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Escrows Ad Infinitum

A new (arm) twist in the tolling saga

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Well, we here at *Memo to Clients* would like to report that an end to the Tolling Agreement/Escrow saga is in sight. Instead, we can report only that the Tolling regime is in place and, if you can imagine this, is getting even more out of control. Here's the latest.

We all know that, when there happen to be one or more outstanding indecency or VNR complaints pending against a station which is the subject of an assignment application, the Commission ordinarily just sits on the assignment application pending the outcome of the complaints. But let's say that you are attempting to sell your only station, with the ultimate goal of closing up and dissolving your company and moving on to something else. You want to get the deal done ASAP – maybe in the next couple of months, but for sure *not* in the next couple of decades, which is how long it could take the Commission to dispose of the complaints that happen to be pending. The Commission might be willing to act on your application now, rather than some time in the (likely) distant future. But to get the Commission to do so, here's what you can expect them to require of you:

- You will have to enter into an *indefinite* Tolling Agreement with the FCC (which, as the adjective “indefinite” clearly indicates, gives the FCC an *indefinite* period of time to act on any indecency complaints currently pending against the station);
- You will have to enter into an Escrow Agreement for an *indefinite* period naming the FCC as third party beneficiary. How much money goes into the escrow? That's an easy arithmetical calculation: the total number of complaints multiplied by the total maximum forfeiture amount. For example, let's say that the FCC has four complaints pending against your station, each alleging the broadcast of indecency at a time when the maximum fine for that kind of thing was \$32,500. The necessary amount to be escrowed (for an *indefinite* period, mind you) would be 4 x \$32,500, or \$130,000. (If you are unfortunate enough to

be the target of indecency complaints relating to broadcasts *after* the maximum fine for such misbehavior was raised ten-fold – to \$325,000 a pop – then the escrow amount would be inflated by the same factor per violation – ouch!) Any way you slice it, the bottom line is that you would have to place in escrow a large chunk of coin just to get the FCC to act on your sale application.

- You of course might think that after suffering this – er, how can we say this politely without using the disagreeable term “extortion”? – fiscal inconvenience at the hands of the Commission, you could then close up shop. You would be wrong. The model Escrow Agreement (which the FCC insists be used) requires that the licensee business entity stay in place during the term of the Escrow Agreement – and in case you need reminding, that term is “indefinite”. If the business entity dissolves, the model Escrow Agreement calls for the escrow agent to pay the escrowed funds as directed by the FCC. (Call us crazy, but we suspect that the FCC would direct the funds right into Uncle Sam’s pockets.)
- You should eventually get your money (or at least some of it) back, but only if: (a) the FCC settles with you; or (b) the FCC notifies you that it has closed the investigation and directs the Escrow Agent to release the funds; or (c) the FCC issues a forfeiture for one or more of the violations in question *and*, after you decline to pay it, the FCC convinces the Department of Justice to sue you in Federal District Court, *and* after that trial the court directs the disposition of the escrowed funds in your direction, *and* that decision is upheld if appealed.

This government-sanctioned, um, arrangement – “blackmail” is such an unpleasant word – is likely to continue until such time as the indecency litigation working its way through the courts is resolved (possibly at least two years away, as discussed in prior *Memo to Clients* issues) or until someone goes to court and successfully seeks a *writ of mandamus*, as we mentioned here last month.

We hope that our next report to you will announce the end of the Tolling/Escrow saga . . . but don’t count on it.