

And Then There Were Five—Unfinished Business Facing a Full Commission

By David D. Oxenford
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With today's confirmation of FCC Commissioner Robert McDowell, the Commission will have a full complement of Commissioners for the first time in over a year. As Commissioner McDowell is a Republican, it will also give FCC Chairman Martin's political party a majority—the first since the departure of Chairman Powell in March of 2005. Given the list of open broadcast items on the Commission's docket, this majority may finally allow resolution of a number of items of importance to both radio and television stations. Rumors abound that many of the pending items have been delayed because of policy disagreements between the Republican and Democratic Commissioners. It will be interesting to see if the promise of action really translates into decisions, and if it does, what the impact of these decisions will be on the broadcast industry.

The following is but a sample of the actions affecting broadcasters that are pending at the FCC, and on which we may see some action in coming months from the full Commission:

Ownership. Last July, the agenda for a Commission meeting included an item that would reopen the examination of the Commission's multiple ownership rules required by the Third Circuit's remand of the Commission's 2003 Ownership Order. That agenda item was pulled without explanation, and no further word on ownership has been heard since. Open issues that need to be dealt with include changes in the local television ownership limitations (i.e. when should duopolies and triopolies be permitted); cross-ownership limitations (newspaper-broadcast as well as radio-television); and even the attribution of television JSAs. Even the radio ownership rules, which the Court allowed to go into effect in September 2004, are subject to reexamination, as the Court ordered the Commission to determine if it was rational to treat all broadcast stations as equal in enforcing its numerical caps on the local ownership of stations. In its reexamination, the Commission would look into whether it needs to take into account the coverage, ratings, and other information about specific stations before making radio ownership decisions. The Commission also has an open proceeding on whether to change the manner in which it counts how many stations are in a non-Arbitron market for purposes of assessing compliance with the radio ownership limitations.

Digital Radio. Even though radio stations around the country are beginning to operate digitally, the Commission has never adopted its final digital radio rules. All FM stations that are currently operating a second digital channel are doing so on an experimental basis, as the Commission has not adopted rules for second channel operations. Nor have rules regarding AM nighttime operations been adopted. Rumors have indicated that these technical issues are being delayed because the Commissioners cannot agree on the scope of the public interest requirements that will be put on these new program streams. A Republican majority could decide to postpone that issue for consideration at a later date.

Equal Employment Opportunity (EEO). There are several proceedings on EEO that have been outstanding for almost three years. The Commission has not decided whether information reported on FCC Form 395 will be treated as public or confidential, thus these reports breaking down every station's workforce by race and gender have not been filed for years. The FCC is also considering whether to require mandatory outreach for part-time as well as full-time employees, and still has not resolved petitions for reconsideration of the EEO rules that were adopted in 2002, and which are currently being enforced.

Children's Television. While the Commission adopted expanded children's television obligations over two years ago—rules which imposed a three hour educational and informational programming obligation on each stream that a station broadcasts in analog or digital, and which placed restrictions on commercial tie-ins including on websites associated with children's programs—these rules have been challenged by a consortium of television companies. While the companies have reached an accommodation with the FCC on their differences, these matters will need to be approved by the Commission and made applicable to all stations.

Indecency. While we saw a series of decisions dealing with TV indecency issues in mid-March, there remain hundreds of complaints pending at the Commission. Rulings on pending radio indecency case may well be among the first to face the new Commissioner, though appeals of some of the TV decisions will no doubt soon follow. In the recent TV decisions, we have seen some disagreements among the Commissioners as to just how far the indecency crack down should go. The new Commissioner may well have to enter those debates in the near term.

Program Taping. Tied into the indecency issue is the long-pending FCC proposal to require that broadcast stations tape their programs, and retain the tapes for some period of time so that the FCC can review the tapes if there are complaints of indecency or other rule violations. While there have been rumors that the proceeding would be resolved soon for over a year, the addition of the fifth Commissioner may bring about some resolution of this issue.

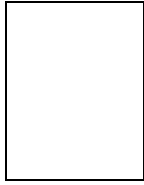
Localism. The Commission has long had an open proceeding on Localism, investigating whether the FCC should impose all sorts of obligations on broadcasters to help quantify their public interest obligations. This proceeding suggested that the FCC look at everything from requirements for PSAs and new programs, to mandates that radio stations play some music from local artists. Despite field hearings conducted in numerous cities well over two years ago, the proceeding remains open and ready for the Commission to propose specific actions gleaned from the voluminous record developed on the Notice of Inquiry.

Payola and Sponsorship Identification. Prompted by the Elliot Spitzer actions in New York State, the FCC has been looking into payola in the radio industry. Furthermore, prompted by claims that TV stations have taken undisclosed consideration for including promotional pieces in newscasts, the Commission has been planning a proceeding to review its rules about the disclosure that is required any time a broadcaster is paid to mention a product or service on the air. Look for these issues to result in some Commission action.

FM Upgrades and FM Translators. FM allotment proceedings have been frozen since last summer while the FCC reviews its processes. Similarly, applications for new FM translators are also on hold as the FCC evaluates how those applications should be processed, and their relationship to LPFM stations. So that FM broadcasters can make necessary technical changes, look for these actions to be resolved in the near future.

Obviously, the new Commissioner will have plenty to keep him busy—just from the broadcast world. The above list does not even include the plethora of routine broadcast issues that reach the Commissioners for review every day, nor does it address the issues that are bound to arise in the final years of the DTV transition. And there are bound to be issues in other services—dealing for instance with satellite radio, cable television and wireless carriers—that will impact the broadcast industry. In fact, looking at the array of issues facing the new Commissioner, you can be sure that his days will not be empty ones. The broadcast community will anxiously await seeing how he fills each and every one of those days.

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