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Memorandum to Clients

April 2013 | News and Analysis of Recent Developments in Communications Law | No. 13-04

Indecency alert!

New Indecency Standard Apparently in Effect

But more changes may be on the way, eventually

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In a public notice that surely ranks among the most bizarre any of us are likely to see, the FCC's Enforcement Bureau and General Counsel have made three startling announcements about the Commission's broadcast indecency policy. According to the notice, for the last seven months or so the Enforcement folks have been applying a new – but not formally announced – standard of "indecency" which is not subject to any official definition, as far as we can determine. And while the Enforcement Bureau and GC both commit themselves to continuing to implement that undescribed "standard", they have now initiated, in a semi-comic way, an inquiry into some possibly significant changes to major elements of the Commission's indecency policy.

Since the public notice was released on April 1, this could have been an April Fool's Day prank, but we're guessing it wasn't.

To get ourselves oriented here, let's all agree that the FCC's decades-long effort to regulate "indecency" is a Big Deal in communications jurisprudence. Where FCC-related issues seldom get to the Supreme Court, indecency has been there, twice, in the last four years. Few subjects have triggered the same level of hand-wringing, saber-rattling bloviation on the part of various commissioners, elected officials and others over the last decade.

Inside this issue . . .

In its most recent review of the FCC's indecency policy, the Supreme Court managed to dodge a First Amendment challenge to that policy by focusing instead on a Fifth Amendment challenge. In particular, in June, 2012, a unanimous court reminded the FCC in no uncertain terms that, if it wants to enforce rules or policies proscribing the broadcast of "indecency", the Commission ***must*** provide broadcasters with clear prior notice about just what constitutes "indecency" in this context.

In that case, the FCC was attempting to prosecute a couple of licensees who had aired "fleeting expletives" or "fleeting nudity", *i.e.*, incidental slips of extremely limited duration. At the time of those broadcasts, the FCC's policy had been to ignore such "fleeting" material. But reacting to the Outrage that was the 2004 Super Bowl half-time show – featuring a half-second, long-distance glimpse of (gasp!) much of Janet Jackson's right breast – and emboldened by the firestorm of political reaction to that glimpse, the Commission had since decided that even the merest soupçon of "indecency" should be prohibited. The licensees argued, among other things, that they had not been given adequate notice of the FCC's indecency standards.

To be sure, the Supremes allowed the FCC to continue to regulate "indecency" – but the Court's clear and unmistakable take-home message to the Commission was that, in so regulating, the FCC would have to provide affected regulatees clear notice of what constitutes "indecency".

That was in June, 2012. According to the recent public notice, three months later Chairman Genachowski "directed" the Enforcement Bureau to "focus its indecency enforcement resources on egregious cases".

There are at least two massive problems with that.

First, whatever Genachowski may have told the Enforcement folks, he didn't do it in any officially public way – that is, in a way that might provide clear notice to potentially affected broadcasters. We searched various archives for any indication that the Genachowski-directed enforcement standard might have been formally announced – say, in a public notice, or a declaratory order, or even in a published statement from the Chairman's office. We came up empty-handed, although our colleague, Peter Tannenwald, did manage to find three trade press articles – one in *Broadcasting and Cable*, one in *TVWeek*, one in *TheWrap.com* –

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A new "Zap-ple" doctrine?

FCC Looks at Health Effects of Radio Waves

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Do cell phones cause cancer?

Those on both sides of the question will carefully parse the FCC's 201-page "First Report and Order, Further Notice of Proposed Rule Making and Notice Of Inquiry," as the agency wades again into one of its murkiest controversies: what effect do radio waves have on health?

The FCC has had rules limiting RF (radiofrequency) exposure for decades. Other bodies recommend numerical exposure limits — that topic that being outside the FCC's expertise. The FCC nevertheless decides which recommendations to adopt, what kinds of transmitters must be tested for compliance, and how those tests are to be carried out.

The proper limits for safe exposure are a matter of considerable debate – a debate that helped to prompt the FCC's current action. The question is controversial in part because of disagreement over how radio waves affect bodily tissue.

Everyone agrees that RF exposure causes heating. A microwave oven works simply by spraying your popcorn with radio waves. A cell phone held up your ear has a similar effect on your brain, in principle, although at much lower energy levels. The FCC directly regulates the amounts of heating permitted from cell phones and many other devices that are used within eight inches (that's 20 centimeters, for our non-U.S. readers) of the body and operate below 6 GHz. See a list of those devices here. Required tests assess the so-called "specific absorption rate" (SAR) by measuring actual heating of a model or manikin representing the affected part of the body. Devices operating above 6 GHz or used more than eight inches away, such as vehicle-mounted radios, instead are subject to a much simpler test of energy reaching the user, called "maximum permissible exposure" (MPE). The MPE limits are here.

Wi-Fi, Bluetooth, and most other unlicensed consumer devices are "categorically excluded" from RF evaluation because they operate at low enough power to be deemed intrinsically harmless. Certain fixed transmitters are also excluded, based on a combination of low enough power and high enough antenna mounting.

The current RF exposure levels date back to 1996. There are two sets of numbers: one for the general public, which the FCC intends to be conservative, and somewhat higher limits for those whose occupations entail working with and around radio transmitters, and who are presumed to understand the risks and know how to avoid them.

A large community of people believe the present RF standards – and particularly the "general population" standards – are far too lenient. Some fear that even FCC-compliant cell phones and other radio-based devices may be dangerous, especially to children. Others are concerned about exposure from antennas on buildings and towers.

Some of these concerns arise from theories that RF energy does more than just heat tissue. No one with scientific training seriously thinks radio waves can damage cells in the same ways that x-rays can. But other hypotheses abound – for example, that radio waves affect magnetic or electrical properties of molecules within cells. None of these hypotheses has been proven, at least to scientific standards. But that does not hinder their circulation on the Internet. Some observers assert other kinds of evidence – such as ADHD diagnoses growing in synchrony with cell phone adoption – to argue the two are connected. Every statistics student learns that correlation does not mean causation, but the human brain is wired to find these kinds of patterns, which can be very compelling.

The FCC's recent action is unlikely to satisfy anyone on any side of the issue.

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Broadcast Renewal Trifecta

Improper "menu" underwriting announcements, "renewal expectancy" . . . and Chesterfields!

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A relatively obscure Audio Division decision involving the renewal application of a noncommercial educational (NCE) "community" radio station in Batavia, Ohio hits the trifecta. It sheds interesting (if not entirely illuminating) light on the standards governing noncommercial underwriting practices. It touches on the apparently-forgotten-but-not-gone question of the adequacy of nonentertainment programming performance for renewal purposes – an area of potentially vast consequence to all broadcasters. And as an extra bonus, it reveals the FCC's current regulatory take on cigarette advertising.

There's something for everybody here. Not all of it, though, makes much sense.

The case arose when a presumably disgruntled former officer of the licensee filed an informal objection directed to the station's license renewal application last year. According to the complaint, the station had violated the prohibition against airing "commercials" on at least three occasions. Further, during the last five months of the license term, the station had broadcast no issue-responsive programming other than some PSA's aired between midnight and 5:00 a.m. At least that's what the complainant claimed. The Division has now granted the renewal, but not before running the licensee through the wringer several different ways.

No references to "Number One" in your underwriting announcements

NCE underwriting practices. The FCC, of course, has developed a byzantine approach to noncommercial underwriting. (If you're new to the field, check out this post for some possibly useful background information.) The complainant's concerns about the station's underwriting practices boiled down to a total of three particular announcements.

One, involving a promotion for an upcoming bluegrass concert, described one of the concert's featured acts as having been "voted Canada's #1 Bluegrass Band". The Division concluded that the reference to the band's supposed "Number 1" status constituted a "comparative" mention which, in the FCC's eyes, is promotional and, thus, prohibited. (Of course, for the phrase in question to be "comparative", logically there should be at least one other bluegrass band in Canada – the Division seems willing to assume that there is such an animal.)

This aspect of the decision is pretty much in line with earlier FCC cases, so it shouldn't surprise anybody, even if it does seem a bit silly – particularly since, as the licensee asserted, the band in question really had been voted Canada's Number One Bluegrass Band. According to the Division's opinion, "the 'factuality' or 'truth' of the text of an [underwriting] announcement is irrelevant" to the determination of whether or not the announcement is "promotional".

So all of our NCE readers should be sure to make a note: no references to "Number One" in your underwriting announcements, even if you can prove that those references are true.

The other two questionable announcements involved what the Division now refers to as prohibited "menu" listings of the underwriter's goods or services. One announcement read, ***in its entirety***, as follows:

> Underwriting by [name and address of company], featuring custom metal roofing, siding, hardware, trim, insulation, trusses, and perma felt paper. Information at [website and phone number].

The second announcement was similar in its relative brevity:

> Programming on WOBO is underwritten by [company name], featuring bulk and bag mulch, peat moss, potting soil, bulk top soil and decorative borders. They also feature pickup and delivery. [Company name, address and phone number].

Pretty innocuous, huh? Not so, said the Division. Both announcements constituted "excessively detailed menus of multiple product/service offerings by underwriters [which] exceed the type of information that would enable listeners to identify supporters of noncommercial programming."

And how did the Division reach that conclusion? According to the decision, both announcements were "similar" to "promotional broadcasts" that had been the subject of earlier fines. But the Division pointed to only one such earlier case. There, the objectionable announcement read as follows:

> [Company name], an established dealer in central Florida for the past ten years, sponsors the "Latin Power" and offers the services and systems from Dish network with a 100% digital signal on audio and video, and more than 30 channels in Spanish, such as "TV Colombia," "Telemundo," "Galavision," "Deportes," "FOX," "ESPN," "Cadena Sur," "TV Azteca," "TV Chile," "Tele Gol," "Univision," and "Playboy" in Spanish, included in the Hispanic pack-

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The Chill is on

Bureau Freezes Full-Power/Class A TV Applications to Increase Facilities

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Attention all full-power and Class A TV licensees!!! The Media Bureau has placed a freeze on the filing and processing of most modification applications for full power and Class A television stations, ***effective April 5, 2013***.

As of April 5, the Bureau stopped routinely accepting any applications from full-power or Class A television stations proposing modifications that would increase the station's currently authorized (by license or granted construction permit) contour in any direction. The single exception to the freeze applies to certain Class A stations filing minor change applications to implement their transition to digital broadcasting. (The freeze may also be waived for other licensees in exceptional circumstances.)

The Bureau is continuing to develop "repacking methodologies" to be employed in the auction.

Also frozen is the processing of any already pending application that would increase a station's protected service area in any direction. However, in announcing the freeze the Bureau has provided that applicants with such pending applications will have a 60-day period to amend to specify facilities that do not increase the station's service area. Any such applications that are not amended will be held by the Commission and processed only after the adoption of final rules regarding the Incentive Auction.

The freeze comes as part of the ongoing Incentive Auction proceeding. According to the Bureau, it is continuing to develop "repacking methodologies" to be employed in the auction. That effort requires a "stable database" of full power and Class A facilities. To accomplish both this goal and that of ultimately reclaiming the maximum amount of spectrum possible, the Bureau has now determined that it's got to slam the door on applications that would expand a broadcast station's use of spectrum.

Readers may recall that, in the Incentive Auction NPRM, the Commission expressed an intention to protect only those facilities that had been *licensed* (or were subject to a covering license application) as of February 22, 2012. At the same time, however, the Commission acknowledged that it had the authority to provide greater protection – an acknowledgement that gave rise to some hope that the licensed-as-of-February 22 limitation might not be hard and fast. Bad news. The Bureau's freeze notice strongly suggests that no additional protection will be provided. In particular, the notice directs a strong cautionary warning to stations holding construction permits that had not been implemented as of February 22, 2012: Any investment in building out such facilities now could be lost in the (very likely) event that they are not protected in the repacking.

The Bureau does provide something of a consolation award for stations in that position (*i.e.*, those holding permits for facilities not-built-out-with-a-license-application-pending as of February 22, 2012). The Bureau *will* accept construction permit applications to revert to the facilities licensed as of February 22, 2012.

For Third Year in a Row, FHH Tops In Media Deals

According to SNL Kagan, recognized as one of the preeminent sources of financial analysis in the media business, last year Fletcher, Heald and Hildreth advised in more media transactions than any other law firm – ***by a long shot***. Hey, isn't this the same article we ran last year? Not quite. While FHH ***was*** also Number One in the number of media deals in 2011, and again in 2010, this past year the total of deals in which FHH provided guidance was 144.5 – 32 more than in 2011 and 40 more than 2010. FHH's 2012 total was more than twice those of the next highest firm.

Fletcher, Heald & Hildreth®

Through rugged economic times, our clients have continued to thrive. And they have continued to call on us to provide guidance and counsel in structuring their deals and navigating them through the regulatory process.

As we have in past years, we congratulate our clients for their successes, we thank them for the confidence they have placed in us, and we look forward to providing the same quality representation to clients, old and new, that we have been providing for more than 75 years.

Reverse auction update

TVStudy Version 1.1.2 Now Available

From our Moving Targets File, the latest word from the FCC is that it has released a new version (Version 1.1.2) of the *TVStudy* software that the Commission "plans to use in connection with" the anticipated spectrum auctions. We wrote about *TVStudy* back in February, when it first burst – without discernible prior notice – onto the scene. Apparently, a number of folks have since provided the FCC with some "feedback" which, in turn, has caused the Commission to fiddle with the software.

According to the Commission, the revised version

> addresses an issue with calculation cell indexing that can result in the population of some cells not being correctly considered, and which may cause the program to crash in unusual instances. The update affects only the command-line program (C code); the graphical user interface (Java code) is unchanged and its version remains the same (Version 1.1.1). To facilitate the update process, the 2013Jan_tvstudy_files (which included both the software and all of the required databases) have been replaced with separate files for 2013Apr_tvstudy (software only) and the databases (cdbs, terrain, census), which are unchanged from the initial release. This means that only the TVStudy software (less than 2 MB) needs to be downloaded and updated; the various CDBS, terrain, and census databases need not be replaced.

Presumably, this makes sense to somebody.

It appears that the Commission plans to use the revised version for auction-related computations, since the FCC's public notice cautions that "[i]t is recommended that all TVStudy users apply this update so that results will match those obtained by the FCC."

If you understand the stuff in the block quote, above, it will probably also make sense to you that the FCC advises that "a separate build (executable file and source code) for Debian-based Linux systems (such as Ubuntu) is also being released along with instructions for configuring the software for use on Debian/Linux platforms." All you Debian/Linux folks (yes, that means you Ubuntu fans, too, we think) can access the relevant files here.

The public notice invites continued input from the interested parties "to help insure consistent results". Notwithstanding Ralph Waldo Emerson's take on consistency, it seems to us that the FCC is on the right track in that regard.

Regulation in retrospect

"New" FCC Rule Books Now Available

In a quaint tip-of-the-hat to the Way Things Used To Be, the FCC has issued its annual public notice advertising the availability of printed versions of its rules. According to the notice, for less than $300 – $298, to be precise – you can grace your bookshelves with all five volumes that comprise Title 47 of the Code of Federal Regulations. Hot off the presses, straight from the Government Printing Office (GPO) to your door.

Before getting out your checkbook, though, take a closer look at what the FCC's public notice is touting: hard copies of the rules *as they were as of October 1, 2012*. That's right, for $298 you can buy a set of rules that are already more than six months out of date. Such a deal. It's the kind of thing you might expect to find if you cruise a lot of yard sales on the weekends. Just the ticket if you're looking for neat stuff to put in an October, 2012 time capsule.

For many of us there is something curiously reassuring about holding a real book in your hand, leafing through its fine-print pages to find just the rule you're looking for. The problem with the books the government is selling is that the rule you find there may not be the rule that's in effect anymore. (And let's be clear here -- it's the GPO which is selling these books, not the FCC. The FCC has simply announced their availability, and is presumably standing ready to throw them at wrong-doers.)

Many old timers in the communications bar swear that the Commission used to require that all licensees have on hand at their stations copies of the rules relevant to their service. If such a requirement did exist (and we suspect that it did), it appears to have gone by the boards, except in the fine print of the low power TV rules. Nowadays, the FCC's website says nothing about such a requirement. Instead, it refers the reader to the e-CFR website maintained by the GPO. That GPO site – which, by the way, many of us here at FHH swear by and strongly recommend – is generally up-to-date within 24 hours, meaning that even the most recent rule changes are reflected in their version. Oh yeah, and it's free.

Image obtained from www.aereo.com

Injunction denied: big deal or interim hiccup?

Aereo in the Second Circuit: Wha' Happened?

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So Aereo recently kept its winning streak alive with a favorable ruling from the U.S. Court of Appeals for the Second Circuit . . . and the next thing you know, the Fox Network is making noises about kissing good-bye to its over-the-air operations and moving to some alternative delivery system, possibly as a subscription service.

If you were to buy into Fox's over-the-top reaction, you might get the impression that the Second Circuit's decision marks a major, and possibly irreversible, turning point in the struggle between broadcasters and the proponents of various Internet-based programming systems. But that's why you read the *Memo to Clients*, right?

As Mike LaFontaine might say, "Wha' happened?"

Correct answer: Very little, at least as far as we can tell from the Second Circuit's decision.

There are a number of factors to consider here. First, the Second Circuit's decision – while densely analytical, thoughtfully reasoned, and ultimately favorable to Aereo – was not unanimous. The dissenting opinion, as it turns out, was also analytical (although somewhat less densely so than the majority's) and thoughtfully reasoned. And anyway, the majority opinion was at most an interlocutory (*i.e.*, intermediate) holding in one isolated piece of litigation in one federal circuit. That case has a long way to go before we can put it in the *finito* file. And there's already at least one other case, involving Aereokiller, working its way through the federal courts in California (that would be in the Ninth Circuit), where at least one court hasn't been kind to Aereo-like arguments.

So while the latest Second Circuit decision may not be the happiest of news to broadcasters, it's far from the end of the line. Which makes Fox's reaction to it a bit puzzling.

If you're new to Aereo and other MVPD wannabes, take a minute and check out our previous posts about Aereo, ivi TV, FilmOn.com and Aereokiller.

When last we left Aereo – a company which offers subscribers the opportunity to access over-the-air programming via the Internet – it had convinced a federal District Judge in New York *not* to enjoin it from continuing operation while copyright infringement lawsuits against it proceed. An injunction would likely have been a death sentence to the fledgling service, so the denial of the injunction was viewed as a set-back for the broadcasters who were looking to send Aereo to the showers in the early innings. The broadcasters appealed the decision to the Second Circuit, where they lost in the recent 2-1 decision.

The majority opinion in the Circuit, authored by Judge Christopher Droney (a relative newby on the Circuit, having joined the court in December, 2011), examined the tangled web of copyright laws, judicial decisions and technological developments at work here. Since the most recent overhaul of the Copyright Act happened back in the mid-1970s while technology has obviously advanced well beyond mid-1970s standards, trying to apply the former to the latter is not an easy task.

In crafting his opinion, Droney was able to rely extensively on the Second Circuit's 2008 decision in the *Cablevision* case. (Note the date: *Cablevision* was decided several years *before* Droney made it to the court; Droney did not participate in *Cablevision*.) In *Cablevision*, the court had concluded that a cable system's remote storage DVR service did not constitute copyright infringement. While the RS-DVR system is not perfectly analogous to Aereo's technology, the earlier *Cablevision* decision provided Droney with at least some helpful guideposts for framing his analysis.

It's hard to view the 2-1 panel decision as absolutely conclusive of anything.

But hold on there. Judge Denny Chin, the dissenter, was no stranger to the *Cablevision* case. In fact, he had written the 2007 District Court decision that the Second Circuit had reversed in *Cablevision*. (Chin was elevated from the District Court to the Court of Appeals in 2010.) So it's safe to say that he is familiar with the law in this particular area, including particularly the niceties of the *Cablevision* decision. It's also safe to say that Judge Chin does not agree with Judge Droney's analysis.

And the third judge on the panel? He happened to be another District Court judge, sitting "by designation". While that doesn't mean he's dumb by any means, it does mean that he did not have the in-depth personal familiarity with the *Cablevision* case that Chin had. It also means that, if the Second Circuit opts to grant *en banc* review – a form of reconsideration – with respect to the panel's decision, that third judge won't participate in those further proceedings, which in turn means that ***that*** vote in Aereo's favor won't be on board in any *en banc* rehearing. The broadcasters have indeed asked for full *en banc* review (and they've been joined by a number of *amici*). As of this writing, there's been no word from the court on whether such review will be granted.

In any event, it's hard to view the most recent 2-1 panel

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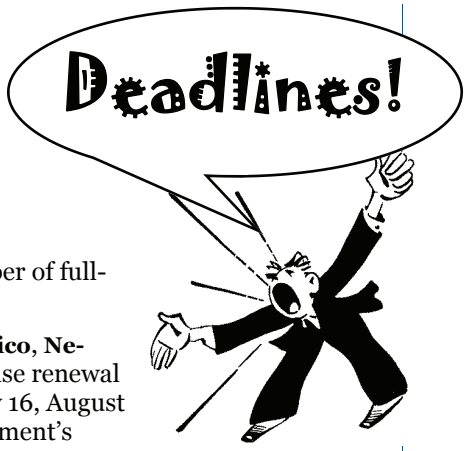

June 1, 2013

Radio License Renewal Applications **-** *Radio* stations located in **Arizona**, **Idaho**, **New Mexico**, **Nevada**, and **Wyoming** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

Television License Renewal Applications - *Television* stations located in **Ohio** and **Michigan** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

Radio Post-Filing Announcements - *Radio* stations located in **Arizona**, **Idaho**, **New Mexico**, **Nevada**, and **Wyoming** must begin their post-filing announcements with regard to their license renewal applications on June 1. These announcements then must continue on June 16, July 1, July 16, August 1, and August 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be placed in the public file within seven days.

Television Post-Filing Announcements - *Television* and *Class A television* stations located in **Ohio** and **Michigan** must begin their post-filing announcements with regard to their license renewal applications on June 1. These announcements then must continue on June 16, July 1, July 16, August 1, and August 16. Please note that with the advent of the online public file, the prescribed text of the announcement has changed slightly. Also, once complete, a certification of broadcast, with a copy of the announcement's text, must be uploaded to the online public file within seven days.

Radio License Renewal Pre-Filing Announcements - *Radio* stations located in **California** must begin their pre-filing announcements with regard to their applications for renewal of licenses on June 1. These announcements then must be continued on June 16, July 1, and July 16.

Television License Renewal Pre-filing Announcements - *Television* and *Class A television* stations located in **Illinois** and **Wisconsin** must begin their pre-filing announcements with regard to their applications for renewal of license on June 1. These announcements then must be continued on June 16, July 1, and July 16. Please note that, with the advent of the online public file, the prescribed text of the announcement has been changed slightly from that of previous renewal cycles.

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in the **Arizona**, **District of Columbia**, **Idaho**, **Maryland**, **Michigan**, **Nevada**, **New Mexico**, **Ohio**, **Utah**, **Virginia**, **West Virginia**, and **Wyoming** must place EEO Public File Reports in their public inspection files. TV stations must upload the reports to the online public file. 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.

Noncommercial Television Ownership Reports - All *noncommercial television* stations located in **Michigan** and **Ohio** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically.

Noncommercial Radio Ownership Reports - All *noncommercial radio* stations located in **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **New Mexico**, **Nevada**, **Virginia**, **West Virginia**, and **Wyoming** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

July 10, 2013

Children's Television Programming Reports **-** For all *commercial television* and *Class A television* stations, the second quarter 2013 reports on FCC Form 398 must be filed electronically with the Commission. These reports then should be automatically included in the online public inspection file, but we would recommend checking. Please note that the FCC requires the use of FRN's and passwords in either the preparation or filing of the reports. We suggest that you have that information at hand before you start the process.

Commercial Compliance Certifications - For all *commercial television* and *Class A television* stations, a certification of compliance with the limits on commercials during programming for children ages 12 and under, or other evidence to substantiate compliance with those limits, must be uploaded to the public inspection file.

Website Compliance Information - *Television* and *Class A television* station licensees must upload and retain in their online public inspection files records sufficient to substantiate a certification of compliance with the restrictions on display of website addresses during programming directed to children ages 12 and under.

Issues/Programs Lists - For all *commercial and noncommercial radio, television*, and *Class A television* stations, a listing of each station's most significant treatment of community issues during the past quarter must be placed in the station's public inspection file. Radio stations will continue to place hard copies in the file, while television and Class A television stations must upload them to the online 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.

(Continued from page 3)

age. Spanish movie channels twenty-four hours and others with classic movies like "Cine Latino," and "TV Colombia." Also, local channels and all the Dish Network channels. Premium channels included on additional plans. [Company name]. Business hours from 9:00 a.m. until 9:00 p.m., seven days a week. Installation services in twenty-four hours. Information [phone numbers].

Maybe we're missing something, but that precedent sure doesn't look "similar" to the two announcements at issue here.

For one thing, the announcement the Division cites was, as a whole, about four times longer than either of the two. And if we're counting specific "menu" items, the cited precedent racks up at least 14 separate mentions (of different Spanish-language channels), and that's ***before*** you get to the various other elements of the underwriter's services being promoted (*e.g.*, "100% digital signal on audio and video", "local channels", "all Dish Network channels", "Premium channels", "Installation services", etc., etc.). By contrast, the two announcements at issue in the latest Division action mention seven and eight separate items, max.

So the Division's decision – which spanks the licensee with a $3,000 fine for the three "commercials" – appears to establish a new and tighter standard for "menu" listings in underwriting announcements. Henceforth, ***NCE stations should be careful to limit such listings to fewer than seven separate items, or run the risk that the announcements will be deemed "promotional".***

"Renewal Expectancy". The complainant claimed that, during the last five months of the license term, the station broadcast no "issue-responsive programming" other than some PSAs between midnight and 5:00 a.m. The licensee appears to have conceded the accuracy of that claim.

The Division properly concluded that the complainant's allegations did ***not*** warrant denial of the license renewal. But the Division still insisted on wagging its regulatory finger menacingly at the licensee:

> [W]e remain concerned that during the last six months of the license term, and even after initiation of improvements, 100 percent of Licensee's issue-responsive programming was in the form of PSAs. . . . Although PSAs can be an effective means of meeting community needs, and may be particularly useful to NCE stations on a limited budget, we have cautioned licensees not to rely on PSAs as the primary method of responding to ascertained needs because they are too brief to address community issues in any depth. [*Footnotes omitted*]

Bottom line: The licensee was "admonished" for its "reliance solely on public service announcements, primarily during nighttime hours, to respond to community needs during the last six months of its license term."

There are at least two problems with this aspect of the Division's decision.

First, as the decision candidly acknowledges, the FCC has historically ***not*** disqualified any renewal applicant because either (a) it relied "primarily" on PSAs or (b) its "public service programming" dropped off at the end of the license term. At most, also as the Division acknowledges, such performance deprived the licensee of a "renewal expectancy". Younger readers will be forgiven if they're not familiar with that quaintly archaic phrase. The notion of a "renewal expectancy" for broadcasters arose in the 1970s in connection with the comparative renewal process, a process which was legislated out of existence nearly 20 years ago. (Ask one of your older communications lawyer friends if you're curious about it, but brace yourself for a series of war stories.)

Since 1996, "renewal expectancy" hasn't been on the regulatory radar as far as the vast majority of broadcasters are concerned, so it's more than a bit odd to see the Division trotting it out now.

It's more than a bit odd to see the Division trotting out "renewal expectancy" now.

The Division's reference to that long-gone factor may be a symptom of the second problem here. That is, while the Division seems to want to chide the licensee for its supposedly deficient programming performance, the Division has absolutely no regulatory basis for doing so.

The fact is that neither the Communications Act nor the FCC's rules require that any broadcaster provide any particular quantum of any particular type of programming addressing any particular subject matter. For sure, since its inception in 1935, the Commission has occasionally considered trying to impose some content-based programming requirements – but each time it has stopped short of doing so. And even the indirect approach it ultimately adopted back in the 1960s and 1970s was abandoned in the mid-1980s, leaving the Commission with no effective means of imposing such a requirement even if it wanted to. (Those interested can find a reasonably detailed history of the FCC's efforts in a law review article available here, or in comments we filed with the Commission six years ago, available in three pieces, here, here and here.)

In other words, the Division's admonishment is about 30 years too late and amounts to little more than (in the Bard's words) "sound and fury, signifying nothing". Still, it should be of concern to all broadcasters that anybody in the Media Bureau (or elsewhere in the Commission) may think it appropriate in this day and age even to hint that the quantity and scheduling of a licensee's "issue-responsive" programming might affect its chances of renewal.

Chesterfields. Finally, the Division's decision addresses a truly arcane question: When an NCE station broadcasts recordings of classic radio programs that happen to contain

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decision as absolutely conclusive of anything. At most it reflects the complexity of the subject matter and the difficulty of resolving the issues presented by Aereo and its kin. Yes, the decision affords Aereo some breathing room in which to continue to try to get traction in the marketplace. But that's about all.

Bear in mind, too, that the Second Circuit's recent decision related only to the question of a preliminary injunction, *i.e.*, an attempt to halt Aereo's operation until the trial court can hear all the evidence and arguments and resolve the question of Aereo's legality on its merits. The actual trial on the merits of the broadcasters' claims of infringement has not yet happened. It's at least theoretically possible that, having picked up some cues during the arguments relative to the preliminary injunction, the broadcast plaintiffs will be able to improve their arguments in the merits phase of the proceeding.

For example, at trial it may turn out that Aereo's supposed system – *i.e.*, one antenna per each subscriber – doesn't work exactly as described. Within the analytical framework of Judge Droney's analysis, that could be bad news for Aereo.

And let's also not forget that, once the trial is over, the losing party will be entitled to appeal – to the Second Circuit and, ultimately, possibly even to the Supreme Court. That process is likely to take several years and will obviously afford plenty of opportunities for all parties to make all conceivable arguments. Need we point out that, once a case gets to the Supreme Court, anything can happen?

Meanwhile, the Aereokiller litigation is likely to be chugging along in California. Aereokiller, of course, is a video delivery system very similar to Aereo's. But as we have previously reported, in the California case (where broadcasters have sued Aereokiller), the trial judge has granted a preliminary injunction. If the tide in the California litigation continues to run in that pro-broadcaster direction, we could easily find ourselves with the classic "circuit split" – *i.e.*, a situation in which two federal circuit courts of appeals (in this case, the Second Circuit in New York and the Ninth Circuit in California) stake out inconsistent positions relative to a particular set of legal questions. A circuit split often leads the Supreme Court to step in to resolve the circuits' differences.

And the Ninth Circuit may not be the only one eventually involved here. Aereo has announced plans to roll out its service in 22 other markets across the country. Broadcasters in each of those markets might also opt to get in on the litigation fun by filing their own infringement actions. The more the merrier! And the more different federal circuits that get involved, the greater will be the likelihood of a circuit split.

One other wild card prospect: Congressional intervention. The source of much of the controversy here is the Copyright Act, which Congress could amend, if it wants to.

The bottom line here is that the Second Circuit's decision is clearly not the bottom line here

The bottom line here, then, is that the Second Circuit's recent decision is clearly not the bottom line here. While it does constitute, for broadcasters, the undesirable loss of an arguably important skirmish, it is not the loss of the battle, much less of the war.

Which brings us back to Fox and its dramatic reaction to the Second Circuit's decision. What are we to make of that? Was it an over-reaction? An attempt to rally the broadcasting troops (think Mel Gibson in *Braveheart*, or maybe John Belushi in *Animal House*)? A calculated effort to disguise, as a frustrated response to the Second Circuit's decision, some already-in-the-works strategy to exit over-the-air broadcasting? We have no idea. But we are confident that the folks at Fox are no dummies, and they appear to have some very definite notions of where they're going here. For sure, the suggestion that Fox might bail out of the OTA universe sparked a firestorm of interest in Aereo, copyright, and the Second Circuit. We'll try to keep on top of developments. Check back with www.CommLawBlog.com for updates.

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ads for cigarettes, what – if anything – is the FCC to do? The station did happen to air such recordings – featuring ads for Chesterfields – a fact brought up by the complainant and conceded by the licensee.

Since the licensee wasn't getting paid to broadcast the old-time programs, the airing of the Chesterfields spots did not technically constitute prohibited commercial activity, so the licensee was off the hook on that score.

But hold on – as we all know, the broadcast of cigarette advertisements has been unlawful for decades. And even if the licensee in this case was not intentionally trying to promote the sale of Chesterfields, the fact is that the announcements embedded in the old-time programs constituted prohibited cigarette ads. So said the Division. But, according to the Division, when this kind of thing is brought to the FCC's attention, the Commission's only role is to notify the Department of Justice about it. DoJ can then decide whether or not it wants to prosecute for violation of 15 U.S.C. §1335. Once the FCC has notified DoJ, the FCC's involvement with this particular allegation is at an end. So the Division sent a copy of its decision to DoJ, allowing the Division to close the books on this case.

And what are the chances that the folks at Justice will send in the SWAT teams because of the Chesterfields ads? We can't say for sure, but given the number of infinitely more urgent issues confronting DoJ, we'd like to think that the licensee here need not worry further about its Chesterfields ads.

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that referred to a statement credited to Genachowski, albeit without specifics as to how anybody might track that statement down to confirm it (much less understand it).

Second, even if the Chairman's "direction" to the Enforcement Bureau was accurately reported, what are we left with? Nothing more than the general notion that, apparently, the FCC's enforcement machine will now be focused primarily on "egregious cases". Do you have any idea what that means? Neither do we.

All we know is that, for the past seven months or so and going forward into the foreseeable future, the "new" indecency standard has centered and will center on the essentially undefined concept of "egregiousness". Even if that concept had been clearly defined – which it hasn't – it's probably safe to say that, before the joint Enforcement/General Counsel notice on April 1, 2013, many, if not most, broadcasters were unaware of the new "egregiousness" notion at all.

Um, isn't that precisely the type of thing the Supreme Court warned the Commission ***not*** to do?

Isn't that just what the Supreme Court told the FCC **not** *to do?*

But not to worry, because in their public notice, the Enforcement Bureau and General Counsel are now asking for our thoughts on "whether the full Commission should make changes to its current broadcast indecency policies or maintain them as they are."

Can we all agree that it's odd for two subordinate offices within the Commission to suggest that the full Commission – which is, of course, the boss of those two offices – should change its rules and policies? Ordinarily, the Commission itself decides whether (and if so, how) it might want to effect such changes. What are we to make of the public notice on that score?

It's probably a safe assumption that somebody on the Eighth Floor approved the public notice, so let's figure that the FCC really is thinking about changing its approach to indecency in some way. What might it have in mind? Here's the totality of what the public notice has to say about that:

[S]hould the Commission treat isolated expletives in a manner consistent with our decision in Pacifica Foundation, Inc., Memorandum Opinion and Order, 2 FCC Rcd 2698, 2699 (1987) ("If a complaint focuses solely on the use of expletives, we believe that . . . deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency.")? Should the Commission instead maintain the approach to isolated expletives set forth in its decision in Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, Memorandum Opinion and Order, 19 FCC Rcd 4975 (2004)? As another example, should the Commission treat isolated (non-sexual) nudity the same as or differently than isolated expletives? Commenters are invited to address these issues as well as any other aspect of the Commission's substantive indecency policies.

The first three sentence-questions suggest that the primary change contemplated here involves the problem of "fleeting" indecency. But the final sentence opens up for discussion the entire range of indecency-related issues.

Curiously, the headline of the public notice claims that the FCC is "seek[ing] comment on adopting egregious cases policy". Since the notice does not provide any definition of that "policy", and since the specific request for comments (quoted above) doesn't even mention that "policy", it's hard to know what to make of the headline.

In any event, the utility of any record likely to be compiled in response to the notice's nebulous invitation is dubious. How, after all, is a commenter supposed to organize his/her/its comments in a coherent and useful way? And how can the Commission's staff be expected to process those comments? Without any apparent context or direction, it's hard to see what the staff can do with them.

So what's the point of the public notice?

Actually, the notice includes one other component, possibly intended to distract the reader while burnishing the reputation of the soon-to-be-departed Chairman. That component consists of one sentence (and a part of the headline) touting the fact that, since last September, the Commission has supposedly reduced its backlog of pending indecency complaints "by 70%", which the notice quantifies as "more than one million complaints". Truly a herculean accomplishment!

Now that's a bit of good news. Anytime the agency is able to clear out a backlog to that extent, some applause is warranted, so we can all give it up for the Commission on this point.

But wait.

According to the notice, the 1,000,000+ complaints that have been tossed involved mainly "complaints that were beyond the statute of limitations or too stale to pursue, that involved cases outside FCC jurisdiction, that contained insufficient information, or that were foreclosed by settled precedent". Maybe we're missing something, but shouldn't complaints "outside FCC jurisdiction" or "contain[ing] insufficient information" or "foreclosed by settled precedent" have been tossed even before they got into the FCC's system?

Let's do some math.

If the staff has had 212 days (*i.e.*, September 1, 2012-March 31, 2013) to determine that more than 1,000,000 complaints could be summarily tossed, that means that the staff managed to handle more than 4,700 complaints a day – assuming that the staff was working seven days a week. At eight hours per working day, that in turn means that the staff was grinding through those complaints at nearly 600 per hour, or 10 per minute – ***one every six seconds.*** (If we assume that the staff was working 24/7, that number would drop to a paltry 195 or so per hour, still more than three per minute.)

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FHH - On the Job, On the Go

Globetrotter **Kathy Kleiman** has checked back in following her excellent adventure in Beijing, where she and about 3,000 of her closest friends convened for an ICANN meeting to discuss new top level domain names, privacy, and revised contracts between ICANN and domain name industry participants (registries and registrars). Travel review from **Ms. K**: "Beijing was awesome."

On April 23, **Mitchell Lazarus** addressed the Wireless Spectrum Research and Development group meeting at MIT. And on May 14, he'll be speaking to the National Spectrum Management Association about "Squeezing New Technologies into the Spectrum."

Frank Jazzo, **Frank Montero** and **Dan Kirkpatrick** attended the Annual Convention of the Maryland/DC/Delaware Broadcasters Association on April 22 in Ellicott City, Maryland. **Frank J** participated on the Legal and FCC Panel with the NAB's **Jane Mago** and **Kelly Cole**.

And on May 1, **Frank J** will be attending the Spring Meeting of the Rockefeller College Advisory Board and the Rockefeller College Alumni Dinner and Awards Ceremony in Albany.

Meanwhile, **Frank M**'s plans take him to: Miami (May 14-15, for the Radio Ink Sports Radio Conference, and then May 16-17 for the Radio Ink Hispanic Radio conference, where he'll moderate a panel on "Keeping it Legal"); San Juan (June 13-14, where he'll be speaking at the Puerto Rico Broadcasters Association convention); and Atlantic City (June 18-19, speaking on the "FCC Legislative and Regulatory Roundtable" at the New Jersey Broadcasters Association convention). And on June 1 he plans to squeeze in a professorial gig at the NAB's Broadcast Leadership Training Program, where he'll teach a class on "Operating for Success: How to Effectively Use Your Attorneys".

From May 3-5, **Peter Tannenwald** will be at the National Translator Association convention in Denver. He's scheduled to participate on a panel on the impact of the reverse spectrum and other FCC matters.

On May 20, it'll be the Swami and the Contracts Guy taking over the Big Easy, as **Kevin ("the Swami") Goldberg** and **Steve ("the Contracts Guy") Lovelady** make a joint presentation at Media Market Finance 2013, the 53rd Annual Conference of the Media Financial Management Association ("MFM") and the Broadcast Cable Credit Association ("BCCA"). Their presentation, appropriately enough, is titled "A Heaping Spoonful of Legal Mumbo Jumbo or Buy, Selling, Hiring, Firing: Contract Provisions to Start and End Strong".

On June 6, **Harry Cole** is scheduled to speak as part of the keynote presentation at the 30th Annual SNL Kagan TV and Radio Finance Summit in NYC.

And finally, let's give it up for **Mitchell Lazarus**, who this past month was published for the fourth time in the last four years in *IEEE Spectrum* magazine. The IEEE, of course, is a widely respected association of electrical engineers. If you're not one of the 385,000 people who already read *IEEE Spectrum* regularly, you can find the article here. The piece has already garnered considerable praise. One blogger (not, as far as we can tell, related to Mitchell) observed with admiration that Mitchell is a lawyer, an engineer and a writer. All true, but regrettably incomplete. That blogger missed a far more important aspect of Mitchell's résumé: he's our *Media Darling of the Month*!

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Which prompts us to ask: how was the backlog allowed to balloon as it had? If it took only a matter of seconds to determine that a complaint could be dismissed, why wasn't that done a long, long time ago?

And speaking of the passage of time, complaints that "were beyond the statute of limitations" should not have taken even seconds to identify. They could have been automatically thrown out as soon as the relevant statute of limitations date came and went.

So while we do sincerely appreciate the clearing out of 1,000,000+ complaints, we're not sure why the FCC might think that it's entitled to any particular kudos for that achievement.

That's especially true in view of the fact that the public notice touting that supposed achievement is totally silent with respect to the effect that the backlog had on broadcasters. Licensees who were the subject of pending complaints did not get their licenses renewed, and weren't permitted to sell their stations, until the complaints were resolved . . . unless, of course, the licensee was willing to enter into a "tolling agreement" by which it would waive a number of its rights. And if a licensee was trying to sell all of its broadcast interests and exit the business, it was required to pony up a big wad of cash for an "escrow arrangement". One hopes that any licensee who might have been required to enter into such a deal because of one or more of the now-dismissed complaints has been expressly and immediately released from the terms of any such deal.

An accompanying apology might be nice, too.

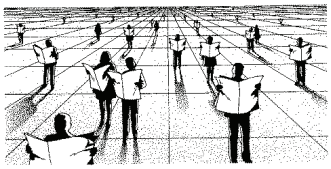
Comments in response to the questions posed about indecency regulation are currently due to be filed by ***May 20, 2013***, and reply comments by ***June 18***.

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

Updates On The News

LPFM Update – Late last year, in its "Fifth Order on Reconsideration and Sixth Report and Order" (we refer to it as the *6th R&O*), the FCC (a) tied up some loose ends relative to LPFM and FM translator matters and (b) adopted new rules and policies governing LPFM applicants. The *6th R&O* was published in the Federal Register the following month, but that didn't mean that all the new rules went into effect back then.

Rather, the changes to Sections 73.807, 73.810, 73.827, 73.850, 73.853, 73.855, 73.860 and 73.872 – and the revised version of FCC Form 318 – all had to be run past the Office of Management and Budget for its approval. (Those changes all involved "information collections" requiring OMB review thanks to the Paperwork Reduction Act.)



The Commission has now announced that OMB is happy with the changes. As a result, they will all take effect on ***May 23, 2013***. It's unlikely that the changes will have any immediate impact, since they relate primarily to LPFM applications, and there's currently no opportunity to file for new LPFM authorizations. However, as we all know, the Commission is hoping to be able to open a window for new LPFM applications sometime in the near future – October, 2013 is one target date, although many are doubtful that the Commission will be able to hit that target. Anyone who expects to be filing any LPFM apps in that window should be sure to make note of the effectiveness of the *6th R&O* changes.

Cellular Wars: The Employees Strike Back! — Normally, the Memo to Clients doesn't stray too far afield from broadcast-related topics (even though Fletcher Heald attorneys are active in a broad range of non-broadcast telecommunications fields). But two recent six-figure fines for non-broadcast violations caught our attention, since we can imagine that many employers – broadcast and non-broadcast alike – might be tempted to engage in the misconduct that drew the fines. So as a public service, here's the scoop.

In two separate Notices of Apparent Liability, two companies got whacked – $126,000 in one case, $144,000 in the other – for operating cell phone jammers. Both times the Feds were called in by anonymous tipsters.

In each case, the company admitted to operating multiple jammers. Seems they were trying to discourage employees from using their cell phones in the workplace. While the FCC's orders obviously don't identify the complainants who ratted out the companies, we think it's probably a pretty good bet that the tips came from company employees who wanted to be able to make cell calls from the workplace.

Both of the target companies 'fessed up to acquiring the jammers online from overseas sources. One of the companies – Taylor Oilfield Manufacturing – claimed that it had fired up its jamming efforts "following a near-miss industrial accident that allegedly was partially attributable to employee cell phone use." No matter, responded the FCC. Jamming is prohibited, and that's all there is to that.

To emphasize how seriously it takes this kind of violation, the Commission piled on when it came to calculating the fines.

In each case, the target company admitted to operating four separate jamming devices. The FCC concluded that the operation of even one such device constituted three separate violations: (1) unauthorized operation, (2) operation of illegal equipment, and (3) causing interference to authorized communications. While the base forfeiture amounts specified in the FCC's rules for those violations are $10K, $5K and $7K, respectively, the Communications Act caps jamming-related fines at $16K per violation. So the FCC figured that each separate jamming device had been used for three separate violations, for a total of 12 violations. Invoking a certain amount of mumbo-jumbo involving upward adjustments, the duration of the violations (a couple of months in one case, a couple of years in the other) and the like, the FCC furrowed its brow, clenched its jaw, and pronounced that one company will be tapped for $126,000, the other $144,000.

In so doing, the FCC noted ominously that each of the target companies could have been slammed for more than $1.3 million – but it decided to go easy on these two because this is the first time the Commission has fined any business for jamming activity. Be forewarned, though, that the FCC is not committed to being Mr. Nice Guy forever. It suggested that "more aggressive sanctions" may be in the offing if these first two fines don't sufficiently deter unlawful jamming.

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The opening section of the document, dubbed the "First Report and Order" (*First R&O*) adopts rules the FCC formally proposed ten years ago – a long time even by federal standards. There are no major policy shifts here, just a lot of fine-tuning.

Manufacturers are now permitted to use SAR testing even when it is not required. (Although more conservative and more expensive, SAR compliance can spare a manufacturer the need to design special housings that keep the user at a specified distance from the antenna.) The FCC has withdrawn its infamous OET Bulletin 65 Supplement C, long the bible on RF exposure testing. Instead, the FCC will now keep that information in its Knowledge DataBase (KDB) system, for easier updates. The *First R&O* clarifies that body-worn and implanted medical devices are subject to the RF exposure rules. Labeling and other requirements for use of the "occupational" limits are revised. There are adjustments to the rules for certain fixed transmitters. The FCC now classes the outer ear as an "extremity," like hands and feet, a step that it concedes will have no discernible practical effect.

The "Further Notice of Proposed Rulemaking" (*FNPRM*) section of the document suggests several additional changes to the rules. These, too, are relatively small-scale adjustments that do not alter the basic structure of the FCC's regulatory approach.

First are revisions of certain key definitions to better accord with reality. Second, the FCC proposes extensive changes to the methods for determining whether a device is categorically excluded from RF exposure testing. These do not seek to change the level of energy reaching the user. (That happens in the "Notice of Inquiry" section, described below). The aim here, rather, is to make the rules both simpler to apply and more consistent across different kinds of devices. Various of these proposals apply to individual devices and to multiple devices operating at the same location. Third, the FCC proposes to adjust the methods used for assessing compliance of "portable" devices, *i.e.*, those used within eight inches of the body. Fourth, the FCC offers proposals for "mitigating" RF exposure, which involve such activities as labels, signs, barriers, job training, and enforcement. Many of these concern details of limiting and calculating occupational exposure. Finally, the FCC proposes an overall edit and clean-up of the RF exposure rules generally.

The specifics are too detailed for adequate summary here. We urge those interested to consult the *NPRM*, paragraphs 110 through 204.

The "Notice of Inquiry" (*NOI*) section is likely to be the most controversial. Here the FCC proposes to reopen the whole question of what numerical exposure limits are appropriate. It may have added fuel to the fire by stating the intent to "adequately protect the public without imposing an undue burden on industry." No doubt some commenters will stress the importance of protecting the public regardless of the burden on industry. In addition to numerical limits, issues laid on the table in the *NOI* include:

- the information that manufacturers and others should provide to consumers;
- methods for reducing exposure (other than lowering the limits);
- methods for evaluating exposure; and
- the costs of imposing "precautionary" limits that are lower than current science can justify.

We hope the FCC is ready for a large volume of submissions. It has signaled, as plainly as it can, that "vague and unsupported assertions" will not carry much weight. But it will probably get a lot of those anyway.

Comments and replies will be due 90 and 150 days, respectively, after publication in the Federal Register. Watch CommLawBlog.com for updates.

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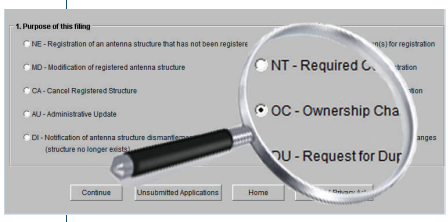
And on a further cautionary note, the FCC mentioned that it could also have found both companies guilty of the additional violation of illegally importing their jammers. It appears that the Commission was satisfied that it was already exacting the requisite pound of flesh. It also appears that, possibly, the FCC was concerned about certain procedural niceties (involving the preliminary issuance of citations) that might have required further attention here. But even though it let both of the target companies off the hook on the illegal importation count this time, the Commission announced that it "intend[s] to impose substantial monetary penalties" for illegal importation in the future.

The moral of this story: don't try to jam your employee's cell phones.



YOU own it. No, YOU own it. No, YOU own it . . . .

Tower Hot Potato

Ownership dispute doesn't shelter station licensee from tower-related obligations

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A recent decision from the full Commission teaches us a couple of valuable lessons when it comes to potential liabilities both for tower owners and for those who may not think that they're tower owners.

It all started in 2006, when Ely Radio, LLC bought KWNA(AM), Winnemucca, Nevada. The deal provided, in standard contractual terms, that the buyer would be acquiring all the "property and fixtures . . . used or useful" in the station's operation. The average reader might leap to the conclusion that the "property and fixtures" in question would necessarily include the station's tower. Don't be so sure.

Fast forward a couple of years. The Enforcement Bureau's San Francisco Field Office determines that the station's tower hasn't been lit at night; making matters worse, the tower's owner hasn't been making the required observations and, as a result, hasn't reported the outage to the FAA. When the Enforcement folks check the FCC's database, they determine that the tower's owner is listed ***not*** as Ely Radio, LLC, but rather the company that had sold the station back in 2006.

Why the agency opted to ignore its own well-established policy of deferring to local authorities is unclear.

Covering all their bases, the Field Office reps notify ***both*** the 2006 seller and buyer of the problem. The seller promptly writes back to advise the Commission that the tower was sold to Ely Radio as part of the 2006 deal, even though the seller did apparently hold onto the land on which the tower is situated. Based on that information, the Enforcement Bureau issues a Notice of Apparent Liability to Ely Radio for the tower lighting, observation and notification violations; the Bureau throws in an additional violation – failure to notify the Commission of the 2006 change in the tower's ownership. Ely Radio responds that, contrary to what the 2006 seller may be saying, Ely Radio did ***not*** acquire the tower as part of its deal, so the seller is the one who should be liable for any tower-related violations.

At this point, let's recall the Commission's longstanding policy of refusing to adjudicate issues relating to local law. The question of who in fact "owns" local property would ordinarily fall comfortably within the scope of that policy – meaning that, confronted with two parties both disclaiming ownership of certain property, the Commission would ordinarily stay out of the dispute and, instead, defer to local authorities.

Not this time. Even though Ely Radio provided the Commission with a letter from its local lawyer explaining local Nevada contract law, the Enforcement Bureau – and, eventually, the full Commission – insisted that, as far as the FCC is concerned, Ely Radio owns the tower and is therefore on the hook for the violations.

Why the agency opted to ignore its own well-established policy of deferring to local authorities is unclear, since it didn't need to resolve the ownership issue in order to whack Ely Radio for the lighting, observation and FAA-notification violations. As it turns out, the relevant Commission rule imposes tower lighting and maintenance issues both on the tower owner ***and***, if the owner defaults on its regulatory obligations, on any licensee using the tower. Since it had been established that Ely Radio's is the only station using the tower and Ely Radio personnel had access to the tower lighting controls – indeed, the lighting had apparently been extinguished by Ely Radio employees – the Commission could legitimately beat up on Ely Radio whether or not it was technically the tower's owner.

Of course, if Ely Radio were not the tower's owner, the Commission could not fine it for failing to notify the Commission of Ely Radio's acquisition of the tower. By insisting that a change in ownership had indeed occurred, the Commission allowed itself to add that violation to the list. In so doing, though, it may also have handed Ely Radio a valid point on which to challenge the forfeiture order, since the FCC's willingness to wade into the waters of local law (even while claiming that it wasn't doing so) seems to fly in the face of its longstanding policy not to do so.

How this will all shake out for Ely Radio remains to be seen. But for everybody else, there are a couple of take-home lessons here. First, when you're buying or selling a business that involves use of an antenna structure that's registered in the FCC's antenna structure registration database, make sure that the sale documents specify who will be responsible for that structure after the closing. And second, as we have previously warned, don't forget that, if the structure is in fact changing hands, the new owner is required to notify the FCC of that change "immediately".