific information about the impact that communications towers have on birds; (2) the need for additional study; and (3) suggestions for minimizing the impact of towers on birds.

The United States Fish and Wildlife Service ("FWS"), an agency within the Department of the Interior, submitted data to indicate that an estimated 10 billion migratory birds breed in North America. The population during the fall migration season may go as high as 20 billion. The FWS maintains an official list of 711 species of migratory birds. The FWS estimates that the number of migratory birds killed each

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For more information about or help with any of the items reported in the **Communications Law Newsletter**, please contact:

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# FCC Considers Tower Rules to Protect Birds continued from page 1

year as a result of collisions with communications towers could range from 4 to 50 million.

A variety of environmental, conservation and wildlife protection organizations filed comments to urge the FCC to adopt regulations that, in their view, would reduce the dangers that towers pose for birds. Communications industry groups generally opposed such proposals on the grounds that the extra cost involved in complying with such rules would be unjustified in the face of insufficient evidence to conclude that towers cause biologically significant losses to bird populations.

The Commission hired the environmental risk consulting firm, Avatar Environmental, LLC, to assist in evaluating the comments and to assess additional studies that might be available. Avatar submitted a report in September, 2004, in which it stated that most of the suggested causes and possible solutions for this problem "remain speculative." Nonetheless, it continued, the scientific community studying this problem has a "degree of confidence" about certain conclusions. Avatar found that the existing state of knowledge tends to support the following:

(1) The greatest bird mortality tends to occur on nights with low visibility conditions, especially fog, low cloud ceiling or other overcast conditions.

(2) All other things being equal, taller towers with lights tend to represent more of a hazard to birds than shorter, unlit towers.

(3) Towers with guy wires create higher risks than self-supporting towers.

(4) Collision mechanisms that appear to be factors are blind collisions (where the bird does not see the tower in time to avoid it) and illuminated spheres of influence (where lights on the tower refract off of water particles in the air, such as in fog).

(5) Certain avian families seem to be more affected than others, including vireos, warblers and thrashes.

(6) Although bird collisions with towers can occur in any season or weather condition, there is a pronounced spike in the number of collisions during the fall migration season, and a smaller spike during the spring migration season.

(7) There are no studies to date that demonstrate an unambiguous relationship between avian collisions with communications towers and population declines in migratory bird species.

(8) Although biologically significant tower kills have not been demonstrated in the literature, the potential does exist, especially for threatened and endangered species.

(9) More research is warranted in order to identify specific causes and possible solutions to this problem.

The Commission invited another round of comments in response to the Avatar report. Included in comments received was information on the results of studies at towers operated by the Michigan Public Safety Communications System. Studies involving relatively small numbers of towers indicated that more bird casualties result at higher towers, towers with guy wires and at towers lit with steady burning red lights (as opposed to other lighting configurations).

A threshold issue is whether the Commission has the authority to promulgate rules concerning safety for migratory birds. Aside from the public interest obligations arising from the Communications Act, the Commission seeks analysis of its potential role under the National Environmental Policy Act of 1969, the Endangered Species Act and the Migratory Bird Treaty Act.

On the basis of the record to date in this proceeding, the FCC has tentatively concluded that, for communications structures subject to Part 17 of its rules, medium intensity white strobe lights conspicuous at night are to be preferred over red obstruction lighting systems, to the maximum extent possible without compromising air navigation safety. The Commission seeks public comment on this conclusion and related issues. In the event that this tentative conclusion is adopted, the Commission wants to know

how it should implement such a new rule. Should existing towers be grandfathered to be exempt – either permanently or until the existing light burns out?

The Commission also invites public comment on whether it should regulate other tower features suggested in the record to be problem areas for migrating birds, such as overall height, the use of guy wires, and siting in problematic locations. The agency asks whether collocation of multiple facilities on one tower could alleviate the problem for birds by reducing the number of obstacles in their paths.

Section 1.1307(a) of the FCC's rules lists eight categories of criteria that, if present, establish that a proposed structure may significantly affect the environment. In these cases, the proponent of the tower construction is then required to prepare an Environmental Assessment. The Commission asks whether this rule should be amended to add consideration for migratory birds as a criterion to trigger the need for an Environmental Assessment.

Comments are due to be filed by January 22. Reply comments should be submitted by February 20.

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*...medium intensity  
white strobe lights  
conspicuous at night  
are to be preferred...*

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## FM Auction Filing Window Set for December 6 to 19 continued from page 1

because applicants for noncommercial stations cannot participate in an auction. (This does not preclude, however, a nonprofit or noncommercial entity from filing an application for a commercial station.) A commercial applicant whose application is not mutually exclusive with any other commercial application will promptly be directed to file a long-form application, and will be well on the way toward obtaining the new construction permit without needing to bid in an auction.

In cases where there are two or more mutually exclusive commercial applications, each applicant will be required to remit an upfront payment to the FCC in order to participate in the auction. The amount of the upfront payment for each allotment is the same as the amount of the minimum opening bid, as shown in the chart on page 5. These payments must be received in the Commission's bank account at the Mellon Bank in Pittsburgh no later than 6:00 p.m. Eastern time on February 5, 2007. The Commission will hold the upfront payment as a deposit until the conclusion of the auction. For winning bidders, the funds on deposit will be credited against the purchase price. The deposits of nondefaulting unsuccessful applicants will be refunded to them.

The bidding is scheduled to open on March 7, 2007 under auction rules similar to those used by the FCC in past auctions. Bids may be submitted online or by telephone. All allotments will be offered in a single auction with simultaneous multiple rounds. Applicants may bid on any or all of the allotments simultaneously for which they are eligible. Bidding for each allotment will remain open until the auction is completed for all of them.

An applicant earns bidding units equal to the number of dollars deposited in upfront payments. An applicant may bid on any combination of allotments for which it has indicated an interest on its short-form application, as long as the total bidding unit value of those allotments does not exceed the number of bidding units for which the applicant is eligible. Activity rules are designed to encourage applicants to bid frequently and thereby to maintain auction momentum. Generally, an applicant that does not bid to its maximum bidding unit eligibility in a given round will suffer a reduction in eligibility for the following round (unless it uses an activity rule waiver – of which each bidder will be allowed three).

The Commission has divided activity requirements into two stages. During Stage One, a bidder desiring to maintain its current bidding eligibility will be required to be active on allotments with bidding units equal to at least 75% of its current bidding eligibility. This minimum required activity will be raised to 95% per round in Stage Two.

Bids must be raised in increments of the provisionally winning bid from the previous round. The bidder may increase the provisionally winning bid only by increments of 10%. Thus a permissible bid would be 110%, 120%, 130%, etc., or any 10% increment to a maximum of 190% of the previous provisionally winning bid. A bid may be removed before the round closes. However, when the

round has ended, a bid may not be withdrawn. Defaulting winning bidders who fail to timely pay the bid purchase price are subject to penalties and sanctions.

Applicants holding a limited number of ownership interests in other media are eligible for new entrant bidding credits. An applicant with no attributable interest in any other media of mass communications is eligible for a credit of 35%. An applicant with an attributable interest in not more than two other media facilities (neither of which is in the same area as the proposed new station) is eligible for a 25% credit. For a winning bidder, these credits may be used to reduce the purchase price of the permit.

At the conclusion of the auction, the FCC will issue an auction closing notice, in which it will announce the winning bidders. Those winning applicants will then have ten business days in which to make down payments. They will have to submit sufficient funds, when combined with the upfront payments already on deposit, to equal 20% of the net winning bid price (the gross bid price less applicable new entrant bidding credits). The deadline for paying the balance of the purchase price will be another ten business days after the deadline for submitting the down payment. Long-form applications on Form 301 will be due 30 days after release of the auction closing notice.

To ensure the competitiveness of the auction, the Commission's rules strictly prohibit applicants competing for mutually exclusive construction permits from communicating with each other about bids, bidding strategies or settlements. This restriction applies to all applicants regardless of whether they become qualified bidders or actually bid. Even if two applicants are each eligible to bid on only one common allotment, they may not discuss with each other their bids or bidding strategies relating to any other FM allotment designated on either of their short-form applications. This ban does not pertain to applicants who identify each other on their short-form applications as parties with whom they have entered into bidding agreements. This prohibition begins at the close of the filing window on December 19 and continues until the deadline for submitting down payments.

In order to maintain a stable environment in the FM Table of Allotments during the auction, the Commission will not accept applications during the filing window for minor changes to existing authorizations on any FM channel, including the noncommercial band. The Commission has also frozen, effective immediately, the submission of petitions for rulemaking and counterproposals that propose a change in channel, class, or reference coordinates for any of the 121 allotments for sale in this auction. Any petition for rulemaking or counterproposal that proposes any change to or fails to fully protect an FM allotment in Auction No. 70 or the preferred site coordinates specified in an auction applicant's Form 175 short-form application will be dismissed. The Commission will announce an end date for this freeze on allotment rulemakings in a public notice following the deadline for filing long form applications by the winning bidders in the auction.



# DEADLINES TO WATCH



## License Renewal, FCC Reports & Public Inspection Files

- Dec. 1, 2006 Deadline to file Ancillary/Supplemental Services Report for all commercial DTV stations.
- Dec. 1, 2006 Deadline to file license renewal application and EEO Program Report for television stations in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.
- Dec. 1, 2006 Deadline to file Biennial Ownership Report for radio stations in Colorado, Minnesota, Montana, North Dakota and South Dakota, and for television stations in Alabama, Connecticut, Georgia, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.
- Dec. 1, 2006 Deadline to place EEO Public File Report in public inspection file and on station's internet website for all nonexempt radio and television stations in Alabama, Colorado, Connecticut, Georgia, Maine, Massachusetts, Minnesota, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota and Vermont.
- Dec. 1 & 16 2006 Television stations in New Jersey and New York broadcast pre-filing announcements regarding license renewal applications. Television stations in Alaska, American Samoa, Connecticut, Guam, Hawaii, Maine, Mariana Islands, Massachusetts, New Hampshire, Rhode Island, Oregon, Vermont and Washington broadcast post-filing announcements regarding license renewal applications.
- Jan. 1 & 16 2007 Television stations in New Jersey and New York broadcast pre-filing announcements regarding license renewal applications. Television stations in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont broadcast post-filing announcements regarding license renewal applications.
- Jan. 10, 2007 Filing deadline for quarterly Children's Television Programming Reports for all commercial television stations.
- Jan. 10, 2007 Place Issues/Programs List for October - December in public inspection file for all full-service radio and television stations and Class A TV stations.

## Deadlines for Comments In FCC Proceedings

Docket	Comments	Reply Comments
(All proceedings are before the FCC unless otherwise noted.)		
Copyright Office Docket RM 2005-5 Copyright issues re cable carriage of digital TV signals		Dec. 4
RM-11349; Petition for Rulemaking to modernize rules on construction, marking and lighting of antenna structures		Dec. 14
Docket 06-121; FNPRM Media ownership		Dec. 21
Docket 06-189; NOI Assessment of competition in the market for video programming.		Dec. 29
Docket 87-268; 7thFNPRM DTV Table of Allotments	Jan. 11	Feb. 12
Docket 03-187; NPRM Effects of communications towers on migratory birds	Jan. 22	Feb. 20
Docket 04-186; FNPRM Unlicensed low power devices in TV band	Jan. 31	March 2
Docket 06-181; Public Notice Requests for exemptions from closed captioning rules	March 27	May 7
Docket 06-208; Public Notice Review of rules pursuant to Regulatory Flexibility Act	(1)	N/A

(1) Comments are due 60 days after publication of notice in the Federal Register.

## Cut-Off Dates for FM Booster Applications

The FCC has accepted for filing the application for a new FM booster station as described below. The deadline for filing a petition to deny this application is indicated. Informal objections may be filed any time prior to grant of the application.

Community	Parent Station	Channel	MHz	Filing Deadline
Fort Collins, CO	KRKY	271D	102.1	Dec. 8
Kalispell, MT	KKMT	259D	99.7	Dec. 8

**FM AUCTION NO. 68  
UPFRONT PAYMENTS DUE:  
DECEMBER 11, 2006  
BIDDING BEGINS: JANUARY 10, 2007**

**DEADLINE TO FILE SETTLEMENT  
AGREEMENTS IN CONFLICTS REGARDING  
MX APPLICATIONS FOR LPTV DIGITAL  
COMPANION CHANNELS  
DECEMBER 15, 2006**

# FM Allotments Offered in Auction No. 70

See story on page 1.

Community	Channel and Class	Minimum Opening Bid	Community	Channel and Class	Minimum Opening Bid
New Hope, AL	278A	\$90,000	Montana City, MT	293A	50,000
Pine Level, AL	248A	20,000	Firth, NE	229A	200,000
St. Florian, AL	274A	120,000	Hyannis, NE	250C1	2,500
Aguila, AZ	297C3	10,000	Pierce, NE	248C2	70,000
Chino Valley, AZ	223A	15,000	Groveton, NH	268A	20,000
Heber, AZ	288C2	7,500	Pittsburg, NH	246A	2,500
Huachuca City, AZ	232A	50,000	Las Vegas, NM	283C2	30,000
Overgaard, AZ	232C3	5,000	Garysburg, NC	276A	50,000
Parker, AZ	247C3	15,000	Arnett, OK	285C2	10,000
Patagonia, AZ	251A	20,000	Pawhuska, OK	233A	7,500
Rio Rico, AZ	300A	30,000	Sayre, OK	269C2	30,000
Snowflake, AZ	258C2	40,000	Sykesville, PA	240A	70,000
Taylor, AZ	278C3	20,000	Pendleton, SC	240A	200,000
Arkadelphia, AR	228A	20,000	Wall, SD	299C	90,000
Bearden, AR	224A	20,000	Linden, TN	267A	20,000
Paragould, AR	257A	50,000	Oliver Springs, TN	291A	200,000
Rison, AR	255A	20,000	Pigeon Forge, TN	292A	200,000
Burney, CA	225A	10,000	Aspermont, TX	226C2	15,000
McKinleyville, CA	236C3	90,000	Baird, TX	243C3	120,000
Willow Creek, CA	253A	5,000	Ballinger, TX	238A	7,500
Arriba, CO	240A	2,500	Balmorhea, TX	283C	40,000
Aspen, CO	228A	40,000	Benavides, TX	282A	2,500
Cheyenne Wells, CO	224C	110,000	Benjamin, TX	237C3	5,000
Flagler, CO	283C3	2,500	Big Wells, TX	271A	2,500
Hugo, CO	222A	2,500	Bruni, TX	293A	5,000
Stratton, CO	246C	110,000	Camp Wood, TX	271A	2,500
Key West, FL	244A	30,000	Childress, TX	281C2	10,000
Lincolnton, GA	254A	40,000	Cotulla, TX	242A	10,000
Patterson, GA	296A	40,000	Dilley, TX	229A	10,000
Pineview, GA	226A	30,000	Eagle Lake, TX	237C	330,000
Plainville, GA	285A	150,000	Eldorado, TX	285A	2,500
Wadley, GA	227A	20,000	Eldorado, TX	293A	2,500
Woodbury, GA	233A	50,000	Elkhart, TX	265A	40,000
Young Harris, GA	236A	50,000	Encinal, TX	273A	1,500
Kailua-Kona, HI	244A	40,000	Freer, TX	288A	2,500
Abingdon, IL	252A	40,000	George West, TX	292A	7,500
North English, IA	246A	15,000	Goree, TX	275A	5,000
Burgin, KY	290A	200,000	Grapeland, TX	232C3	50,000
Morgantown, KY	256A	40,000	Hamilton, TX	299A	7,500
Science Hill, KY	291A	70,000	Hebbronville, TX	254A	5,000
Bordelonville, LA	280A	10,000	Hewitt, TX	294A	150,000
Leesville, LA	224A	40,000	Junction, TX	277C3	5,000
Monticello, ME	234A	7,500	Leakey, TX	299A	2,500
Custer, MI	263A	30,000	Mason, TX	281C2	10,000
Frederic, MI	237A	20,000	Mason, TX	269C3	5,000
Ludington, MI	242A	30,000	Matador, TX	221C2	5,000
McBain, MI	300A	30,000	Munday, TX	270C1	30,000
Onaway, MI	292C2	40,000	Pineland, TX	256A	10,000
Paradise, MI	234A	1,500	Rocksprings, TX	235C3	1,500
Greenwood, MS	277A	40,000	Sabinal, TX	296A	5,000
Holly Springs, MS	243A	40,000	Savoy, TX	297A	90,000
Marietta, MS	250A	50,000	Sweetwater, TX	221C3	20,000
Vardaman, MS	258A	20,000	Turkey, TX	244C2	2,500
Doolittle, MO	283A	50,000	Weinert, TX	266C3	10,000
Grandin, MO	283A	15,000	Glenville, WV	299A	15,000
Lowry City, MO	285A	10,000	Boscobel, WI	244C3	50,000
Madison, MO	247C3	50,000	Ephraim, WI	295A	5,000
Marceline, MO	256A	15,000	Rosholt, WI	263A	70,000
Marquand, MO	295A	20,000	Bairoil, WY	235A	1,500
Lewistown, MT	300C1	10,000	Reliance, WY	25 4C3	30,000
			Sinclair, WY	267C	15,000

# Court Denies Extension of Retransmission Consent Agreement

Mediacom Communications has been denied its Motion for a Preliminary Injunction to enjoin Sinclair Broadcast Group from ending their retransmission consent agreement for the carriage of 22 Sinclair television stations on Mediacom's cable television systems. The United States District Court for the Southern District of Iowa refused to grant Mediacom's Motion in *Mediacom Communications Corporation v. Sinclair Broadcast Group*, 2006 U.S. Dist. LEXIS 81577. Mediacom is accusing Sinclair of antitrust law violations in their dispute about cable carriage of Sinclair's stations during the 2006-2008 must carry/retransmission consent cycle.

During the 2003-2005 carriage cycle, Mediacom carried 22 Sinclair TV stations on its cable systems pursuant to a retransmission consent agreement. That agreement expired at the end of 2005, but it included a provision for automatic monthly extensions, subject to the right of either party to terminate with 45 days advance notice. The agreement has been extended each month while the parties attempted to negotiate an agreement for the next cycle.

In September, 2005, Sinclair notified Mediacom that it elected retransmission consent in the new cycle for all 22 of its stations on Mediacom systems. In a substantial change from the expiring agreement, Sinclair said that it wanted to be paid cash for the carriage of each of the 22 stations. Mediacom responded that it would pay for the retransmission rights for 13 of Sinclair's stations affiliated with major networks, but that it was not interested in carrying the other nine stations. Sinclair insisted that Mediacom should pay for and carry all 22 stations or none at all.

After many months of negotiations, Mediacom sued Sinclair, complaining that tying the 13 wanted stations with the 9 unwanted stations in one transaction constitutes an antitrust violation. Sinclair gave notice to terminate the old agreement. Facing an immediate loss of access to Sinclair's stations, Mediacom filed its Motion for an order from the court to force Sinclair to maintain the status quo during the pendency of the law suit.

Precedent in the Eighth Circuit required the court to

*continued on page 7*

## Hundreds of Petitioners Seek Closed Captioning Waivers

Section 79.1 of the FCC's rules mandates that most new television programming be closed captioned for the benefit of hearing-impaired members of the audience. The rule also establishes a process for waiving this requirement upon a demonstration that including closed captioning in the production would be an undue burden on the program producer or distributor. A program producer or distributor seeking this waiver must file a petition showing that it would experience significant difficulty or expense.

Factors to be considered include: (1) the nature and cost of the closed captioning for the programming; (2) the impact of the operation on the provider or program owner; (3) the financial resources of the provider or program owner; and (4) the type of operations of the program provider or owner.

Such petitions are to be placed on public notice for public comment. The Commission had been following a practice of issuing a separate public notice for each petition for a closed captioning waiver that it received. Then for several months the notices stopped appearing. Now the Commission has resumed the public notice practice. A single public notice referencing some 494 petitions for waivers has been released. Copies of the petitions can be obtained on the page for the Consumer and Governmental Affairs Bureau at the FCC's website. The website address is [http://www.fcc.gov/cgb/dro/caption\\_exemptions.html](http://www.fcc.gov/cgb/dro/caption_exemptions.html).

The deadline for filing comments in response to any of these petitions in Docket 06-181 is March 27. Replies will be due by May 7.

## Process Streamlined for Changing Community of License *continued from page 1*

The *Report and Order* also revised other aspects of the allotment rulemaking process. Under the new rules, a party submitting a petition for rulemaking for a new FM allotment must also file a Form 301 construction permit application with the petition and pay the filing fee immediately.

In most rulemaking proceedings, the FCC will accept comments filed electronically online. That has not been the case however, until now, in allotment rulemakings where only paper pleadings were permitted. Electronic pleadings will now be accepted in allotment rulemakings.

When it adopted the *Notice of Proposed Rulemaking* in this proceeding in June, 2005, the Commission imposed a freeze on the filing of petitions for rulemaking to amend the

FM Table of Allotments. That freeze will be lifted when this *Report and Order* becomes effective. As of this writing, the complete text of the *Report and Order* has not been released by the Commission nor has public notice of this action been published in the Federal Register. More details will be available when the order is published.

**FM AUCTION NO. 70**  
**FILING WINDOW FOR SHORT FORM**  
**APPLICATIONS: DECEMBER 6-19, 2007**  
**UPFRONT PAYMENTS DUE:**  
**FEBRUARY 5, 2007**  
**BIDDING BEGINS: MARCH 7, 2007**

## Court Denies Extension of Retransmission Consent Agreement continued from page 6

use four criteria to determine the appropriateness of a preliminary injunction: (1) the threat of irreparable harm to the moving party; (2) the state of the balance between this harm and the injury that granting the injunction would inflict on other parties; (3) the probability that the movant will succeed on the merits in the underlying law suit; and (4) the public interest.

Mediacom argued that if the old contract were allowed to expire it would suffer irreparable harm to its reputation, goodwill and business. It said that upon giving notice to its subscribers that they would no longer be able to view Sinclair stations on Mediacom systems, those subscribers would become confused about whether they could trust Mediacom to provide them with the local television signals important to them. Customers would likely lose confidence in Mediacom and switch to DBS companies. Local government officials, who make decisions regarding Mediacom's cable franchises, would likely also come to view the company negatively because of the confusion about the Sinclair stations. Mediacom also asserted that customers would be harmed by higher prices for their television services.

The court rejected these arguments for a variety of rationales. Primarily, it reasoned that the purpose of antitrust laws is to protect competition, not particular competitors. None of the harm that Mediacom predicted would befall it or its customers would be caused by a reduction in competition. Therefore it was not antitrust related and not necessarily germane to an analysis of the Motion. Secondly, the court found that most of the potential injuries that Mediacom complained about were quantifiable and subject to calculation for money damages. In that case, the harm cannot be called *irreparable*.

The second factor to consider is the balance of harms between the parties. This balance must decidedly tip toward the moving party to justify a preliminary injunction. Among other things, the court may consider the rights and the financial stability of the parties. The court determined that Mediacom's financial stability was not in jeopardy. There was no indication that denying the Motion would result in the company's bankruptcy, reduction in its work force, or other similar drastic harm. On the other hand, both parties had the right to enforce the terms of a contract that they had freely entered into – a contract that included specific provisions about termination that Sinclair wished to invoke. A party is to be given great leeway in exercising its own judgment about its business partners. The requested injunction would impinge upon Sinclair's rights by forcing it to continue to do business with Mediacom against its will. The balance of harms did not tip in Mediacom's direction.

Thirdly, the court must weigh the movant's probability of success on the merits of its case in the lawsuit as a whole. The court said that tying arrangements are only violations of antitrust law if the defendant coerces the buyer into pur-

chasing a product it would not have otherwise purchased. The court declined to find that Sinclair coerced Mediacom to carry all 22 stations. Sinclair pointed to an offer it made late in the negotiations to sell Mediacom carriage rights for each station separately. Mediacom had rejected this offer on the grounds that it was economically unviable and merely a sham proposal, because the aggregate of the separate single-station prices totaled about \$1 million more than Sinclair's earlier asking price for the entire package. The court did not think that a \$1 million differential was very coercive to a multi-million dollar company such as Mediacom. The court referenced a document that Mediacom had filed with the Securities & Exchange Commission in which Mediacom stated that the prices being requested by Sinclair were excessive, but not "*material* to our results of operations or financial condition."

Another element of analysis of the probability of success on the merits concerns whether the tying arrangement is illegal *per se*. To define a tying arrangement, one has to define the market being affected. Mediacom was unable to define the market in this case to the court's satisfaction. Furthermore, the allegedly misbehaving party must have the power to dominate the market. The court ruled that while Sinclair might have been attempting to exploit a permissible level market power, it had not attempted to impose illegal restraints on the market. All in all, the court could not find much likelihood that Mediacom will prevail on the merits.

The last criterion is in the public interest. While some consumers may be inconvenienced by higher prices or interruptions in service, the court said those issues are outweighed by the greater public interest of assuring competition in the market place. True competition cannot be promoted or enhanced by forcing companies to do business with parties with whom they do not wish to deal. The public interest would not be served by such an intrusive court order.

Mediacom has appealed this ruling on its request for a preliminary injunction to the Eighth Circuit Court of Appeals. Meanwhile, the old retransmission consent agreement expires, the Sinclair stations go off cable, and the District Court prepares to bring the case to trial.

**DEADLINE TO FILE LONG-FORM  
APPLICATIONS FOR SINGLETON IPTV  
APPLICANTS IN AUCTION NO. 81  
DECEMBER 13, 2006**

**DEADLINE TO IMPLEMENT EAS  
OPERATIONS ON ALL RADIO AND TV  
DIGITAL PROGRAM STREAMS  
DECEMBER 31, 2006**

# Ownership Review to be Augmented with Economic Studies

As it promised to do when it launched the remanded rulemaking proceeding on media ownership, the FCC has announced that it will conduct or contract with outside consultants to conduct various economic studies as a part of its review of the media ownership rules. In a recent Public Notice, the Commission described these ten studies, each of which will be peer reviewed:

**How People Get News and Information.** This study will survey consumers about their use of media. It will identify consumers' primary, secondary and tertiary sources of news and information; whether these sources change depending upon the time of day or the day of the week; and the frequency with which consumers access these sources. This research will be provided by the Nielsen ratings company.

**Ownership Structure and Robustness of Media.** The objective of this study will be to describe the ownership structure and robustness of current media, including broadcast television, cable television, satellite television, broadcast radio, satellite radio, newspaper and the internet. This information will be compared to the state of the media marketplace when the FCC last reviewed its ownership rules in 2002-2003. FCC staff members C. Anthony Bush, Kiran Duvadi, Scott Roberts and Andrew Wise will conduct this study.

**Effect of Ownership Structure and Robustness on the Quantity and Quality of TV Programming.** This research will aim to analyze the effect of ownership structure and robustness (as described in the study above) on various measures of the quantity and the quality of different types of television programming, including local news and public affairs, minority programming, children's programming, family programming, religious programming, and violent and indecent content. The researcher for this segment will be Gregory Crawford of the University of Arizona.

**News Operations.** The purpose of this study is to collect data on the size and scope of the news operations of radio and television stations and newspapers. It will analyze the relationship between the nature of the news operations and market characteristics, including ownership structure and robustness. Kenneth Lynch, Daniel Shiman and Craig Stroup of the FCC are tapped to conduct this study.

**Station Ownership and Programming in Radio.** Station-level data will be used to examine how ownership

structure affects the programming and audience of radio stations. This study will be led by Tasneem Chity of CRAI.

**News Coverage of Cross-Owned Newspaper and Television Stations.** This project will be designed to study the effect of newspaper cross-ownership on television news coverage using matched pairs of cross-owned and non-cross-owned television stations. Jeffrey Milyo of the University of Missouri will conduct this study.

**Minority Ownership.** Two studies will address the level of minority ownership in media companies and the barriers to entry. One of these studies will be conducted by Arie Bersteau and Paul Ellickson of Duke University. The other one will be under the direction of Allen Hammond of Santa Clara University and Barbara O'Connor of California State University, Sacramento.

**Vertical Integration.** Austan Goolsbee from the University of Chicago will examine levels of vertical integration in the media industry.

**Radio Industry Review: Trends in Ownership, Format and Finance.** This study will update research about the radio industry performed during the Commission's last review of the media ownership rules that resulted in a 2002 report of the same name. FCC staffer George Williams will oversee this work.

The FCC's two Democratic commissioners released statements in which they were critical of these announced research plans. They apparently were not consulted about these projects. Commissioner Adelstein called the Commission's Public Notice a "unilateral release" that "ultimately undermines the public's confidence by raising more questions than it answers." He said the descriptions of the studies are "scant, lacking any sense of the Commission's expectations for scope, proposed methodology and data sources."

Commissioner Copps also said that the announcement raises more questions than it answers. He wants to know "How were the contractors selected for the outside projects? How much money is being spent on each project . . . ? What kind of peer review process is envisioned? Why are the topics so generalized rather than being targeted to more specific questions?" He expressed concerns about the overall credibility of the research effort.

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