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Memorandum to Clients

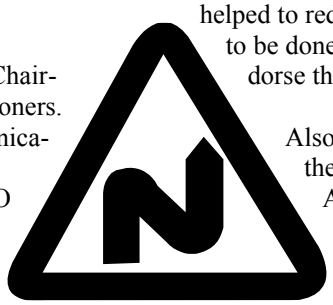
July, 2002 | *News and Analysis of Recent Events in the Field of Communications* | No. 02-07

Back to the Future?

EN BANC HEARING SEEKS JUSTIFICATION FOR REVIVAL OF EEO RULES

By: Anne Goodwin Crump

Late last month, the Commission held an *en banc* hearing on the subject of broadcast and cable equal employment opportunity (EEO) rules. As might be expected, the overall tone of the meeting indicated that the hearing was an attempt to find reasons to justify re-imposing EEO rules on the broadcast and cable industries.



The hearing began with opening statements by Chairman Michael K. Powell and the other Commissioners. Former FCC Commissioner and current communications attorney Henry Rivera then provided a description of the history of the Commission's EEO rules and policies. These comments largely focused on the benefits which Mr. Rivera claimed had come about as a result of the rules, but he also emphasized his belief that more remains to be done to wipe out broadcast employment discrimination.

After the introductory remarks, the meeting turned to two panel discussions, each followed by a question-and-answer period. The first one was to focus on the challenges of EEO outreach. The composition of the panel was rather heavily weighted toward representatives of minority and women's organizations, including the National Urban League, American Women in Radio and Television, the National Organization for Women, and Hispanic Americans for Fairness in Media. These group representatives largely presented the view that there historically had been employment discrimination in the broadcast industry, that the previous broadcast EEO rules had helped to reduce the problem, but that more work still needs to be done in this area. These panelists seemed to endorse the return of EEO regulation by the Commission.

Also included on the panel were a representative of the American Federation of Radio and Television Artists, as well as the Vice-President of Midwest Family Broadcasters, Marilyn Kushak, and the Executive Director of the Texas Association of Broadcasters, Ann Arnold.

Ms. Arnold questioned the need for new EEO regulations. She pointed out that the broadcast industry has, for some three years now, ***not*** been subject to any EEO rules, but that there is no evidence of any new discrimination in employment. She also informed the Commissioners, none of whom was a sitting Commissioner during the last license renewal cycle, of the abuses which had occurred under the former EEO system. Chairman Powell indicated that he could not believe that licensees who had done nothing wrong would pay off petitioners instead of having faith in the Commission's processes. Ms. Arnold pointed out that some licensees simply could not wait for those processes, as they were involved in sales or had other pressing issues requiring FCC approval. In addition, the legal fees associated with the cost of defending even a plainly bogus claim of discrimination could be enormous. The Commission holds all station licenses in its hands, and sometimes taking the certainty and the swifter resolution of a settlement represents the more beneficial, pragmatic business decision. In the event that the Commission decides to impose any EEO rules, she asked that those rules be as clear as possible to avoid abuses, and that they impose as few burdens as possible.

The second panel addressed possible methods of achieving broad and inclusive outreach. Included on the panel were Cathy Hughes, the founder and chairman of Radio One, Inc.; Belva Davis of KRON-TV, San Francisco; Michael Jack, Gen-

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The Scoop Inside

To err is bureaucratic, to waive divine

New Policy Permits Reliance On FCC On-Line Databases, Some Waivers of Major Change Rules

By: Jennifer Wagner

The Commission has adopted a new policy that permits waivers of its procedural rules when errors in its broadcast database deny applicants fair consideration.

In a decision released earlier this month, the Commission determined that the public interest favors waiver of its procedural rules to amend an application that is patently defective due to an erroneous (or erroneously omitted) Commission broadcast database record when there is an administratively feasible solution that would not harm any other applicant whose application was timely filed. The case at hand, *In re Application of Star Development Group, Inc.*, also opens the door to waivers of the AM major change rule.

Star Development Group had filed a short-form pre-auction application advising of its interest in competing for a new AM station in Orlovista, Florida, during the filing window for Broadcast Auction No. 32. Since no mutually exclusive applications were filed, the application was accepted for filing, Star was instructed to file a long-form application for the channel. Star did so, but its application was challenged by a petitioner who claimed, correctly, that Star's technical proposal did not protect a minor change application which the challenger had previously filed and which, as a result, was entitled to protection. But when it had prepared its application, Star had not known about the challenger's application because the prior-filed application did not appear in the Commission's Consolidated Data Base System (a.k.a., "CDBS").

Normally, an applicant's failure to take into account an earlier-filed application would be fatal to the later-filed application, even if the later applicant had made diligent efforts to determine whether any conflicting applications were in fact pending. But in this case, the Commission determined that Star should not be penalized for failing to learn of the earlier-filed application when that earlier-filed application had not been included in CDBS.

This new policy moves the Media Bureau one step closer to replacing paper records with an electronic database as an official record upon which the public may rely, a leap the Commission has already taken with the Wireless Bureau's universal licensing system database. Previously, the Commission has held that its databases are an unofficial source of information secondary to station authorizations, applications and pleadings. But since the Commission is now promoting public access to its electronic databases -- and, as a result, since it is making access to many of its primary sources of information increasingly difficult -- it is entirely appropriate that the Commission should treat those electronic databases as official records on which the public is entitled to rely.

In this case, the mutual exclusivity between the applicants could be resolved to everyone's satisfaction through a change in Star's proposed frequency. But here's the catch: A change in frequency is a "major amendment", which would mean that, if it were so amended, Star's application would normally have been removed from the processing line and ultimately dismissed as late-filed. Such a form-over-substance result would be ridiculous, especially since both parties were victims of a Commission mistake and a viable win-win solution existed. With this in mind, the Commission waived its rule that a major amendment requires a new filing date and sends an application to the end of the line, and accepted Star's major amendment.

The Commission reiterated that the applications in this case were paper filings lost between the cracks during the Commission's transition from paper to electronic filing, a situation that is unlikely to recur. Despite that factor, the new policy stands and the

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Focus on FCC Fines

By: R.J. Quianzon

No goin' to a go-go. A Kingman, Kansas FM station was fined $39,000 for "operating a radio station from an unauthorized location" as well as a laundry list of more mundane violations, including failure to maintain: proper obstruction lighting, EAS equipment, a main studio at an authorized location, and a public inspection file. The station was properly licensed to operate in Kingman, but had apparently moved its operations to the Latino Boom Nightclub in Wichita, more than 40 miles from Kingman. While the station continued to transmit from its authorized transmitter site, it apparently also somehow transmitted a signal from the Latino Boom. Meanwhile, the station's offices and studio facility in Kingman appeared to be empty. Acting on a complaint, the Feds inspected both the Kingman and Latino Boom facilities and concluded that the station was operating from "a location from which [it] was not authorized to operate." They also determined that, since the Latino Boom is almost 42 miles from the center of Kingman, and more than 27 miles outside the station's city-grade contour (and more than 12 miles outside the city-grade of the only other station licensed to Kingman), operation of the station from the Latino Boom was in violation of the main studio rule. And while at the station's authorized transmitter site, the G-men had occasion to look at the tower long enough to notice that the top beacon and three of four side lights weren't working. They also determined that the station had no EAS equipment. While the licensee claimed that she really did have EAS stuff but that it had been removed for repair, the FCC Untouchables noted that, even if that were true, the equipment had been out of service for more than 60 days, so the licensee should have filed a request for additional time to repair its equipment. Finally, the licensee fessed up that she had no public file. The total amount of the fine was broken out as follows: $10,000 each for the lighting and public file violations; $8,000 for the EAS violation; $7,000 for the main studio rule violation; and $4,000 for operation at an unauthorized location.

Vulgarities, in context, may not be vulgar. The FCC released an interesting order recently which found that otherwise vulgar words were not so when placed in different context. The FCC's policy on the broadcast of indecency has long prohibited the airing of material which, in context, "depicts or describes sexual or excretory organs or activities." In the recent case, the FCC had no problems with a station which broadcast a conversation containing colloquial synonyms for male genitalia and the act of urination. The FCC found that the term for male genitalia word "was not used to 'describe or depict' a sexual activity or organ but was instead used as a vulgar insult." Similarly, it found that the variations on the term for urination were not really descriptive of that particular excretory act, but rather were "commonly used slang terms indicating or describing a sense of anger." This is a very slender distinction which most stations would generally prefer not to have to argue before the FCC. Clients should ensure that their stations do not air material which is obscene or indecent, according to the frequently shifting FCC standards. (*Ed. Note—For more discussion on the FCC's policy on indecent broadcasts, see the related article elsewhere in this Memo.)*

Vulgarities, in context, cause a $7000 fine. A Chicago FM station was fined $7000 by the FCC for airing vulgarities. During a morning talk show, an on-air personality played a song which described several sexual activities and sexual organs. The FCC analyzed three factors when reviewing the materials. Namely, the FCC will examine 1) the explicitness or graphic nature of the broadcast, 2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities, and 3) whether the material appears to pander or is used to titillate or shock. Clients are advised that these standards have been on the books for years and, while the FCC has indeed enforced these rules, those enforcements efforts have been

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door to major amendment waivers has been opened. Precisely how wide that opening is and what types of applicants will be able to avail themselves of it are questions which remain to be resolved.

If you have any questions about the new waiver policy, or if you know of errors in the FCC's database that you need corrected, please contact the FHH attorney with whom you normally work or Jennifer Wagner at either (703) 812-0511 or wagner@fhhlaw.com.

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unpredictable and arguably inconsistent in actual practice. We caution clients to avoid becoming a test case for the latest FCC definition of these standards.

Advertisements, in any context, are prohibited for Noncommercial Stations. A Florida noncommercial educational ("NCE") FM station was recently punished by the FCC for broadcasting advertisements and conducting prohibited fundraising. In attempting to identify underwriters (*i.e.*, the accepted term for "sponsors" in universe of noncommercial radio) of the station, the station broadcast various spots, er, underwriting announcements, lasting from 45 seconds to 90 seconds. Under normal circumstances, on-air acknowledgment of underwriters by NCE stations is permitted by FCC rules. However, such acknowledgments must not "contain comparative or qualitative descriptions, price information, calls to action, or inducements to buy, sell, rent or lease." The spots which the non-commercial station aired were essentially equivalent to commercial advertisements and the station was admonished that such broadcasts are prohibited.

In a more egregious example, the same station conducted a seventeen minute interview with an inventor and then solicited listeners to invest in the inventor's company. While the inventor did not pay the station anything for the interview or promotion, that was of no consequence to the Commission. Although station fundraising is generally permitted for non-commercial stations, those stations may not conduct on-air fundraising for other entities or companies.

Rebroadcasts must have written consent. A television station was fined by the FCC for rebroadcasting material from a radio station without the ***written*** consent of the radio station. The television station recorded a segment from an unaffiliated local radio show and replayed a portion of the recording during a television program. FCC rules require a station which rebroadcasts the program of another station - - in this instance a TV station rebroadcasting a radio station - - to keep a copy of the written consent to rebroadcast for FCC inspection. In the case before the FCC, although the TV station and the AM station were not in agreement over whether the radio station had in fact consented to the rebroadcast at all, the inescapable fact was that no ***written*** consent existed, and that was enough to warrant a fine. Clients are reminded to take care to secure written consent from the originating station when rebroadcasting any portion of a broadcast program.

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eral Manager of WRC-TV, Washington, D.C. and Vice-President of NBC Diversity; Rev. Robert Chase of the United Church of Christ; Charles Warfield of ICBC Broadcast Holdings, Inc.; former state senator Art Torres of the Walter Kaitz Foundation; Tom Baxter of Time Warner Cable, and Steve White of AT&T Broadband. These panelists recounted a number of anecdotes based on their experiences. Ms. Hughes remarked on the difficulty she has in recruiting Caucasian applicants for her minority-oriented stations. Other negative experiences, however, seemed to be from the distant past. The representatives of the larger media entities described recruitment programs which they have found to be successful in attracting diverse applicant pools. While this point was not made during the hearing, it is worth noting that a number of these proposals were put forward by entities which were not themselves subject to the direct application of any EEO rules. Their voluntary adoption of such programs could beg the question of why government regulations are needed when businesses have adopted these measures on their own as a matter of good business.

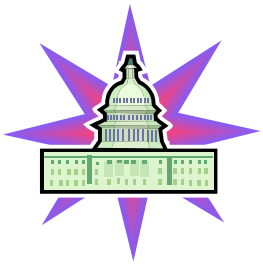
In any event, the goal of the meeting seems to have been to provide the Commission some form of evidentiary record in support of new EEO rules for broadcasting and cable. And while neither of the panels produced any evidence of any particular need for FCC regulation in this area, the sympathetic ear given by the Commissioners to decades-old anecdotes and vague platitudes suggests that the Commissioners, at least, are likely to view the hearing as bolstering the adoption of new EEO rules for broadcasting and cable. It is highly likely that the Commission will indeed, perhaps for political reasons, adopt some type of new EEO rules and policies. What remains to be seen is exactly the form those new regulations will take and whether they, like the two versions which preceded them, will be subject to a successful attack in the courts.

If you would like more information about this, contact the FHH attorney with whom you normally work or Anne Goodwin Crump at (703) 812-0426 or crump@fhhlaw.com.

Consolidation - Too far too fast?

Legislation Proposed to Counteract Effects of Consolidation in Radio and Related Entertainment Industries

By: Lee G. Petro



Expressing deep concern for the effects of the Telecommunications Act of 1996 on the radio industry -- and particularly the unprecedented consolidation in a range of related media industries, including radio, concert venues, and concert promotions -- Senator Russ Feingold (D-WI) has introduced legislation, the "Competition in Radio and Concert Industries Act of 2002", to prohibit anti-competitive practices in these industries.

Specifically, the new legislation would authorize the FCC to revoke the radio licenses of entities that use their dominant power in both the radio and concert promotion and venue industries to discriminate against musicians, concert promoters or other licensees not affiliated with the licensee. For example, under this legislation, a hypothetical licensee named "Deer Channel", which is under common control with a concert venue or promotion company, would be prohibited from restricting the promotional giveaways by another station in the radio market to a particular concert sponsored by Deer Channel and its affiliates. Under this legislation, the hypothetical Deer Channel also would be prohibited from improperly influencing the programming, or terms of sale of such programming, of a nonaffiliated musician, or restricting the ability of a non-affiliated musician to receive promotional services from nonaffiliated entities. All licensees would be prohibited from extracting money or any other form of consideration from musicians or their representatives, in exchange for airing their programming.

The proposals are broad in scope and surprising in the extent to which they seem to fly in the face of prevailing legislative winds which have been blowing strong in the opposite direction for years.

Additionally, Senator Feingold's legislation would require the FCC to designate for hearing any assignment or renewal application by an entity that would control more than 60% of the national radio audience. In effect, this would institute a national ownership limit similar to the national television audience limit (35%) that was recently struck down by the D.C. Court of Appeals. In such hearings, the licensee would have the burden of proof that it did not participate in the improper activities discussed above. Since it is generally difficult, if not impossible, to prove a negative, the imposition of this burden is especially significant.

What's more, under the legislation an applicant designated for hearing would be required to demonstrate that the station in question "has identified and will respond through appropriate programming or content to the problems, needs and interests of the local market for such radio station."

Further, the legislation would establish an ownership cap in local radio markets limiting the control of any one entity, including those stations operating under LMA's, to just 35% of the audience or 35% of the advertising revenue, in the local market. The legislation would also extend the "attribution" rules to include those stations in which an entity holds an option to purchase, or has control of the programming, or selection of programming content, and limit local marketing agreements and other program services agreements to just one year.

Finally, the Commission would be required to conduct a study within one year of the legislation's passage that would examine both the viability of privately-owned audience measurement companies (read: Arbitron), and the ability for radio licensees to manipulate such rating results. The Commission would be required to submit yearly reports on the compliance of the radio industry with these changes, and would be prohibited from considering revisions to these new rules under the Biennial Review process.

Sen. Feingold's proposals are broad in scope and surprising in the extent to which they seem to fly in the face of prevailing legislative winds which have been blowing strong in the opposite direction for years. But his proposals may also reflect growing dissatisfaction, and possibly resentment, at where those prevailing winds have taken the industry.

At press time, the legislation had been referred to committee, with no hearings scheduled. As you can imagine, there will be tremendous lobbying to kill this legislation before it sees the light of day. As a practical matter, it appears unlikely that that this proposal will go very far, but one never knows. And even if it dies in committee, the fact that it was introduced at all may mark a turning point in the rush toward concentration of the radio industry which has been underway full steam since at least 1996. We will of course keep you updated on future developments.

If you have any questions about the proposed legislation, contact the FHH attorney with whom you normally work or Lee G. Petro at (703) 812-0453 or petro@fhhlaw.com.

FCC Announces 2002 Regulatory Fees

By: Alison J. Shapiro

The Commission has released its Report and Order on the Assessment and Collection of Regulatory Fees for Fiscal Year 2002. Annual regulatory fees are due to be received by the FCC ***no later than September 25, 2001***. This year, ***payments can be made beginning September 10 through the ending date***. Any payment not received by Mellon Bank by 11:59 p.m., September 25, 2001, will be assessed a 25% late payment fee. The 2002 regulatory fees are as follows:

FY 2002 SCHEDULE OF REGULATORY FEES FOR BROADCASTERS

FY 2002 Schedule of Regulatory Fees for Radio Stations

Fee Category	Annual Regulatory Fee (USD)
AM Radio Construction Permits	370
FM Radio Construction Permits	1,500
TV VHF Commercial	
Markets 1-10	47,050
Markets 11-25	34,700
Markets 26-50	23,625
Markets 51-100	15,150
Remaining Markets	3,525
Construction Permits	2,750
TV UHF Commercial	
Markets 1-10	12,800
Markets 11-25	10,300
Markets 26-50	6,600
Markets 51-100	3,875
Remaining Markets	1,075
Construction Permits	5,175
Low Power TV, TV/FM Translators/Boosters	320
Broadcast Auxiliary	10
Satellite Television Stations	
All Markets	805
Construction Permits	420
Earth Stations	140

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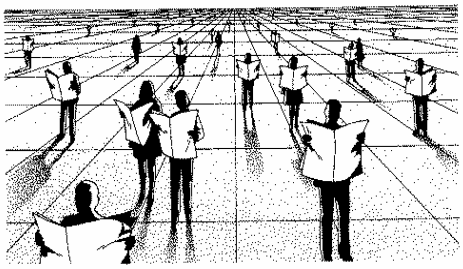
If you have any questions about regulatory fees or want to know how much your station must pay this year, please contact the FHH attorney with whom you normally work or Alison Shapiro at (703) 812-0478 or shapiro@fhhlaw.com.

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*
<20,000	500	375	275	325	375	500
20,001 -50,000	925	725	375	525	725	925
50,001 -125,000	1,500	975	525	775	975	1,500
125,001- 400,000	2,250	1,575	800	950	1,575	2,250
400, 001—1,000,000	3,125	2,525	1,425	1,700	2,525	3,125
>1,000,000	4,975	4,100	2,075	2,625	4,100	4,975

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

Updates on the News

Channel 54, 55 & 59 auction begins August 27, 2002. As you may recall, in the continuing saga of the FCC's spectrum clearing efforts at the top part of the TV band, the auction which had been scheduled for last month was postponed, and the channels to be included in the first round of that auction were limited to Channels 54, 55 and 59. Congress has required the FCC to auction channels 54, 55, and 59 by September 19, 2002 and, accordingly, the FCC has scheduled the auction of those three channels to begin on August 27, 2002. Only persons who were previously qualified to bid in May will be allowed to participate in the upcoming auction.



New application processing fees go into effect September 10, 2002. The Commission has amended its schedule of application filing fees to reflect changes in the Consumer Price Index - Urban ("CPI-U") as of October 1, 2001. Copies of a Fee Filing Guide listing the new fees will be available in August at the Commission's website (http://www.fcc.gov/formpage.html) or through its Forms Distribution Center at 1-800-418-FORM [3676]. For those of you keeping track, the CPI-U has undergone a net change of 40% since October, 1989.

Spectrum Policy Task Force Update. As recounted in previous issues, the Commission has established a Spectrum Policy Task Force to examine a wide range of fundamental issues relating to spectrum management. The Task Force has scheduled four public workshops in August, to be held in the Commission Meeting Room at its Washington headquarters. Dates and topics include: August 1 - Experimental Licenses and Unlicensed Spectrum; August 2 - Interference Protection; August 5 - Spectrum Efficiency; and August 9 - Spectrum Rights and Responsibilities. Panelists and other information will be announced later. In case you can't rearrange your early August vacation plans to drop in on the workshops, they will be transmitted over the internet from the FCC's website at www.fcc.gov/realaudio.

FCC Draft Strategic Plan Draft available for review. The Commission is drafting a "strategic plan for 2003-2008" (why they don't call it a Five-Year Plan is not clear), as required by the Government Performance and Results Act. According to the FCC, the draft is now far enough along to reflect the "strategic direction the FCC intends to follow", and public review and comment has been invited. You can check out the current draft of the plan at http://www.fcc.gov/omd/strategicplan. Comments are due by August 2, 2002.

Kudos to Chairman Powell. Put another candle in the Commissionership tenure celebration cake --Chairman Michael Powell's second term as a Commissioner on July 1. And less than two weeks later, the Chairman was appointed by President Bush to serve on the new interagency Corporate Fraud Task Force.

You're !#?%!ing me. . . You can really say !#?%*&! on the air?*

New Twists In Indecency Policy Evident In Two Low-Profile Decisions

By: Harry F. Cole

The law of indecency seemed to take a few steps recently, but it's hard to know whether those steps were forward, backward or sideways. The bare-bones facts are described in our "Focus on FCC Fines" coverage. What follows is a somewhat deeper analytical plunge into the indecency pool.

On the one hand, there's the long-running case of KROQ, Pasadena. More than five years ago, KROQ broadcast one or another version of a dainty ditty delicately dubbed "You Suck". (Who says that romance was dead in the 90s?)

One (and, apparently, only one) person who happened to be listening to the station that evening was so offended by whatever was broadcast that she lodged a complaint with the Commission. But the complainant did ***not*** have a tape or transcript of the broadcast. Instead, she apparently obtained a copy of the commercially-available, unedited "You Suck" and included that with her complaint.

In response, the station acknowledged that it had a copy of the unedited version of the song on hand, but pointed out that it also had an edited version. The station sent the FCC a copy of the lyrics of the edited version and, in an admirable display of candor, admitted that it couldn't be 100% sure which version was actually aired, since the station did not keep specific records or logger tapes and since the announcer on duty at the time had not listened to the song while it was broadcast. But the station pointed out that, had the unedited version been broadcast, more than one complaint almost certainly would have been raised about the song.

The Commission's staff sent a copy of the station's response, complete with the edited version of the lyrics, to the complainant, and asked her which version had been broadcast. She responded that she recalled hearing certain words which did not appear in the edited version. From this, the staff concluded that the station had in fact broadcast the unedited version. The station got hit with a $2,000 fine.

The station objected that there was no actual evidence that the unedited version -- which everyone seems to agree contains "offensive" language -- was actually broadcast. So what, responded the full Commission in May. As far as the Commission was concerned, the commercially-available CD of the song was enough to provide "sufficient context" and "information regarding what was said in the broadcast in question", even though the station disputed whether that particular version had in fact been broadcast.

The significance of the FCC's decision is that the Commission seems to have moved away from its long-standing requirement that a complainant submit a tape or transcript of the programming which the complainant believes to have been offensive. According to the Commission now, that requirement never really existed. Instead, the Commission's "general practice of requesting a significant excerpt" is simply a way "in which the Commission attempts to ensure that it has sufficient information regarding what was said" during the broadcast. In its most recent KROQ decision, the FCC seems to be saying that a CD which ***might*** have been broadcast is enough to take care of that.

Obviously, there are some conceptual problems here. For example, it is difficult to understand how the mere existence of a commercially-available CD is relevant to what a particular station actually broadcast on a particular night at a particular time. While the complainant in this case asserted that she recalled hearing some words during the broadcast that did not appear in the station's edited version (but which did appear in the unedited, commercially-available version), it is clear that the complainant had her own copy of the commercially-available version -- since she sent a copy to the Commission with her complaint. That being the case, it seems hard to tell whether her recollection of what she heard on the air may have been affected in some way by the CD.

At most, the combination of the complainant's recollection and the unedited CD amount to circumstantial evidence. Against that evidence the Commission could and should have weighed the station's own circumstantial evidence, which included the observation that no other complaints had been received concerning the broadcast in question. But the Commission chose to ignore that.

And from a policy perspective, one can only wonder what other materials the Commission will review in future cases to get "sufficient context" concerning a particular broadcast. The previous requirement (er, excuse us, the previous non-requirement) that a tape or transcript be submitted with the complaint at least had the salutary effect of focusing the Commission's, and licensee's, attention on what was actually broadcast. But now the Commission has indicated that it will be willing to consider materials that may not have been broadcast at all. And faced with consideration of such materials, the licensee will now have the difficult, if not impossible, burden of proving a negative.

That is, if a complainant now alleges the broadcast of offensive language and provides, for example, a CD which contains offensive language, it will be up to the station to state

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unequivocally that that CD was not in fact broadcast on the station. But how do you prove that, especially if you don't maintain an infinite library of logger tapes? In the KROQ case, the station admirably declined to state unequivocally that it had not broadcast the unedited version, presumably ***not*** because the station thought that it had in fact broadcast the unedited version, but rather because it could not prove that it hadn't. But the Commission then jammed that (to put it politely) back down the station's throat, stating that "a licensee may not avoid liability 'by claiming that he doesn't know what did or did not go out over his station.'"

So the take-home message here is that licensees must continue to be concerned about possible indecency complaints, and should seek to establish internal programming policies which will enable them to state, unequivocally, that particular material was ***not*** broadcast. That may be an impossibility, but it certainly seems to be what the FCC now expects.

But against that somewhat discouraging news, let's look at another case which suggests some increased bureaucratic tolerance in the area of indecency regulation.

In June, 2002, the FCC's Enforcement Bureau had occasion to consider a complaint which alleged that an announcer on Station WGR(AM), Buffalo, had (a) invited listeners to call the station to discuss "who in the NHL they would 'piss on," and (b) used the term "sawed-off little prick" when referring, pejoratively, to an NHL executive. Amazingly, the Bureau expressly found the use of those terms ***not*** to be indecent.

According to the Bureau, neither "prick" nor "piss on" was being used by the announcer to "describe or depict" a sexual or excretory activity or organ. Instead, "prick" was merely a "vulgar insult", while "piss on" (and the related "pissed at" and "pissed off") are "commonly used slang terms indicating or describing a sense of anger". The Bureau held that as used, these expressions are "clearly not indecent."

This is something of a breakthrough. Students of indecency regulation will recall that in the seminal case of *FCC v. Pacifica Foundation*, the indecent broadcast in question was George Carlin's monologue focusing on "seven dirty words". One of the points of the monologue was to demonstrate how the words in question really had little if any connection to sexual or excretory functions. And yet, it was the broadcast of the Carlin monologue which opened the way for aggressive Commission regulation of the use of particular language on the air.

In the WGR case, the Commission appears finally to be recognizing what Carlin was trying to tell it 25 years ago -- that particular words themselves have no inherent "bad" meaning or effect, and that any effort to proscribe the broadcast of particular words must be subject to reasonable limits based on the intended meaning of the terms used — intended, that is, by the person using the terms.

So it appears that, for the time being at least, the terms "prick" and "piss off" (and variations thereon), if used properly, will not be deemed "indecent".

If you have any questions about the impact of the recent indecency decisions on your own operations, you should the FHH attorney with whom you normally work or Harry F. Cole at (703) 812-0483 or cole@fhhlaw.com.

Harry F. Cole's column, "Cole's Law", appears in Radio World magazine, from which this article has been adapted.

More "Flagged" Applications Processed

By: Liliana E. Ward

Five more assignment applications which had been "flagged" by the Commission have now been acted on, with two being granted and three being designated for hearing, sort of.

The applications in question would all result in a situation where one licensee in a market would hold more than 50% of the market's advertising revenues, or two separate licensees would together control more than 70% of the revenues. For several years the Commission has been "flagging" such applications, a policy which amounted to sitting on the applications indefinitely. Late last year the FCC adopted an interim policy for handling "flagged" applications.
The five applications acted on recently do not shed much new light on the subject. While all five applications would result in major league concentration in their respective markets, the FCC found that there was enough other competition in one market to justify a grant, and a second application was granted where it was shown that the subject stations would likely cease operation if the sale weren't approved.

As for the three applications designated for hearing, the Commission's 2001 *NPRM* provided that the applicants could postpone the hearing pending adoption of new multiple ownership rules. If the applicants take advantage of that provision (which they are likely to do), they will be able to continue any LMA's they may have in place in the meantime. In other words, the "designation for hearing" simply means that the applications will be held in abeyance for the time being, without any imminent threat of denial or termination of consolidated operations.

FM ALLOTMENT PROPOSALS 6/24/02-7/18/02

State	Community	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
KS	Elkhart	263C1	02-158	Cmts - 8/26/02 Reply—9/10/02	Drop-in
NV	Austin	227C	02-159	Cmts - 8/26/02 Reply—9/10/02	Drop-in
NV	Baker	296C	02-160	Cmts - 8/26/02 Reply—9/10/02	Drop-in
NV	Battle Mountain	231C	02-161	Cmts - 8/26/02 Reply—9/10/02	Drop-in
NV	Eureka	300C	02-162	Cmts - 8/26/02 Reply—9/10/02	Drop-in
NV	Fallon	297C	02-163	Cmts - 8/26/02 Reply—9/10/02	Drop-in
NM	Cimarron	236C2	02-164	Cmts - 8/26/02 Reply—9/10/02	Drop-in
UT	Moab	234C	02-165	Cmts - 8/26/02 Reply—9/10/02	Drop-in
UT	Salina	276C	02-166	Cmts - 8/26/02 Reply—9/10/02	Drop-in
TX	Eldorado	241A	02-167	Cmts - 8/26/02 Reply—9/10/02	Drop-in
TX	Channing	284C	02-168	Cmts - 8/26/02 Reply—9/10/02	Drop-in
TX	Escobares	284C	02-169	Cmts - 8/26/02 Reply—9/10/02	Drop-in
TX	Ozona	275C3	02-170	Cmts - 8/26/02 Reply—9/10/02	Drop-in
CO	Gunnison	265C2	02-171	Cmts - 8/26/02 Reply—9/10/02	Drop-in
TX	Rotan	290A	02-172	Cmts - 8/26/02 Reply—9/10/02	Drop-in
TX	Wellington	248A	02-173	Cmts - 8/26/02 Reply—9/10/02	Drop-in
OK	Red Oak	227A	02-174	Cmts - 8/26/02 Reply—9/10/02	Drop-in
TX	Memphis	292A	02-175	Cmts - 8/26/02 Reply—9/10/02	Drop-in
TX	Matador	227C3	02-176	Cmts - 8/26/02 Reply—9/10/02	Drop-in
TX	Milano	274A	02-177	Cmts - 8/26/02 Reply—9/10/02	Drop-in

FM ALLOTMENTS ADOPTED 6/24/02-7/18/02

State	Community	Channel	Docket No.	Availability for Filing
TX	Ballinger	238A	01-292	TBA
AR	Bearden	224A	01-258	TBA
TX	Benadives	282A	01-256	TBA
TX	Eldorado	293A	01-294	TBA
TX	Freer	288A	01-243	TBA
TX	George West	292A	01-147	TBA
MO	Grandin	283A	01-259	TBA
OK	Pawhuska	233A	01-260	TBA
TX	Weinert	266C3	01-205	TBA

"TBA" means "to be announced". Newly-allotted channels are not likely to become available for filing until after the Commission has resolved certain difficulties with its broadcast auction processes. The Commission has provided no indication of when those difficulties may be resolved.

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.

FHH - On the Job, On the Go

Alison Shapiro has been appointed Co-Chair of the Northern Virginia Practice Committee of the Federal Communications Bar Association.

Howard M. Weiss will be attending the meeting of the Texas Association of Broadcasters in Austin from August 20-23.

Lee G. Petro has been re-appointed as Co-Chairperson of the FCBA's National Telecommunications Moot Court Competition Committee. The Committee coordinates the only national telecommunications moot court competition in the country with the law students at Catholic University of America Law School.