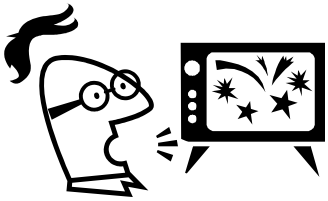
FLETCHER, HEALD & HILDRETH, P.L.C.

Memorandum to Clients

March, 2006 | *News and Analysis of Recent Events in the Field of Communications* | No. 06-02

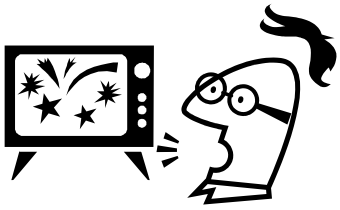
Indecency enforcement comes on strong



The Indecency Sheriff Is Still In Town

FCC tries (with limited success) to clarify policies

By: Harry F. Cole
703-812-0483
cole@fhhlaw.com



After months of anticipation, in March the FCC released three decisions addressing questions of broadcast indecency and profanity. In the FCC's view, these decisions clarify that regulatory crazy-quilt and provide useful and consistent guidance to all affected regulatees.

But out here in the real world, the Commission's decisions provide little more than a mishmash of conflicting results, questionable distinctions, pseudo-"analysis" and virtually no certainty.

Except that the Commission does, conclusively and unequivocally, announce that "shit" is to be deemed right up there with "fuck" as the two words in the English language worthy of being, among other things, "presumptively profane".

The Commission's decisions provide little more than a mishmash of conflicting results, questionable distinctions, pseudo-"analysis" and virtually no certainty.

The three separate decisions were released simultaneously, and were plainly intended to be read as a comprehensive statement of the Commission's policy on indecency and profanity. The three decisions include: (1) a decision affirming the assessment of a $550,000 fine against CBS for the 2004 Super Bowl Half Time show (which, of course, featured the notorious "wardrobe malfunction" which led to the exposure of much of Janet Jackson's right breast for – literally – half a second); (2) a decision assessing more than 100 CBS affiliates fines of $32,500 each (for a grand total well north of $3,000,000) for the rebroadcast of an episode of "Without a Trace" on New Year's Eve, 2004; and (3) a decision resolving in various ways indecency/profanity complaints directed to several dozen programs of various types.

In the aggregate, the decisions amount to nearly 100 pages (not including the separate statements of the Commissioners). While it would be impossible to distill all of the FCC's "analysis" into the narrow confines of the *Memo to Clients*, here are some of the highlights.

Indecency Analysis Explained

First and foremost, the Commission has reiterated and expanded its previous analytical approach to indecency/profanity. That analysis supposedly works as follows. Starting with the standard definition of indecency which the Commission has used for decades ("material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium"), the FCC first reviews the complained-of material to determine whether that material in fact "describes or depicts sexual or excretory activities or organs".

(Continued on page 16)

The Scoop Inside

Be careful what you wish for

CDBS Amendment Options Can Lead To Unwanted Results

By: Ann Bavender
703-812-0438
bavender@fhhlaw.com

Beware to those who use the FCC's electronic filing system to file broadcast station applications. The system has quite a few (ummm, how can we say this politely?) quirks.

One of these involves amendments. Specifically, the system provides two separate and distinct ways to upload and file an amendment to a pending application. And here's a surprise – if you choose the wrong method, or at least if you're not careful following the necessary steps for each method, you may end up filing the wrong information with the FCC. And if you file the wrong information without realizing it, there's a near certain likelihood that the authorization that gets granted won't be for the facilities you really want. . . which will mean that you'll have to go back to the Commission to get everything straightened out. So listen up.

Method One pre-fills the amendment with the information, exhibits, and attachments contained in the initial application. This is fine if you are amending the application for the first time. You start with a draft amendment identical to the initial application and revise only those portions of the application being amended. However, if you use Method One for a second or third amendment, you have a problem. The amendment still pre-fills with the information, exhibits, and attachments contained in the initial application, ignoring all revisions made in subsequent amendments.

For example, let's say you file a first amendment to your application in which you revise the proposed station power from 1.5 kW to 3 kW. Then you have to file a second amendment because your FAA clearance came through so you have been able to get your tower registered and you want to insert the registration in your pending application. If you use Method One for that second amendment and you don't happen to realize or notice that the technical portion of the amendment pre-filled with the proposed power at 1.5 kW (as was proposed in the application as originally filed) instead of 3 kW (*i.e.*, the power specified in the first amendment), you could easily think all you need to do is enter the new tower registration number in the application form and press the file button. The result – the FCC ends up granting you a permit for 1.5 kw, rather than 3 kW, which is obviously the power you really wanted.

This is where Method Two becomes important. Method Two involves making an online copy of the most recently filed amendment. This approach pre-fills the new amendment with the information, exhibits, and attachments contained in the most recently filed prior amendment (including, in our example, the revised power). You start with a draft amendment identical to the most recent prior amendment and revise only the portions being further amended – just what you intended to do. The FCC ends up granting the power you intended.

One final word to the wise: before filing a second (or third, etc.) amendment which you didn't create yourself (maybe your engineer did), you should always check all information, exhibits, and attachments in the amendment to confirm that they reflect the information you intend to file. Getting it right before you file is always easier than trying to correct problems after the fact.

Fletcher, Heald & Hildreth
A Professional Limited Liability Company

1300 N. 17th Street - 11th Floor
Arlington, Virginia 22209
***Tel*:** (703) 812-0400
Fax: (703) 812-0486
***E-Mail*:** Office@fhhlaw.com
Web Site: fhhlaw.com

Supervisory Member
Vincent J. Curtis, Jr.

Co-Editors
Howard M. Weiss
Harry F. Cole

Contributing Writers
Ann Bavender, Sima Chowdhury, Anne Goodwin Crump, Joseph Di Scipio, Jeffrey J. Gee, Steve Lovelady, Lee G. Petro, R.J. Quianzon and Michael Richards

Memorandum to Clients is published on a regular basis by Fletcher, Heald & Hildreth, P.L.C. This publication contains general legal information which is not intended to be deemed legal advice or solicitation of clients. Readers should not act upon information presented herein without professional legal counseling addressing the facts and circumstances specific to them. Distribution of this publication does not create or extend an attorney-client relationship.

Focus on FCC Fines

By: R.J. Quianzon
703-812-0424
quianzon@fhhlaw.com

March Madness - FCC picks (on) colleges – Two colleges made it to the final for-feiture this March as the FCC continued its crackdown on pirates and improper mobile radio usage. In Oakland, California, and Camden, New Jersey, the FCC sent out its gearheads to size up the latest crop of prospects. The FCC found what they were looking for and sent the schools invitations to a Big Dance of sorts, determining whether they should be fined.

In Oakland, the FCC visited the California College of the Arts and found that the campus was broadcasting a signal on 87.9 MHz. The FCC searched its roster and found that the school was not listed as an eligible player – or a licensed station. The FCC noted that the school's "Art Interference Radio" lived up to its name and was causing unlicensed interference at 874 microvolts per meter at 220 meters. The FCC has given the school a notice to turn off the station. The school has ten days to address the findings before the FCC determines whether to issue a fine.

The other college-directed foul call this month was issued to Camden County College in Camden New Jersey. In this case, the school was scolded for using its mobile system (likely a walkie-talkie or vehicle-based two-way radios) in violation of FCC rules. The FCC noted that the College's radio users were not listening to see if anyone else was using the frequencies before talking into their radios and the users were not identifying their radio by call sign when speaking. FCC officials are looking at the call, but the school could face fines or other penalties.

Bury the evidence - FCC finds problems with AM station -- FCC rules require AM radio stations using vertical radiators with a base on the ground to bury their radial wires. Although many of the antenna problems described in this column involve problems observed by FCC agents looking up at towers, the agents did not have to lift their heads to find this problem. The FCC notified a Norwich, New York, station that a government inspection had turned up radial wires that were inadequately buried. The station has twenty days to explain this condition to the FCC.

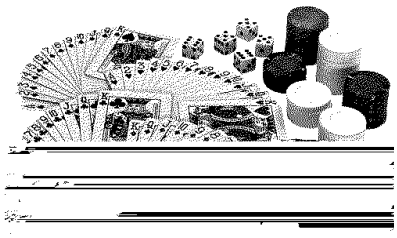
Cheating on exams - the examiners, not the applicants – The FCC allows private companies to administer examinations for the issuance of commercial operator licenses. However, the FCC is now accusing one of the companies of cutting corners, a practice which may have led to cheating on the exams. The examiner was admonished and all of the applicants will have to retake the tests.

As part of the commercial operator examination, applicants are required to know Morse code. The FCC indicates that the examiner was allowing applicants to take this part of the examination over the phone. The FCC also indicates that numerous devices and internet web sites can be used to translate Morse code and there is no way for the examiner to know if the applicant was using such a device during the test. Although the examiner pointed out that FCC rules do not explicitly require the test to be administered in person, the FCC answered that there was no way for the examiner to know who was taking the test or what was being used to assist them when administered over the phone.

Third times the Fine - LPTV station fails EAS testing – A Palmdale, California, Class A television station faces an $8,000 fine for not properly maintaining its EAS system. During May, 2004, FCC agents found that the station did not have its EAS system operating properly and had not been logging EAS tests. In June the agents returned and found the same problems. The station was warned that its equipment needed to be operating, monitoring EAS sources and tests, or malfunctions needed to be logged. A year and a half later, the FCC returned and found the EAS equipment was not connected to the station's transmitter, was monitoring only one source, and had not conducted monthly tests even after they had been twice warned. After the latest FCC visit, the station told the FCC that they had finally plugged in the equipment but that it turned out to be broken. The FCC was not impressed by the hat trick and issued an $8,000 fine.

Blueprint for avoiding closed captioning fines – Readers may recall that the June, 2005 installment of this column reported that numerous television stations in Washington, D.C. faced significant fines for failing to close caption emergency response information during a severe thunderstorm. The NBC owned and operated station reached an agreement with the FCC to pay a fine and implement a compliance plan to prevent a repeat of the incident. Pursuant to that agreement, the station has agreed, among other things, to adopt a policy requiring visual presentation to accompany any emergency bulletins that interrupt regularly-scheduled programming. The station will also post reminders of the requirement on visible points in the newsroom and will program speed dial buttons on phones in the newsroom to reach the captioning

(Continued on page 5)



Playing it close to the vest

FCC Hedges Bet On Gambling Advertising

DOJ folded long ago, but since 1999 FCC has yet to raise or call

By: Jeffrey Gee
703-812-0511
gee@fhhlaw.com

As we discussed in last month's edition, the law regarding the advertising of online gambling remains unclear. Since online gambling has existed for less than ten years, however, some confusion is to be expected. Conversely, one would expect the status of advertising for off-line casino gambling, which has existed for hundreds of years, would be as clear as day. Unfortunately, between court rulings, prosecutorial decision making, and ambiguous public statements by the FCC, the current status of casino gambling advertising can be as tough to figure as the odds at the Golden Nugget sports book. [Author's Note: Due to the overuse of gambling metaphors in last month's article, this will be the last attempt at gaming humor for remainder of this article.]

On paper, federal laws on the advertising of lotteries and casino gambling are relatively straightforward. Title 18 U.S.C. §1304 provides that it shall be a criminal offense to permit the broadcasting of any advertisement of "any lottery, gift enterprise, or similar scheme." This prohibition is generally understood to include not only lotteries and casino gambling, but ***any*** activity in which anything of value is given for a chance to win another thing of value.

Based on the statutory mandate from Congress (*i.e.,* 18 U.S.C. §1304), Section 73.1211 of the FCC's rules follows this prohibition, prohibiting broadcasters from broadcasting any advertisement for "any lottery, gift enterprise, or similar scheme," with a few important exceptions. First, the prohibition does ***not*** apply to lotteries conducted by states where the station broadcasting the advertisement is located within a state that conducts such a lottery. The rules also provide an exception for lotteries and other activities permitted by state law and conducted by non-for profits or as an incidental promotional activity by commercial organizations. Also excepted, for no apparent reason, are non-profit fishing contests. Most significantly, gaming activities conducted by Indian tribes pursuant to Federal law are excepted from the FCC's rules.

Thus, the rules on their face permit the advertising of certain casino activities (when conducted by Indian tribes under Federal law) but they also prohibit the advertising of precisely the same activities (when, say, Indians aren't involved). Obviously, consistency is not one of the law's strong points.

The FCC's rules expressly prohibit conduct which the DOJ has concluded is perfectly legal, and DOJ's position is bolstered by no less an authority than the Supreme Court.

Largely because of the clear incongruities at work here, the U.S. District Court for New Jersey concluded, in *Players International, Inc. v. U.S.*, that the federal prohibitions on the advertising of casino gambling failed to pass First Amendment scrutiny. In early 1998, the government appealed that decision to the U.S. Court of Appeals for the Third Circuit. In 1999, however, while the *Players International* appeal was pending, the Supreme Court decided, in *Greater New Orleans Broadcasting Ass'n v. U.S.*, that advertising private casino gambling could not be prohibited in states in which such gambling is legal, whether or not Indians were involved. In light of the *Greater New Orleans* decision, the Department of Justice filed to withdraw its appeal of the *Players International* case and notified Congress that DOJ would ***not*** continue to defend the constitutionality of Section 1304 as applied to truthful broadcast advertising for lawful casino gambling.

Thus, it appears clear that, as far as the Justice Department is concerned, broadcasters can air truthful advertising for lawful casino gambling, *regardless of where the broadcaster is located.*

Into this moment of clarity stepped the FCC with a 1999 Public Notice that referred to the Justice Department's actions but did ***not*** explicitly take the same position with respect to Section 73.1211 of the FCC's rules. Instead, the FCC promised that it would "re-evaluate the matter following the Third Circuit's disposition of the *Players International* case."

The Third Circuit dismissed the *Players International* case in 2000, but – and here's a big surprise – the FCC has yet to revisit the subject. Thus, broadcasters are left with the fact that the FCC has never officially disavowed its rules restricting casino advertising, even though the Justice Department expressly disavowed the underlying Federal statue on casino advertising.

(Continued on page 8)

Meet the new boss (re-mix)

Long-Awaited Fifth Commissioner At Hand?

By: Michael Richards
703-812-0456
richards@fhhlaw.com

It took the Senate Commerce Committee just twenty minutes to complete its interview of FCC Commissioner-designate Robert McDowell. With such issues as media ownership deregulation and the AT&T merger with Bell South on the Commission's agenda, you might have thought that there would have been more questions. But there weren't, which suggests that Congress may be anxious to move this nomination along quickly to fill the long-vacant fifth seat on the Commission. (*Extra!! At press time we learned that Senator Rockefeller (D-WV) has put a hold on McDowell's nomination apparently because of legislative issues unrelated to McDowell himself; while probably not a permanent stumbling block, the hold will likely slow things down some.*)

McDowell is a Bush-Cheney loyalist, having served in the Florida trenches during the 2000 recount. Now-Chairman Martin, of course, was Deputy General Counsel to the 2000 Bush campaign. Because they share such common roots, McDowell is expected to provide Chairman Martin the crucial third vote in a number of policy areas – most notably the Chairman's efforts to relax certain media ownership limits – which have been simmering on the backburner for months if not years, presumably awaiting the arrival of that decisive vote. (Since Chairman Martin ascended to the Chairman's seat, the Commission has been evenly split, two Republicans and two Democrats, a stalemate situation which has led the FCC to avoid certain highly controversial issues which break along party lines.)

Commissioner-designate McDowell does not have any significant record on broadcast issues, including the long-pending multiple ownership proceeding. Often described as an attorney with a telecommunications background, he most recently served as Vice President of Comptel, a trade association that represents alternative providers of telecommunications services. These little guys are facing increasingly large competitors among the incumbent "Baby Bells," which have metamorphosed into behemoths more closely resembling the Old Ma Bell in sheer market girth. Of course, the old Ma Bell remnant, AT&T, was merged into SBC Communications (which took on the AT&T name). The new SBC/AT&T is now seeking permission to merge with another of the old telco incumbents, Bell South. While many analysts expect Chairman Martin to support the proposed combination, McDowell's background as a lobbyist and lawyer for the anti-AT&T insurgency suggests that he might not follow Martin's lead here, and instead side with Democrats on the Commission who have been more skeptical of such mega-mergers.

Although McDowell has diplomatically promised to "wipe the slate clean" and "prejudge nothing," the odds-makers inside the Beltway aren't giving either the pro- or anti-merger teams much of a spread when it comes to the new Commissioner. Some informed speculation suggests that McDowell might recuse himself from the Bell South merger altogether. The pressure to recuse would be especially strong if his last employer, Comptel, took a formal position.

McDowell is a cum laude graduate of Duke University, and received his law degree from the College of William and Mary. A native Virginian, McDowell, his wife and two children live on land that was once the McDowell family farmstead in a now suburban area just a little beyond Washington's beltway. He currently serves on the board of a hometown arts organization and has twice run unsuccessfully for the Virginia legislature. A website is operational from his last bid for state delegate in 2003. It still contains a link for campaign contributions by credit card.

(Continued from page 3)

service. The station will distribute a reminder to its employees every six months and will incorporate the policy into annual training sessions. Although the FCC originally proposed a $16,000 fine, it settled with NBC for $12,000. Most importantly, though, because the settlement provides that NBC did ***not*** admit to having violated any rules, its record at the FCC does not suffer any blemish from this particular situation.

Just because it's called a non-competition agreement doesn't mean that it's anti-competitive

Non-Competes 101

Part 1: Keeping your seller out of your market

By: Steve Lovelady
703-812-0517
lovelady@fhhlaw.com

One of the fundamental principles of the U.S. system of free enterprise is that competition is good. So courts in this country tend to be reluctant to enforce contractual agreements in which the parties agree not to compete with each other. In fact, some agreements that rise to the level of restraints-of-trade are downright illegal (as in the "Go to jail, go directly to jail, do not pass GO" type of illegal) under federal laws. Federal regulations and state laws may also prohibit agreements between competitors who agree not to . . . well, compete.

In certain limited circumstances, however, non-competition agreements can be legally entered into between two consenting parties and will be enforceable in court. Those are the agreements we are going to examine in detail in this article.

There are two basic categories of legal non-competition agreements commonly encountered in the business of operating television and radio stations: (1) agreements by sellers of stations not to compete with their buyers after the sales are concluded; and (2) agreements by employees not to compete with their employers after employment relationships have ended. Since each of these types of agreements has its own peculiar characteristics, we are going to divide this article into two installments: This month we cover non-competition agreements in the sale-of-stations context, and next month we will examine agreements not to compete between employers and employees.

When buying a broadcasting station, it is fairly common to include a non-competition agreement as part of the deal. Sometimes it is included as a provision nestled in with the other terms of the general Asset Purchase Agreement for the station, and sometimes it is a stand-alone agreement for which separate compensation is negotiated and paid in addition to the purchase price. Either way, the buyer of the station wants to be protected from a situation in which the seller could turn around right after the sale and start competing against the buyer. Public policy permits these types of agreement as fundamentally fair exchanges of value in the limited context of the sale of the business of the station.

The buyer of the station wants to be protected from a situation in which the seller could turn around right after the sale and start competing against the buyer.

As with all contracts, the first point to examine is: Who are the parties to the agreement? In situations where the seller of a station is a corporation, it is not enough for the buyer who wants to be protected from competition to just enter into an agreement with the selling company. The buyer must also get an agreement from the actual persons who own the company. Otherwise, the owners can just form a new company and start competing.

For example: If you are buying a radio station from Big Tex Broadcasting Company, you need to get the owner, Billy-Bob Johnson, to agree personally not to compete with you after the closing, to stop Billy-Bob from forming New Tex Broadcasting, Inc. with the money he earned from the sale, and buying a better-signal station in the same market to compete with you. In order to have a binding agreement with Billy-Bob, he should either sign the Asset Purchase Agreement as an individual (if the non-competition agreement is built into that document), or he should sign a separate non-competition agreement between you and Billy-Bob individually. And if Big Tex Broadcasting is owned by Billy-Bob, his brother Darryl, and his other brother Darryl, all three of them should sign the agreement so that each is bound individually. In the remainder of this article, when we write about agreements between buyers and sellers of stations, the term "sellers" is meant to include both the sellers ***and*** the sellers' owners.

The next issue to consider in non-competition agreements between buyers and sellers of stations is compensation: How much to pay and whether it should be in one lump sum at closing or spread-out over time. This is mostly a tax issue, which we won't get into in any great depth here. Buyers and sellers should get their tax advisors to help with negotiations of this point. However, here are a few of the basic concepts, to give you a flavor of how complicated this can get.

From the buyers' perspective, payment of separate compensation for a non-competition agreement is generally an expense recognized in the year it is made, as opposed to a capital investment that is depreciated over time.

(Continued on page 7)

(Continued from page 6)

From the sellers' perspective, money received from non-competition agreements is ordinary income, whereas money from the sales of stations will be capital gains (generally taxed at a lower rate). But, if the selling company is a regular "C corp." for tax purposes, payments to the individual owners/shareholders of the corporation under non-competition agreements could avoid the "double taxation" problem that applies to dividends to "C corp." shareholders.

With regard to timing of the payment (one payment up-front, or periodic payments over the length of the agreement), from a contract enforceability perspective, there is really not any technical difference. Practically, however, some buyers may perceive that their sellers are more likely to refrain from competing if there are monetary incentives to be received in the future. Also, buyers may not want to make a large up-front payment to parties who, the buyer figures, are likely to breach non-competition agreements – because then the buyer would end up having to chase the other party down and sue him in order to recover the payments once they are made.

Now, we look at the real "guts" of non-competition agreements—how to define competition. For broadcast stations, this mostly means format (for radio), affiliation (for television), advertising sales (for commercial broadcasters), and market. Because of the general public policy bias against non-competition agreements, it is best to tailor the definition of competition as narrowly as possible while still protecting the buyer's interests. The broadest possible definition would be to prohibit the seller from owning an interest in any type of media outlet at all. It might be difficult to enforce, for example, such a broadly worded non-competition agreement if the seller of a radio station buys a newspaper in the same community. Technically, it is competition for advertisers, but it certainly isn't directly competitive. If the seller bought another radio station in the same service with the same format as the station it sold, *that* would be real competition.

Each situation is unique, but the general rule to ensure the best chance of enforceability is to limit the definition of competition to one that is as narrow as possible.

Each situation is unique, depending on the size of the market and other factors, but the general rule to ensure the best chance of enforceability is to limit the definition of competition to one that is as narrow as possible. If you are buying a Spanish-language format station and intend to continue it in that format, you might be overreaching if you try to prevent the seller from operating a Mandarin language radio station in the same market.

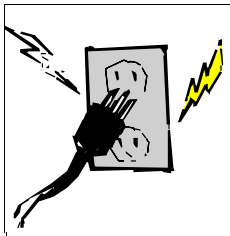
Something that is frequently overlooked is that competition can also mean the competition to hire staff (both on-air and management). Buyers that want to protect their investments when acquiring broadcast stations should include provisions in their non-competition agreements that prohibit the sellers from hiring away any staff of the buyers' stations or discouraging prospective employees from accepting employment from the buyers. Depending on the market, this can be an effective method of preventing a seller from immediately hiring away all of people who actually run the station.

Two other essential factors in non-competition agreements are the ***geographic*** scope of the area within which competition is prohibited, and the ***duration*** of the agreement not to compete. In other words – how far and how long. The FCC has some specific policies that buyers and sellers should take into consideration when including these provisions in non-competition agreements, since conformance to FCC policies will affect whether the FCC approves the assignment of the stations licenses to the buyer.

The FCC's stated policy for non-competition agreements can be inferred from two questions buried in a worksheet to the instructions to the application form: "does the geographic scope of the covenant extend beyond the service contour of the station(s) to be assigned?" and "does the duration of the covenant extend beyond the length of a full license term?" If the answer to either of these is "yes," then the buyer and seller must answer "no" to a question on the FCC's assignment application about whether all of the agreements in connection with the transaction comply with the FCC's policies. Trust us – on that application any "no" answers must be explained and justified in order to get the FCC to approve the application.

It should be noted that, while a "no" answer in the application would almost certainly complicate and likely delay processing of the application, it would probably not be an absolute kiss of death. There is little if any recorded precedent indicating that an excessive non-compete will get an application denied, although it's certainly possible that the FCC could require some change(s) to the non-compete. This lack of precedent may in part be because of the ambiguity regarding the FCC's duration policy quoted above. Does it mean that the duration of the agreement not to compete cannot be longer than the standard 8-year long license term, or does it mean that the duration cannot exceed the remaining length of the current license until it expires? It's unclear. Typically, the negotiated duration of non-competition agreements in the buy/sale of a broadcast station tends to

(Continued on page 11)



FCC to licensees: you snooze, you still lose

FCC Pulls The Plug On Once-silent AM

Commission cuts no slack despite relaxation of Section 312(g)

By: Sima N. Chowdhury
703-812-0484
chowdhury@fhhlaw.com

Back in prehistoric days – well, at least prior to the 1996 Act – a station could go dark and stay dark pretty much indefinitely, as long as the FCC issued it an STA from time to time authorizing the station to remain off the air.

Then along came the 1996 Act, which included a new Section 312(g) which provided that the licensee of any station which failed to transmit a broadcast signal for 12 consecutive months would automatically expire – no ifs, ands or buts, no waivers or extensions, no nothing. If the station was off the air for 12 consecutive months, the station was toast.

The FCC seemed to relish that provision because it relieved the Commission of having to consider and resolve various claims about off-the-air stations. Essentially, all the FCC had to worry about was whether the station had operated at all during any 12-month period. If the station had not, the Commission had no options: the license automatically expired.

But then, as we reported in the January, 2005 *Memo to Clients*, in late 2004 Section 312(g) was changed to remove the unavoidable "automatic death penalty" aspect and to substitute, in its place, a measure of discretion. As modified, the statute still provides for automatic license termination, but it now goes on to state that the Commission may extend or reinstate such station license if the holder of the station license prevails in an administrative or judicial appeal, the applicable law changes, or for any other reason "*to promote equity and fairness.*"

Since then, the question has been whether the FCC would be inclined to avail itself of that extra discretion, or whether, instead, the Commission would tend to stick with the more draconian – but far more easily implemented – automatic expiration component of the Act.

It looks like the staff is going to favor the draconian over the compassionate.

In a recent case, a Conway, Arkansas AM station specifically sought to invoke the discretionary element of Section 312(g) in order to avoid expiration of its license. The station had been off the air for more than a year. The Commission issued a license expiration notice in June, 2005, to which the licensee responded by urging the Commission to reinstate the license, using the discretion offered under §312(g).

The FCC staff, presented with an opportunity to let a station continue to operate, chose instead to shut it down.

There was doubtless not a dry eye in the FCC's offices when the Commission, with little regard for the sweeping language of the statute itself, found simply that the facts of the case did ***not*** warrant an exercise of the discretion retained under §312(g). Taking into consideration a series of procedural missteps which the licensee had taken, we should not be surprised at this outcome. But the fact remains that the FCC staff, presented with an opportunity to let a station continue to operate, chose instead to shut it down. This underscores why licensees should be sure to keep their stations up and running – and, in particular, why they should in no event allow their station to remain off-the-air for more than 12 months. Notwithstanding the 2004 change in the Act, termination of the license appears to remain the Commission's preferred approach.

(Continued from page 4)

This creates an odd situation in which the FCC's rules on their face expressly prohibit conduct which the DOJ has concluded is perfectly legal, and DOJ's position is bolstered by no less an authority than the Supreme Court's ruling in *Greater New Orleans Broadcasting Ass'n*. And the FCC's own 1999 public notice might reasonably be read as the Commission's effort to publicly disavow its rule (even if the notice in fact stopped short of doing precisely that). That conclusion could reasonably be drawn from the fact that the FCC has not enforced the rule since that public notice.

But the fact remains that the FCC, whether through bureaucratic inertia, conspiracy, or oversight, has left the rule on its books. As a practical matter, lawyers tend to be reluctant to counsel folks to ignore the rules that are still alive and kicking. That can lead to trouble for all concerned. But if there were ever any inclination to provide such counsel, this would certainly be an obvious place for it. The combination of factors at work here strongly indicates that this rule is a dead letter, unlikely to be enforced.

Any questions regarding whether or not your station can accept such advertising should be referred to communications counsel for review.

Heading for the white open spaces?

"White Space" Proposal Gets Boost From Capitol Hill

By: Lee G. Petro
703-812-0453
petro@fhhlaw.com

Reinvigorating a debate that many had thought was dead, two separate bills have been introduced in the U.S. Senate which would require the Commission to adopt rules to authorize the unlicensed use of television spectrum for wireless broadband services. The bills have been fast-tracked in the Senate and, thus, have raised the attention and concern of television broadcasters and other affected parties.

The bills differ in substance slightly, but the impact of either likely could be detrimental to television broadcasters and other users of the spectrum.

First, both would require the Commission to complete the long-pending television white space proceeding within 180 days. You may remember that the Commission opened a proceeding a few years back in which it sought comments on a proposal (from its Spectrum Task Force) to permit fixed and mobile uses of the TV band for wireless services. The idea was that, over large geographic areas, similarly large chunks of the TV band are not being used. Wouldn't it make sense, the Commission reasoned, to allow unlicensed devices to operate on those frequencies in those areas? That would make maximally efficient use of the spectrum without interfering with anyone else's use.

Above, an artist's rendering of "white space"

However, a large majority of the comments filed in the proceeding opposed the proposals, and press reports indicated that Chairman Martin did not view this as a high priority when he came into the head office. As a result, while the proceeding still technically lingers as an open matter on the FCC's books, the smart money figured that it was going nowhere at all – and sure enough, there have been no apparent moves in the interim to move the matter forward.

But the new bills now working their way through Senate would require the completion of this rulemaking, and adoption of technical rules and certification processes for unlicensed devices to "facilitate the robust and efficient use" of the TV band (S.2332). One bill goes so far as to require the television broadcaster to provide field measurements in order to file a complaint with the Commission over alleged interference.

The Senate Commerce Committee held a hearing on the bills on March 14th. Many of the senators warned broadcasters against raising false claims of interference in an attempt to derail the bills. It would appear that the Senate hearing was merely a formality, and that the two bills will be reconciled and attached to a larger bill in late April. While there is not yet a companion bill in the House of Representatives, it is possible that such a bill will be introduced should the Senate bills gain traction.

Several groups have already begun to start grass-roots movements against the bill, including the wireless microphone users who also use the TV band, the consumer electronic companies who fear the unlicensed devices will interfere with the digital set-top boxes, and, not surprisingly, television broadcasters.

The parties share several concerns about the validity of the FCC's "white space" notion.

First and foremost, proponents of that notion have thus far ***not*** developed a device that will be able to sense whether a television station is using a particular spectrum. Since the proposal depends on the presumed availability of such devices, the fact that none has yet been produced raises valid questions as to whether it makes sense to adopt rules based on non-existent technology.

Second, no one has yet provided a solution for the problem of the unidentified receiver. Let us assume that it is possible to make a device which (a) accurately senses whether a TV channel is available and then (b) can react accordingly, either transmitting (if it senses no nearby transmissions) or moving to another frequency (if transmissions are detected on the first-chosen frequency). The problem is that such a device would not necessarily be able to accurately determine the proximity of the unlicensed device to a television receiver. Without knowing its proximity to a television receiver, the unlicensed device could not determine whether it would cause interference to the reception of a particular TV channel.

Since the device will not have the same reception abilities as a television receiver, many are concerned that the

(Continued on page 10)

FCC still loath to remove a town's only station

307(b) Shuffle Rejected

By: *Sima N. Chowdhury*
703-812-0484
chowdhury@fhhlaw.com

Unimpressed with an AM licensee's attempt to parlay the proximity of its two stations into upgrades for both of them, the FCC recently dismissed one of the licensee's CP applications.

The licensee owns stations in beautiful downtown Harvard and equally beautiful Evanston, both in Illinois. It filed an application to move the Harvard station across the border to Weston, Wisconsin. That application, miraculously enough, turned out to be a singleton, which meant it could be granted without recourse to any competitive auction. Things were looking up.

The Commission does not react favorably to attempts by licensees to strong-arm their way to a conclusion of their own choosing.

But when the staff processed the application, it recognized that the station in question is the only radio station licensed to Harvard. As a result, grant of the application would deprive Harvard of its only local "transmission service". And even though Weston is a bigger town and lacks any local stations (and thus would appear to be even more deserving of its own local service than smaller Harvard), the FCC's policy for some time has been clear: removal of a community's only local station is "presumptively contrary to the public interest". So things were automatically not looking good for the Harvard deal.

But wait, said the licensee. The FCC should not limit its analysis to Harvard v. Weston. Rather, the licensee argued, the FCC should recognize that the move to Weston is merely one part of the licensee's overall game plan which included moving the Evanston station to scenic Carol Stream, Illinois. That latter move can be accomplished ***only*** if the Harvard station moves out to, say, Weston – or, in a worst-case scenario, if the Harvard station is shut down and its license turned back in to the Commission.

The licensee assured the Commission that the licensee is prepared to kill the Harvard station in order to effectuate the move from Evanston to Carol Stream. Thus, according to the licensee, the proper analysis is whether it would be better to end up with a Weston ***and*** a Carol Stream station, or just a Carol Stream station.

(Continued on page 11)

White Space (Continued from page 9)

unlicensed device will transmit on a channel it has incorrectly determined to not be in use. Similar attempts to develop acceptable devices to operate in other bands have been unsuccessful to date.

And hovering all of these potential problems is the ultimate enforcement problem: since the devices would be unlicensed, it would be impossible to track down and order the users to cease using the devices should they in fact interfere with licensed operations.

Finally, many broadcasters are concerned about the impact of the unlicensed devices on the DTV transition. Since the unlicensed devices would be digital, and the final broadcast transition to DTV is still three years in the future, many are concerned that the unlicensed use of the spectrum will adversely affect the digital operations of television stations just as they commence full-power service on their channels. Since digital reception is an all-or-nothing proposition – *i.e.*, either there is a picture on the receiver or the screen is blue – it is not clear whether the public would tolerate the new DTV service if it is constantly being interfered with by mobile devices that are unable to be tracked down and turned off.

The grass-roots campaigners have urged parties to send letters to their Senators to inform them of their concerns regarding the unlicensed devices. On the other side, Intel and Microsoft are strongly lobbying the Senate to adopt the bill to permit the introduction of new wireless broadband services and devices. In the middle, as usual, are the viewers of the television stations that may or may not continue to receive their digital programming.

We will continue to monitor the situation, and provide updated as future events occur. In the meantime, if you have any questions, please contact the attorney with whom you normally work, or Lee G. Petro.

Going once, going twice, SOLD!!!

TV Auction Ends Quickly

FCC nets $23 million

By: R.J. Quianzon
703-812-0424
quianzon@fhhlaw.com

In one of the first FCC auctions to make television station construction permits available to any bidder who wanted to buy one, the FCC saw most of the construction permits sell for more than one million dollars. The auction ended after only four days, a relatively quick event when compared with earlier FM auctions that dragged on for weeks.. The speed with which the auction progressed was tied to the fact that only ten construction permits were on the block in this auction.

Although auction rules place some limitations on how much bidders can raise their bids, in several markets bidders almost doubled the previous bids round after round. For instance, bidding in Bend, Oregon, began at $80,000; when the auction was over, the Eugene, Oregon, ABC affiliate had paid more than 100 times the opening bid and was willing to plop down $8.6 million for the construction permit. The winning bid amounts for the ten permits were:

Bend, Oregon - $8.6 million
Greeley, Colorado - $5.3 million
Osage Beach, Missouri - $2.7 million
Derby Kansas - $ 2.7 million
Pueblo, Colorado - $2.6 million
Medical Lake, Washington - $1.6 million
Apalachicola, Florida - $1.4 million
Topeka, Kansas - $1.2 million
Jackson, Mississippi - $295,000
Duluth, Minnesota - $404,000

Four of the successful bidders claimed that they were new entrants and therefore qualified for 35% discounts off their high bids.

(Continued from page 7)

be five years or less, so this issue is moot if the station's license is not up for renewal soon.

Another point to consider is that non-competition agreements are interpreted and enforced under state laws. It is important in any contract to specify which state's laws apply. In non-competition agreements it is especially important, because the enforceability of such contracts varies from state to state. Get the advice of a lawyer qualified to practice in the state for which law you choose. Also, we generally recommend including a "savings" clause in non-competition agreements that specifies any provision deemed to be invalid or unenforceable under the law of the state will not invalidate or make unenforceable the remaining provisions of the contract. And we recommend inserting a clause which states that the offending provisions will modified to the extent necessary to make it valid and enforceable. In this way, if a court determines that a duration of four years is unenforceable under a particular state's laws, but that a 2-year duration would be enforceable, then the court can revise the agreement to last for two years instead of not enforcing it at all.

Finally, buyers who intend to re-sell the stations they are buying before the term of their non-competition agreements expires should try to include a provision in their contracts with the seller that the right to enforce the agreements is transferable to any new buyer and still binds the original seller.

(Continued from page 10)

The FCC wasn't buying what the licensee was selling.

As the Commission saw it, the licensee was arguing that its two applications (*i.e.*, Harvard to Weston and Evanston to Carol Stream) could be treated as contingent, even though those applications did not even mention each other, much less comply with the details of the rule governing contingent applications. Moreover, the Commission was not impressed by the fact that, with its "move it or lose it" threat, the licensee seemed to be saying that the licensee – through its manipulation of its two stations – should be the one to determine what arrangement of stations would best satisfy Section 307(b) considerations.

This action underscores a number of noteworthy points. First, the Commission remains firmly locked onto its policy of not removing a community's only local station. Second, the Commission does not react favorably to attempts by licensees to strong-arm their way to a conclusion of their own choosing. And third, if you do plan to try to leverage your ownership of a couple of stations into some kind of dual upgrade situation, be sure that your applications satisfy the contingent application rule before arguing to the Commission that the applications are, in fact, contingent.

Up, up and away!!!

FCC Announces Proposed 2006 Regulatory Fees

By: Harry F. Cole
703-812-0483
cole@fhhlaw.com

The Commission has released its Notice of Proposed Rulemaking on the Assessment and Collection of Regulatory Fees for Fiscal Year 2006. Sit down and hold on -- the majority of broadcast licensee regulatory fees are proposed to go up for 2006. Who'd have thunk it? The proposed fees (which would be due for payment later this year) are set out on the next page.

This year it looks like the proposed fee increases will be hitting TV licensees overall a bit harder than radio folks, at least percentage-wise. TV license fees are set to go up anywhere from 1.1% (for commercial VHF stations in the top ten markets) to 3.7% (for commercial UHF's in Markets 11-100. VHF and UHF licensees in other markets should see their fees go up by 2.9%-3.6%, and holders of new CP's for television stations are slated for a 2.9% increase. Fees for LPTV, TV/FM translators and boosters are proposed to bump up by 3.8%.

On the radio side, the majority of fee categories are proposed to remain the same as last year. However, Class C and D AM stations serving at least 25,001 people should see their fees climb anywhere from 1.8% (for Class C's serving 1,200,001-3,000,000 people) to 4.5% (for Class C's serving 25,001-75,000 folks). The only FM licensees getting hiked are licensed Class A, B1 and C3 stations serving more than 500,000 people.

And the prize for the highest proposed percentage increase this year goes to (drum roll, please) AM construction permit holders, whose fee will increase from $310 to $375, a whopping 21%.

The payment window has not yet been set. While regulatory fees are usually due to be received by the FCC in late September, this is ***not*** invariably the case. As you may recall, in 2004, the Commission surprised everyone and required payment of regulatory fees in August. With that recent history, it is difficult to predict what the Commission will do this year. We will let you know when the FCC announces the filing window.

As usual, fee payments must be accompanied by a completed FCC Form 159 (Fee Remittance Advice). To fill out that form you will need to know the FCC Registration Number (FRN) of the entity owing the fee, as well as the FRN of the person or entity making the payment (if that person or entity is different from the one which owes the fee). You will also need to know the payment type code for the particular fee you are paying. Fees can be paid on-line again this year. Again, payments not paid on-line or received by Mellon Bank (*i.e.*, the Commission's fee collection representative) by their due date will be assessed a ***25% late payment fee***. We will, of course, be happy to assist you in the filing of your fee(s).

*Under the "red light" system, a licensee which fails to pay the required reg fee is "red lighted". When that occurs, the licensee will **not** be granted **any** new authorization unless and until the "red light" is cleared either by payment of the outstanding fee or the making of appropriate arrangements with the Commission for such payment.*

Payment of reg fees has always been important, but it became even more last year with the implementation of the "red light" system. Under that system, a licensee which fails to pay the required reg fee is "red lighted". When that occurs, the licensee will ***not*** be granted ***any*** new authorization unless and until the "red light" is cleared either by payment of the outstanding fee or the making of appropriate arrangements with the Commission for such payment. If a delinquent licensee files an application of any kind, that application will be dismissed if the delinquency is not cleared up within 30 days. In view of this, we urge everyone who is subject to regulatory fees to be sure to get their payments made in a timely manner.

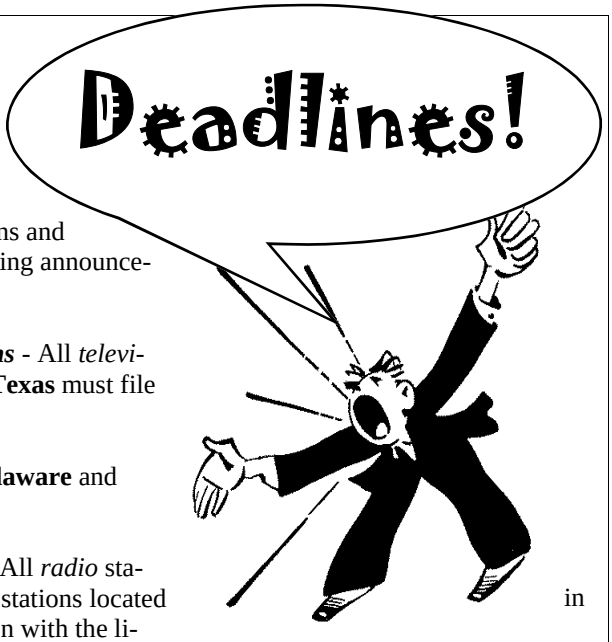
Comments on the Commission's proposed regulatory fees are due to be filed with the FCC by April 14. Reply comments are due April 21. We expect the Commission to release its Report and Order with the final regulatory fee amounts early this summer.

The *proposed* 2006 regulatory fees are listed on the next page.

FEE CATEGORY	Proposed FY 2006 Annual Regulatory Fee (USD)
TV VHF Commercial	
Markets 1-10	62,675
Markets 11-25	46,225
Markets 26-50	33,125
Markets 51-100	19,450
Remaining Markets	4,775
Construction Permits	3,275
TV UHF Commercial	
Markets 1-10	20,750
Markets 11-25	18,175
Markets 26-50	10,425
Markets 51-100	6,350
Remaining Markets	1,775
Construction Permits	1,775
Low Power TV, TV/FM Translators/ Boosters	410
Other	
Broadcast Auxiliary	10
Earth Stations	205
Satellite Television Stations	
All Markets	1,100
Construction Permits	555

Proposed FY 2006 Schedule of Regulatory Fees for Commercial Radio Stations						
Population Served	**AM Class A**	**AM Class B**	**AM Class C**	**AM Class D**	**FM Classes A, B1 & C3**	**FM Classes B, C, C1 & C2**
<=25,000	625	475	375	450	550	725
25,001 -75,000	1,225	925	575	700	1,125	1,250
75,001 -150,000	1,825	1,150	775	1,150	1,550	2,300
150,001- 500,000	2,750	1,950	1,150	1,375	2,375	3,000
500,001 -1,200,000	3,950	2,975	1,925	2,300	3,775	4,400
1,200,001- 3,000,000	6,075	4,575	2,875	3,675	6,150	7,025
>3,000,000	7,275	5,475	3,650	4,600	7,850	9,125
AM Radio Construction Permits	375					
FM Radio Construction Permits	550					

April 1, 2006



Television Renewal Pre-Filing Announcements - *Television* stations located in **Arizona**, **Idaho**, **Nevada**, **New Mexico**, **Utah**, and **Wyoming** must begin pre-filing announcements in connection with the license renewal process. **Arizona**, **Idaho**, **Nevada**, **New Mexico**, **Utah**, and **Wyoming** *Class A TV* stations and *LPTV* stations originating programming also must begin pre-filing announcements.

Television/Class A/LPTV/TV Translator Renewal Applications - All *television*, *Class A TV*, *LPTV*, and *TV translator* stations located in **Texas** must file their license renewal applications.

Radio Renewal Applications - All *radio* stations located in **Delaware** and **Pennsylvania** must file their license renewal applications.

Radio and Television Renewal Post-Filing Announcements - All *radio* stations located in **Delaware** and **Pennsylvania** and all *television* stations located in **Texas** must begin their post-filing announcements in connection with the license renewal process, and continue such announcements on April 1 16, May 1 and 16, and June 1 and 16.

EEO Public File Reports - All *radio* and *television* stations *with more than five (5) full-time employees* located in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, **Tennessee**, and **Texas** must place EEO Public File Reports in their public inspection files. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

Radio and Television Ownership Reports - All *radio* stations located in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, and **Tennessee** must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All *television* stations located in **Texas** must also file a biennial Ownership Report. All reports filed on FCC Form 323 or 323-E must be filed electronically.

April 10, 2006

Children's Television Programming Reports - For all *commercial television* stations, the reports on FCC Form 398 must be filed electronically with the Commission, and a copy must be placed in each station's local public inspection file.

Commercial Compliance Certifications - For all *commercial television* stations, a certification of compliance with the limits on commercials during programming for children ages 12 and under must be placed in the public inspection file.

Issues/Programs Lists - For all *radio*, *television*, and *Class A TV* stations, a listing of each station=s most significant treatment of community issues must be placed in the station=s local public inspection file. The list should include a brief narrative describing the issues covered and the programs which provided the coverage, with information concerning the time, date, duration, and title of each program.

April 3, 2006

LPTV/Class A Television/Television Translator Filing Freeze - *LPTV*, *Class A TV*, and *television translator* stations will be precluded from filing minor modification, displacement, and digital on-channel conversation applications during this filing freeze from April 3, 2006, through May 12, 2006.

(Continued on page 15)

(Continued from page 14)

May 1-May 12, 2006

LPTV/Class A Television/Television Translator Filing Window - *LPTV*, *Class A TV*, and *television translator* stations may file applications for digital companion channels during this filing window in connection with the digital television transition.

June 1, 2006

Television Renewal Pre-Filing Announcements - *Television* stations located in **California** must begin pre-filing announcements in connection with the license renewal process. **California** *Class A TV* stations and *LPTV* stations originating programming also must begin pre-filing announcements.

Television/Class A/LPTV/TV Translator Renewal Applications - All *television*, *Class A TV*, *LPTV*, and *TV translator* stations located in **Arizona**, **Idaho**, **Nevada**, **New Mexico**, **Utah**, and **Wyoming** must file their license renewal applications.

Television Renewal Post-Filing Announcements - All *television* stations located in **Arizona**, **Idaho**, **Nevada**, **New Mexico**, **Utah**, and **Wyoming** must begin their post-filing announcements in connection with the license renewal process, and continue such announcements on June 1 and 16, July 1 and 16, and August 1 and 16.

EEO Public File Reports - All *radio* and *television* stations *with more than five (5) full-time employees* located in **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **Michigan**, **Ohio**, **Nevada**, **New Mexico**, **Utah**, **Virginia**, **West Virginia**, and **Wyoming** must place EEO Public File Reports in their public inspection files. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

Radio and Television Ownership Reports - All *radio* stations located in **Michigan** and **Ohio** must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All *television* stations located in **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **Nevada**, **New Mexico**, **Utah**, **Virginia**, **West Virginia**, and **Wyoming** must also file a biennial Ownership Report. All reports filed on FCC Form 323 or 323-E must be filed electronically.

July 1, 2006

Digital Television Stations - All *television* stations must complete construction of and begin operation with their full replication or maximization facilities or face the loss of interference protection beyond the signal contours of the facilities actually in operation as of that date. If a station is unable to meet this deadline, it musts file a waiver request prior to or on July 1.

FHH - On the Job, On the Go

It's that time of year again, when the NAB converges on Vegas. This year FHH attorneys will be mingling *en masse.* Attending all or part of the NAB will be: the **Franks** (Jazzo and Montero), **Jim Riley**, **Scott Johnson**, **Kathleen Victory**, **Harry Martin**, **Howard Weiss**, **Lee Petro** and **Joe Di Scipio**. They'll all be staying at the Bellagio. And lest you think that they will be boondoggling 24/7, get this. **Joe** will be on the Enforcement Panel on Monday, April 24, from 10:30-11:45 a.m. **Frank J** will be on the "Current Issues in Law and Policy" panel at the BEA conference held in conjunction with the NAB; it'll be at the Vegas Convention Center on Thursday, April 27, from 10:30-11:45 a.m. And **Frank M** will be attending a reception held by the Independent Spanish Broadcastres Association on Tuesday, April 25.

Howard and **Scott** will attend the Alabama Broadcasters Association convention in Gulf Shores from May 27-28. **Howard** will then attend the Virginia Association of Broadcasters convention at Virginia Beach from June 15-18.

Frank J was a panelist at the George Washington University's Executive Briefing on "'Smart' Cities and Secure Infrastructure: Modularity, Interoperability and 'Future-Proofing" on March 24 in Washington.

(Continued from page 1)

If the answer to that question is yes, then the material is further analyzed under a three-part test focusing on: (1) the explicitness or graphic nature of the material; (2) whether the material dwells on or repeats at length the offensive descriptions; and (3) whether the material "panders to, titillates, or shocks the audience". This tri-partite analysis is "contextual", which means that it supposedly takes into account "the manner and purpose" of the material in question. According to the Commission, this means that material which panders, titillates or shocks is to be treated "quite differently" from material which is "primarily used to educate or inform the audience".

While this "analysis" may appear at first blush to afford a somewhat objective, reproducible test which can be applied even-handedly to various fact patterns and which should, theoretically, lead to consistent results from one case to the next, look more carefully. Each of the separate components of the analysis gives the Commission boatloads of wiggle room within which to apply subjective judgments. And since the FCC insists that none of the various components is "weighted" vis-à-vis the others, the Commission has maximum flexibility to pick and choose among the various factors, stressing one or the other in any given case in order to justify a pre-ordained determination.

The FCC's gloss on profanity removes from the scope of "profanity" a wide variety of terms – for example, racial or ethnic epithets – that might otherwise have been thought to be "profane" under the FCC's 2004-vintage definition.

In other words, it's almost impossible for an average person, looking at a given set of facts, to predict with any reliability whether the FCC would conclude that those facts constitute "indecency". (We'll illustrate this below.)

Profanity Analysis Explained

The concept of "profanity" – a class of speech separate and distinct from "indecency" – has been around for decades, and was historically thought to include some element of sacrilege. "Profanity" was almost completely ignored by the FCC until the 2004 *Golden Globe Awards* decision. At that point the Commission announced that "profanity" involved ***not*** sacrilege, but rather language "so grossly offensive to members of the public who actually hear it as to amount to a nuisance".

The recent decisions narrow that definition by limiting it to "words that are sexual or excretory in nature or are derived from such terms". That gloss on profanity removes from the scope of "profanity" a wide variety of terms – for example, racial or ethnic epithets – that might otherwise have been thought to be "profane" under the FCC's 2004-vintage definition. But beyond that narrowing, the new decisions shed virtually no light on how the Commission will determine, from one case to the next, whether any particular language is "so grossly offensive" as to "amount to a nuisance".

Further complicating that profanity analysis is the FCC's observation that certain "vulgar sexual or excretory terms" are SO grossly offensive as to be "presumptively profane". These terms are ones which are "the most offensive words in the English language" and which are "likely to shock the viewer and disturb the peace and quiet of the home". (It appears from the remainder of the decisions that the universe of such "presumptively profane" words is limited to two, *i.e.*, fuck and shit.) BUT even presumptively profane language may, in "unusual circumstances", NOT be profane "where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance".

So, again, the Commission has given itself maximum leeway to engage in ad hoc decision-making, using an "analysis" which provides no meaningful guidance as to any governing limits. Indeed, even the seemingly *verboten* "presumptively profane" words ***might*** be permitted.

Pixilation, Bleeping and Clothing

Based on the definition of indecency – which, by its own terms, involves a description or depiction of activities or organs – one might conclude that indecency could be avoided by using standard "bleeping" or "pixilating" in order to mask any actual "description" or "depiction". Think again.

The Commission has now made clear that "mere pixilation of sexual organs is not necessarily determinative . . . because the material must be assessed in its full context".

The difficulty with this approach is that it enables the FCC to penalize not what is ***actually*** depicted, but rather what the viewer or listener (whoever he or she might be) ***believes*** is being depicted. After all, lurking under the pixilation or the bleeping may be purely innocent content which the audience has been lured, by other circumstances, to mistakenly believe is offensive.

(Continued on page 17)

(Continued from page 16)

Interestingly, by the Commission's reasoning, it would appear that the use of the term "the F-word" as a substitute for "fuck" – a substitution which the Commission itself utilizes, presumably to reduce the number of really, really bad words it has to print – would be objectionable because, even though the word "fuck" is not spoken, the reader (or listener), coming across the term "the F-word", immediately recognizes the unspoken/unwritten term, *i.e.*, "fuck".

Similarly, the Commission (in August, 2004) at least suggested that, as long as nudity was not involved, depictions of activities which might be interpreted as sexual would not be a problem. But in the recent decisions, that no longer appears to be the case. According to the Commission, the lack of nudity is immaterial where "the sexual nature of the scene is unquestionable". In stating that position, however, the Commission does not explain why, then, the scene in "Buffy the Vampire Slayer" – which involved a fully-clothed Buffy "kissing and straddling" an associate in a seemingly intense and passionate manner – was deemed acceptable less than two years ago.

Which Stations Get Cited?

Historically, the Commission has tended to cite for indecency violations only those stations against which a complaint was filed. Presumably the Commission felt that, even if it had reason to believe that some allegedly indecent programming was broadcast on a number of stations nationwide, the agency's only concern should be the station whose broadcast elicited the complaint.

That approach seemed to change in late 2004, when the FCC issued a Notice of Apparent Liability (NAL) for the broadcast of "Married By America" on the Fox Network. The Commission sought information from a Fox O&O about what stations had carried the program nationally – a universe which included stations which were ***not*** the subjects of any complaints – and ***all*** those stations were ultimately hit with the NAL. Of course, earlier in 2004 the Commission, addressing *L'Affaire Janet Jackson* and Super Bowl 2004, had gone after ***not*** all the CBS affiliates which had broadcast the scandalous disrobing of Ms. Jackson, but merely the CBS O&O's. (For what it's worth, the Commission explained this disparate treatment by saying that the CBS affiliates which are not O&O's "could not have reasonably anticipated" that the Super Bowl show would contain bad stuff, so those non-O&O's should not be liable; by contrast, the FCC noted, the Fox affiliates could have known what was in store and could have pre-empted it.)

No problem – this potential inconsistency has now been cleared up in the recent decisions. In the "Without A Trace" decision, the Commission advises that, because of its "commitment to an appropriately restrained enforcement policy", it plans to fine only those licensees whose broadcasts were "actually the subject of viewer complaints to the FCC", ***even though*** the Commission has been "informed" that other stations also broadcast the program. And, sure enough, the FCC applies the same "restrained" policy in several cases addressed in its omnibus decision.

Thus, for the time being, at least, it appears that fines will ***not*** be issued against stations as to which ***no*** complaints have been filed. (It will, of course, be interesting to see how the Commission addresses this question in the "Married By America" proceeding, which is still pending before the FCC. As noted, the initial NAL there proposed fines against a number of stations which were ***not*** the subjects of complaints. Theoretically, the FCC's next decision relative to "Married By America" will withdraw those fines from those complaint-free stations – if, that is, the Commission really does intend to apply this policy consistently

The S-List

One of the great ironies in the history of indecency is that, while many people seem to assume that there has always been a list of bad words (usually numbering seven) that the FCC has absolutely, positively prohibited, in fact there has ***never*** been such a list. The notion of the "seven dirty words" was coined by George Carlin in the comic monologue the broadcast of which led to the Supreme Court's 1978 *Pacifica* decision. But Carlin was just making that up – there never was such a list. And even when the FCC slapped Pacifica for broadcasting the Carlin monologue, the FCC did ***not*** adopt his list as FCC policy.

But the irony is now complete because it appears from the recent decisions that the FCC is now ready to establish such a list. As noted above, at present the list of "presumptively profane" words – *i.e.*, words that ordinarily will trigger regulatory problems almost automatically – consists of two (fuck and shit, as well as their variants). And in its recent decisions the Commission has also considered other "coarse" expressions and declined to include them on the list, even though they may be "understandably upsetting" or "understandably offensive" to some members of the audience. That secondary list of bad-but-not-that-bad language includes: poop, crap, you suck, dick, dickhead, wang, little banana, hell, damn, bitch, pissed off, up yours and ass (in various expressions, including "kiss my ass", "fire his ass", and "wiping his ass"). According to the Commission, such language ***may***, if used in certain particular contexts, ***not*** be "patently offensive". This is not to say that those secondary

(Continued on page 18)

(Continued from page 17)

expressions will invariably be forfeiture-exempt – to the contrary, the Commission clearly raises a warning flag about their possible use in other contexts. The problem is that the Commission provides no guidance as to when they may be good and when they may be bad.

The FCC As Uber-Editor

Normally, we tend not to think of the FCC as a creative force in our culture. Rather, the Commission is simply a regulatory agency which ordinarily would ***not*** be called upon to make artistic judgments.

That was then, this is now.

The Commission has thrust itself deeply into the creative process, probably as a result of the *Saving Private Ryan* decision last year. To recap, back in 2004, the Commission made clear, in the *Golden Globe Awards* decision, that even the occasional, fleeting use of "fuck" would be prohibited. But then along came Veterans' Day, when a number of stations chose to broadcast the World War II epic *Saving Private Ryan*, which prominently features the use of that word over and over again.

The Commission has jumped with both feet into the quicksand of artistic judgment, an enticing but dangerous quagmire. But the creative process is an area which does not lend itself to bright guidelines or easy limits.

Under the policy laid out in *Golden Globe Awards*, of course, there would have been no question: the unedited broadcast of *Saving Private Ryan* would have been prohibited. But a number of folks – including politically influential veterans' groups and their standard-bearers in Congress – protested that removal of that language would render the movie inaccurate and less powerfully honest. So the Commission carved out an exception which permits the use of graphic language (including "fuck"), when it is "critical to portraying serious events realistically".

It should not be hard to figure what happened next. The creators of programming used graphic language and images to depict the stories they were telling, some viewers were offended by that, the FCC received complaints, and lo and behold, the FCC now finds itself in the role of art critic and editor.

For example, a noncommercial TV station broadcast a documentary about blues musicians designed to provide a window in the musicians' world "with their own words". And those words included a fair number of selections off the Really Bad List. The station argued that the inclusion of that language was important so as to accurately reflect the viewpoints of the program's subjects. The Commission "disagree[d] that the use of such language was necessary to express any particular viewpoint". The FCC also said that the station had not "demonstrated that it was essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance, or that the substitution of other language would have materially altered the nature of the work."

In the same vein, several episodes of the police drama *NYPD Blue* contained variations of the word "shit", usually articulated by the policeman/protagonist. The licensee asserted that the words were used for dramatic effect (presumably in much the same way as the other Really Bad Word was used in *Saving Private Ryan*). But the FCC held that "mere dramatic effect" was not an adequate justification here, apparently because the "authentic feel" of the program "could have been fulfilled . . . without the broadcast of expletives".

Obviously, the Commission has jumped with both feet into the quicksand of artistic judgment, an enticing but dangerous quagmire. The creative process is an area which does not lend itself to bright guidelines or easy limits. If, in the creator's opinion, the use of certain language or images is essential to communicate that which the artist seeks to communicate, on precisely what basis does the FCC conclude that the language/images were not really essential, or that the artist's goal could have been achieved in some other, less offensive, way? We don't know, and the FCC doesn't tell us. But the FCC ***does*** make it clear that it reserves the right to second-guess artistic judgments.

The Hobgoblin At Work

In light of Emerson's admonition that a foolish consistency is the hobgoblin of little minds, it may be unwise to expect the FCC to be 100% consistent all the time. But still, the FCC should certainly be able to do better than it has in its recent rulings. Some examples:

- In the "Without A Trace" decision, stations were fined an aggregate of more than $3 million for depicting a teen-age sex party. But one episode of *The Oprah Winfrey Show* focused on teen-age sex parties, providing clear descriptions of a number of graphic sexual activities supposedly engaged in at

(Continued on page 19)

A word to the wise from Joe Di Scipio

The Digital TV Transition – Never Say Never

Failure to meet some early stage DTV requirements not necessarily fatal to post-transition protection

As we have told you many times before in these pages before, the DTV transition is well into its final stages. We are happy to report that we were able to help secure post-transition protection for one of our clients even though they did meet some of the early stage requirements – that is - not timely filing either the pre-election certification or channel election (the client was represented by different counsel at the time). The FCC staff initially stated that they would not grant any post-transition protection to our client, but through the right amount of legal argument, lobbying, and Congressional interest, we were able to get the post-transition protection our client was seeking. All of this is a not so subtle reminder that we have significant expertise as it relates to the digital television transition. Please contact us should you need any guidance as your station progresses through the digital transition.

(Continued from page 18)

precisely such parties. *Oprah* was not penalized at all.

- In a Spanish-language movie, a couple "appear to have sexual intercourse" – meaning, presumably, that the movie's images lead the viewer to surmise that sex is occurring, even if the images do not actually depict the act and the actors are not naked. The FCC declares this indecent. Similarly, a scene "simulating oral sex" appears in a music video – again, the use of the term "simulating" presumably indicates that the activity in question is suggested rather than explicit and that the audience is left to surmise what is happening. (There is no indication of nudity in the second example.) That, too, is indecent.

  But in an episode of *Alias*, two characters are shown "in bed passionately kissing, caressing and rubbing against each other" – the FCC has no problem with that. Similarly, two programs allegedly involved plot lines in which a female character grabs or squeezes a male character's genitals for comic effect. While there appears to be no question at all as to what was being depicted on the screen, the FCC concludes that, in these cases, "viewers [were] left to surmise what is happening", and no fine is assessed. So it appears that implied sexual activity may be okay sometimes, but not others.

- In an episode of *Will and Grace*, a repeated gag involves characters placing their hands on a female character's breasts and adjusting them "to enhance her appearance". In other words, the focus of a running gag in a comedy program is a woman's breasts (which the FCC elsewhere has declared to be sexual organs, lest there be any doubt about that). But in describing the program – which does ***not*** draw a fine – the FCC declares that the episode "does not dwell upon or repeat references to sexual organs".

Further analysis of the Commission's decisions would likely reveal similar disconnects. The primary problem from the perspective of the broadcast industry is that these decisions leave the industry with precious little actual guidance as to where the line between good and bad actually is. Law and regulation are normally supposed to provide us all with an idea of where the line is, so that we may conduct ourselves in a way which keeps us safely on the "good" side (assuming that that's the way we choose to conduct ourselves). So it's a disappointment – not to mention a disservice to those subject to regulation – when the FCC claims to be operating pursuant to a reasonably objective analytical standard, but in fact appears to be invoking a variation of the classic "I know it when I see it" approach.

The trouble is that, while the FCC may know indecency or profanity when it sees them, the rest of us can't know and won't know how the FCC will rule until the FCC rules. And that uncertainty is contrary to the intended goal of good regulation, not to mention the First Amendment.

At this point it is unclear whether any of the broadcasters affected by any of the FCC's actions will attempt to appeal the decisions. We will keep you apprised of further developments as they occur.

FM ALLOTMENTS ADOPTED –2/21/06-3/21/06

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
TX	Cuney	102 miles SE of Dallas	259A	05-33	TBA
TX	Port Isabel	23 miles NE of Brownsville, TX	288A	04-274	TBA
IL	Cuba	78 miles N of Springfield, IL	292A	05-118	TBA
WA	Coupeville	100 miles NW of Seattle, WA	266A	04-280	TBA
WA	Sequim	122 miles NW of Seattle, WA	237A	04-280	TBA
FL	Yulee	24 miles N of Jacksonville, FL	287A	05-240	None
IL	West Salem	65 miles NW of Evansville, IN	266A	04-341	TBA
OH	Pickerington	17 miles E of Columbus, OH	278A	03-328	None
OK	Okeene	91 miles NW of Oklahoma City, OK	268C3	05-296	TBA
TX	Matagorda	108 miles SW of Galveston, TX	252A	04-215	TBA
FL	Otter Creek	36 miles SW of Gainesville, FL	*240A (NCE Reservation)	05-54	TBA
MN	Grand Portage	146 miles NE of Duluth, MN	274C	04-432	TBA
LA	Harrisonburg	128 miles N of Baton Rouge, LA	232A	04-266	TBA
CA	Mecca	37 miles SE of Palm Springs, CA	274A	04-267	TBA
CA	San Joaquin	133 miles E of San Jose, CA	299A	04-269	TBA
LA	Rosepine	175 miles W of Baton Rouge, LA	281A	04-270	TBA
WY	Bairoil	185 miles NW of Cheyenne, WY	235A	05-117	None (Accommodation Substitution)
WY	Sinclair	143 miles W of Cheyenne, WY	267C	05-117	None (Accommodation Substitution)
OR	Bend	129 miles E of Eugene, OR	253C1	03-78	None
OR	Prineville	145 miles E of Eugene, OR	271C3	03-78	None (Accommodation Substitution)

FM ALLOTMENTS ADOPTED –2/21/06-3/21/06 (*continued*)

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
NY	Black River	79 miles N of Syracuse, NY	223A	05-279	None
TX	Meyersville	99 miles E of San Antonio, TX	261A	05-246	TBA
TX	San Antonio	79 miles SW of Austin, TX	262C0	05-246	Accommodation Reclassification
WI	Tomahawk	134 miles NW of Greenbay, WI	**265C3**	**04-202**	TBA
OK	Waynoka	137 miles NW of Oklahoma City, OK	231C2	04-271	TBA
CA	Wasco	28 miles NW of Bakersfield, CA	224A	04-272	TBA
TX	Richland Springs	127 miles NW of Austin, TX	299A	04-273	TBA
AR	Hermitage	104 miles S of Little Rock, AR	300A	04-431	TBA

FM ALLOTMENTS PROPOSED –2/21/06-3/21/06

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
OK	Waukomis	76 miles N of Oklahoma City, OK	292A	06-46	Cmts-4/17/06 Reply-5/2/06	Drop-in
KS	Arkansas City	60 miles SE of Wichita, KS	293C0	06-46	None	Accommodation Reclassification
TX	Oakwood	117 miles SE of Dallas, TX	300A	06-43	Cmts-4/17/06 Reply-5/2/06	Drop-in
TX	Carrizo Springs	116 miles SW of San Antonio, TX	295A	06-50	Cmts-4/24/06 Reply-5/9/06	Drop-in
AL	Frisco City	105 miles SW of Montgomery, AL	278A	06-51	Cmts-4/24/06 Reply-5/9/06	Drop-in
MS	Flora	21 miles N of Jackson, MS	280A	06-52	Cmts-4/24/06 Reply-5/9/06	Drop-in
AR	Gravette	114 miles SW of Springfield, MO	262A	06-59	Cmnts-5/8/06 Reply-5/23/06	1.420(i)

Notice Concerning Listings of FM Allotments

Consistent with our past practice, Fletcher, Heald & Hildreth PLC provides these advisories on a periodic basis to alert clients both to FM channels for which applications may eventually be filed, and also to changes (both proposed and adopted) in the FM Table of Allotments which might present opportunities for further changes in other communities. Not included in this advisory are those windows, proposed allotments and proposed channel substitutions in which one of this firm's clients has expressed an interest, or for which the firm is otherwise unavailable for representation. If you are interested in applying for a channel, or if you wish us to keep track of applications filed for allocations in your area, please notify the FHH attorney with whom you normally work.

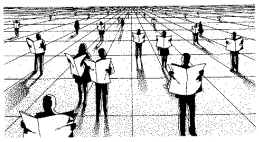
Fletcher, Heald & Hildreth, P.L.C.
11th Floor
1300 North 17th Street
Arlington, Virginia 22209

First Class

Stuff you may have read about before is back again . . .

Updates on the News

Expanded Band Aid? – The solemn knell you may have been hearing off in the distance signals the impending demise of dual-AM licenses issued in connection with the AM expanded band proceeding. As you may recall, when the relative handful of expanded band licenses were issued in the 1990s, the lucky winners were permitted to operate both their original and their expanded band stations for five years (following licensing of the expanded band station). The idea was to give those folks an opportunity to decide which of the two stations to hold onto. At the end of the five years, the licensee was to choose one or the other, and the station not selected would cease operation. As it turns out, a significant number of those situations are ripening in the very near future and, sure enough, groups are organizing to try to avoid the need to turn one of the two licenses back into the FCC. One proposal would allow expanded band operators to sell one of their two stations to small businesses at discount prices. Stay tuned.



KidVid Proposal Out For Comment – In the January, 2006 *Memo to Clients* we described a proposal which had been submitted by "representatives of the broadcast and cable industries and public interest groups" relative to some of the FCC's children's TV rules which are currently on appeal. The FCC apparently thought well of the proposal and has put it out for comment in a Second Further Notice of Proposed Rulemaking. If you want to get your two cents' worth in, comments are due by April 24, and replies by May 8.

NYAG Targets Entercom – We have previously noted the efforts of Elliot Spitzer, New York Attorney General and gubernatorial candidate *extraordinaire*, to single-handedly put an end to any and all business practices which might somehow be lumped, by anybody anywhere, under the heading of "payola". His tireless efforts have led him this month to file suit against Entercom. While Spitzer has obtained some very interesting internal documents from Entercom, it remains far from clear whether he will be able to make his case. But if the case does gets litigated, Spitzer should get access to the news media for some time to come.