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

Memorandum to Clients

May, 2008 | *News and Analysis of Recent Events in the Field of Communications* | No. 08-05

Act now, before the inspectors arrive!!!

Updated "The Public And Broadcasting" Now Available For Immediate Placement In Public Inspection Files

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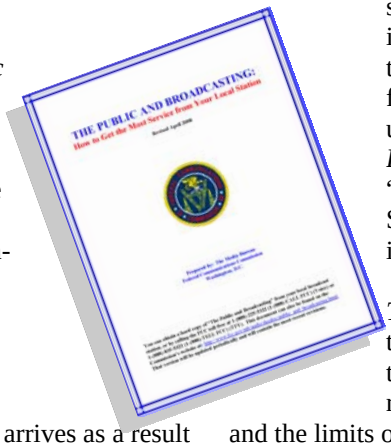
With a minimum of fanfare, the FCC has released a new (we hesitate to declare it "improved") edition of *The Public and Broadcasting*, the agency publication a copy of which all full-service broadcasters are required to have in their local public inspection files. We posted a notice about the release of the new edition on our blog – www.CommLawBlog.com – when the Commission announced it. If you have not already taken the time to obtain a copy of the new version and place it in your public file, you should do so as soon as possible.



The latest re-write is the first since 1999. It arrives as a result of the Commission's localism fixation. In the Commission's view, the Great Unwashed (*i.e.*, the broadcast audience) are largely dissatisfied with the programming of many if not most broadcasters, but the Great Unwashed somehow lack the skills, knowledge and/or tools by which to (a) identify their dissatisfaction and (b) take steps to express that dissatisfaction to appropriate figures (*i.e.*, the broadcasters themselves and, ultimately, the Commission). *The Public and Broadcasting* – none-too-subtly subtitled "How to Get the Most Service from your Local Station" – is intended to serve as a preliminary instruction manual.

The Public and Broadcasting is supposed to tell the people what they should know about the broadcasters who use their airwaves, the rules under which those broadcasters operate, and the limits of government regulation. Presumably on the theory that the manual might come in most handy for someone who already happens to be inspecting a station's local public inspection file, for decades all such files have been required to contain a copy of the manual. (Of course, if a person is savvy enough to know about the existence of a public file, and motivated enough actually to go look at one, that person probably doesn't need *The Public and Broadcasting*. But we digress.)

The 2008 edition helpfully updates outdated terms (f'rinstance, gone are references to the "Mass Media Bureau", which have been replaced by references to the "Media Bureau" – since the term "Mass Media Bureau" bit the dust years ago) and deletes discussions of rules and policies which no longer exist (example: the "personal attack rule" is no longer addressed, because that rule also bit the dust long ago). The new version also includes new discrete sections on digital broadcasting, V-chips and local marketing agreements. It also gives more detailed information on how to file a complaint – especially a complaint about allegedly indecent programming.

In fact, aside from technological or legal changes, the biggest change between the content of the 1999 edition and the 2008 edition is the enormous increase in space devoted to inde-

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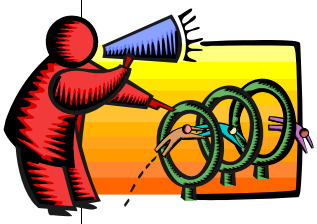
The Scoop Inside

*First verify, **then** certify, **then** modify*



Environmental/Cultural/Historical Hoops Must Be Cleared BEFORE Certification Can Be Made

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Since 2005, pretty much anybody proposing to construct a new tower has had to jump through a lot more hoops before being able to certify that the construction would not entail environmental concerns. Recently, a tower construction company gave us all a good reminder of the need to jump through those hoops ***before*** checking the "yes" box for that environmental certification. If you have filed an application which involves a new tower, or if you think you may be filing one in the foreseeable future, be alert: the Commission takes the environmental certification seriously.

For those of you who may have missed our articles about the environmental requirements back in the January and February, 2005, *Memos to Clients* (both of which can be found on-line – at http://www.fhhlaw.com/articles_memo_clients.asp), here's a quick refresher. In submitting a construction permit application to the FCC, an applicant must certify compliance with the environmental and historic preservation requirements. While back in the day that usually meant merely confirming that passers-by near the tower would not be zapped with excessive RF, by 2005 it had come to mean something considerably different. Now, in addition to routine health/safety RF considerations, the applicant has to check to see whether the proposed site might have particular historical, environmental, ethnic or cultural significance. And that generally entails hiring professional consultants with archaeological credentials who will survey the site and contact local historical preservation officials and any native American tribes which have indicated any possible interest in the area.

Only after that process has been completed successfully can the applicant check "yes" in response to the environmental certification question.

Woe be unto you if your certification is false – and a false certification includes checking "yes" without completing all your homework. When that happens, you may be looking down the barrel of a "voluntary contribution" to government and adoption of a compliance plan.

That, at any rate, is what happened to a company which built some towers without first having jumped through the hoops.

The company in question constructed three new towers without first doing diddly relative to the requirements set forth in the *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review*, or "NPARTS106NHPAR" for short. NPARTS106NHPAR is the source of the historical/cultural review requirement which was initiated in 2005.

The company in question was not a complete scofflaw. Apparently, after having constructed the tower, the construction company became aware of the NPARTS10NHPAR requirements and contacted the FCC apparently to fess up to the construction and to determine how to come into compliance. As part of the after-the-fact effort the company hired a consultant to perform the type of detailed site inspection and assessment that should have been done *before* the environmental certification was checked "yes" – and that consultant declared the sites clear of any problems, a conclusion with which the Commission's staff concurred. So no blood, no foul, right? Wrong. Even though it turned out that the site did not raise environmental problems and that a "yes" response to the environmental certification would have been accurate (if only the applicant had done its homework before so certifying), the fact that the company had certi-

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Focus on FCC Fines

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FCC to broadcasters: Let's make a deal – In the autumn of 2005, the FCC issued a $15,000 fine to a Puerto Rico station for failing to maintain an issues/programs list and for tower violations. The station protested the fine and the FCC reduced it to $14,000 in 2007. The station protested the fine again, but with this protest, the station offered to make a deal with the FCC. The FCC took the deal and in 2008, two and a half years after the first fine was issued, the FCC cut the fine down to $8,000. In exchange for the lower fine, the station agreed that it would follow the FCC's rules and would send in three letters over the next two years reporting to the FCC that it is following the rules.

In a similar wheeling-and-dealing opportunity, the FCC let an Alabama radio operator cut its $12,000 fine down to $6,500. The Alabama case involved an operator that was missing issues/programs lists from the public files for three of its stations (an AM and two FMs). The FCC proposed a $12,000 fine in February, 2007. The stations protested the fine, but six months later the FCC ignored the protest and upheld the $12,000 fine. The station protested a second time and with its second protest was a bit more conciliatory to the FCC. Seeing the broadcaster's hat in hand, the FCC agreed to cut the fine to $6,500. As with the Puerto Rico case, in order to reduce its fine, the owner had to promise (a) not to violate again and (b) to three letters over the next two years reporting that it has been following the rules.

Send change of address notices to the FCC – Unfortunately, broadcasters cannot simply send a postcard to the FCC to let the government know "We're Moving." Instead, because broadcaster moves often involve relocating radio frequencies and broadcast equipment, one must use the appropriate FCC forms and processes to assure that the Commission's records accurately reflect the change. Perhaps more importantly, broadcasters must recognize that, when a main studio move will also involve a relocation of auxiliary gear (like an STL), affirmative FCC approval will be required as well.

A New Mexico station faces an $800 fine for moving its studio, and its studio-transmitter link, without telling the FCC. The station used a 900 MHz wireless link to deliver its programming from its studio to its transmitter site. In February, 2007, the station moved its studio and moved the link with it. However, the station neglected to tell the FCC that it was now beaming the 900 MHz link from the new location. Instead, another user of the frequency reported to the FCC that the station had moved into its neighborhood and was making too much noise (in the spectrum).

The FCC showed up at the station and explained that when the station moved, it should have filed paperwork telling the FCC that the auxiliary gear moved, too. The FCC checked back a month later and the station had not filed the paperwork, although the station advised that it would be getting on it soon. Six months after the FCC first showed up at the station, the paperwork *still* was not on file, and the FCC fined the station $4,000. The station protested the $4,000 fine. However, the FCC noted that even at the time that the station filed its protest it *still* had not filed the paperwork. Indeed, the paperwork didn't get submitted until April, 2008, 14 months after the station moved. However, the station did prove that a $4,000 fine was a financial hardship, and the FCC reduced it to $800.

In a similar case, a Mississippi AM apparently forgot to tell the FCC of the correct address for its transmitter. Responding to a complaint that the AM station was not powering-down after sunset, an FCC field agent camped out at the tower for several hours over two nights to monitor power levels. While the agent was sitting at the tower watching the power meter, he happened to notice that the tower location was not at the location specified in the station's license. Oops.

The FCC agent met with the station owner and asked about the power and location problems. The owner admitted that he had planned to move the tower, had had it licensed for the new location many years ago, but that the real estate deal fell through. The station owner also confessed that the station had to be powered down manually at night and that this was done around 9:00 in the evening. In response, the FCC agent sent the tower owner an $8,000 fine. The station owner then provided the Commission evidence of his financial status. The FCC responded by reducing the fine to $1,500. The FCC will likely also collect its fee for the modification application to correct the tower's location in the FCC records.

Another AM that does not shut off – The previous tale of the AM station that had to be shut off manually is outdone by the Florida daytime-only AM station that could not be shut off at all. The FCC received a complaint about an AM station that was not shutting down at night. An FCC agent appeared at the station and verified that the station was still broadcasting well after sunset, contrary to its license. The FCC agent returned later to review the problem with the station's Chief Operator and the President of the licensee. In what must have been quite a sight, the Chief Operator and President gave the FCC agent a tour of the station – but when the time came to shut down the transmitter, neither was able to do it.

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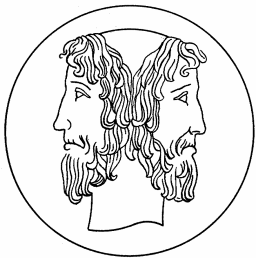

A kinder, gentler FCC, or just Samoa the same?

Nine Years Of Sporadic, Unauthorized Operation Draw Short-Term Renewal

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Recently the Commission bared its regulatory fangs at a hapless licensee who, for the better part of a decade, had had trouble keeping (a) its station on the air and (b) the FCC notified of what was going on with its station. After nearly a decade of seemingly near-total disregard for the FCC, the licensee finally suffered the wrath of the regulator: it got a short-term renewal and an $18,000 fine – but (and it's a big "but"), unlike a couple of other recent cases, the Commission did *not* take the station's license away.

The station in question is in American Samoa. It went off the air on May 4, 1999. Section 312(g) of the Communications Act provides that, when a station fails to operate for 12 consecutive months, its license is generally deemed to have automatically expired. With that 12-month clock counting down, in March, 2000 – ten months after the station went silent – the station was bought by South Seas Broadcasting (SSB).

SSB advised the Commission that it had returned the station to operation on April 27, 2000, just in the nick of time, but it did so only with unauthorized facilities (the 2000 Temporary Facilities) inconsistent with those specified in its license – and it hadn't bothered to ask the FCC for permission to use the 2000 Temporary Facilities even temporarily. And it then operated only for 3 days until April 30, 2007, before it went silent again.

For sure, we should all hope that the Commission is prepared to be as lenient with the rest of us as it was with these folks.

On May 1, 2000, SSB supposedly filed a request for special temporary authority (STA) to operate with temporary facilities. The FCC claims to have no record of receiving that filing, which probably explains why the Commission never acted on it. (SSB was able to produce a copy of such a request stamped "received" by the Commission on May 22, 2000 – it's not clear why it might have taken so long for a May 1 letter to reach the Commission, but we are talking American Samoa, after all, which is about as far away from the FCC as you can get.) Despite that mere niggle, SSB says it cranked the station back up in late June, 2000, apparently with the still unauthorized 2000 Temporary Facilities.

So SSB's story is that the station was on the air from June, 2000, until December, 2003. But an American Samoa listener complained to the FCC in September, 2003, that the station hadn't been on the air since 1999. The Commission sent an inquiry to SSB asking what was up. Having received no response within the allotted time, the Commission sent a follow-up inquiry on February 25. In early March, 2004, SSB finally responded, advising the Commission that the station had been off the air from May, 1999, to April 27, 2000. SSB also said in that March, 2004, response that the station had also gone off the air in late December, 2003, because of a lightning strike, and then a cyclone had blown through in January, 2004, destroying the 2000 Temporary Facilities. So the station had been off the air from December, 2003, into March, 2004. In mid-March, 2004, the station cranked up again, this time with yet another set of previously-unauthorized facilities (the 2004 Temporary Facilities). According to SSB, a couple of days after commencing operation with those facilities SSB got around to requesting an STA to cover them – but again, the FCC has no record of that supposed request, so it never happened to get granted.

Five months later the station was off the air again. SSB claims that it notified the Commission of this turn of events by letter dated August 25, 2004, but again the FCC says it has no record of such a letter. In November, 2004, SSB asked for an STA to operate with the 2004 Temporary Facilities. In response, the Commission's staff sent SSB a further inquiry about (a) the station's operational status prior to May, 2000, and (b) a July, 2000, STA request which SSB claimed to have filed but of which the FCC was apparently unaware. Importantly, this inquiry, dated November 30, 2004, gave SSB 30 days in which to respond. Failure to do so would result in cancellation of the station's license.

SSB failed to respond within the 30-day period and, on January 26, the Commission sent it a letter canceling the license. But two days later – on January 28 – SSB filed a letter, dated January 18, 2005, responding to the November inquiry. SSB's basic position was that it had been forced to operate with emergency facilities in 2000 and that, when the 2000 Temporary Facilities were destroyed, it encountered considerable difficulty in obtaining an alternate permanent site, thus necessitating the 2004 Temporary Facilities.

So what we have is a station which, when it operated at all, does not appear to have operated with any authorized facilities for years. It does not appear to have notified the FCC of its off-air status, as required, nor does it appear to have prop-

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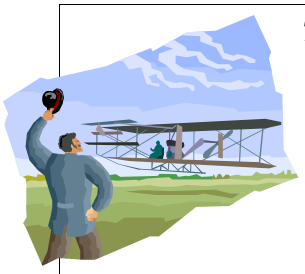

Testing the wings of DTV

DTV Transition To Hit NC Coast Five Months Before Rest Of Country

"First in Flight, First in Digital"

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The FCC has announced that television stations in the Wilmington, North Carolina market have agreed to act as guinea pigs in the DTV transition by shutting down analog operations early. Moving ahead under the slogan "First in Flight, First in Digital", all of the full-power, commercial television stations and two low power TV stations in the Wilmington market have agreed to go all-digital on September 8, 2008, more than five months ahead of the national deadline of February 17, 2009. The noncommercial station in the market declined to participate because it simply rebroadcasts programming from the state-wide network and had technical issues with local origination.

The early transition for the Wilmington market was announced at a press conference held at the FCC on May 8. Representatives of the stations involved, the mayor of Wilmington, and electronics retailers Best Buy and Circuit City were on hand for the big announcement. The press conference was preceded by a private meeting with FCC Chairman Kevin Martin and some members of the staff who will be working on this project. At that meeting, Chairman Martin and the staff solicited ideas from the local stations and mayor on how the FCC can help with the transition, and particularly how it can help get the word out to residents of Wilmington and the surrounding counties.

Chairman Martin indicated that the FCC's efforts will include having an FCC office located in Wilmington, which will be staffed by various FCC personnel in the months leading up to the transition. In addition, FCC staff members will be attending various local events, such as blueberry festivals, fairs, and the like, where they will set up booths to help spread the word. The Commission also will be seeking help from diverse local groups, including various community services groups and those that deliver meals to the elderly and shut-ins in an effort to inform those hardest to reach with information about the transition. It is clear that the FCC plans to do everything in its power to make the Wilmington transition work.

At the press conference, Chairman Martin gave credit to Democratic Commissioner Michael Copps for promoting the idea of having a test market or markets to help both in preparing for the overall DTV transition and in spotting potential problems. Chairman Martin stated that Wilmington had been chosen as one of a few possible test markets because all of the stations are already set to go with full-power DTV operations. Sources indicate that there also was considerable behind-the-scenes pressure placed on Wilmington stations, including personal telephone calls from Chairman Martin, to agree to serve as the test market. Many theorize that Chairman Martin's North Carolina ties may have contributed to the desire to use Wilmington, while other, cynical observers wonder if its proximity to the beach may not have been another consideration. Whatever may be the case, the waterfront location will be an added benefit for those FCC staffers spending parts of the summer months on location prior to the September transition.

FCC staff members will be attending various local events, such as blueberry festivals, fairs, and the like, where they will set up booths to help spread the word about the DTV Transition.

Practical considerations which had led some stations to hesitate about going forward early included the need to make sure that there would be continued cable and satellite carriage after the switch to all-digital. Apparently, pressure from the Chairman was brought to bear on those issues as well, and he stated that he had received indications from both cable companies and satellite companies that they would be ready to go with continued carriage as of September 8. The question of whether that carriage would be in high definition remained open, but the overall tone was quite positive.

The only sour note came from Commissioner Jonathan Adelstein, who took a verbal swipe at both Chairman Martin and fellow Democratic Commissioner Copps. While he praised the Wilmington stations for being willing to step out and make the early transition, he questioned whether the Commission would be willing and able to make similar efforts (including the anticipated attendance at local blueberry festivals and the like) to make the transition work in other markets. If the expression on his face is any indication, Commissioner Copps was clearly offended by these remarks.

In any event, the FCC is moving forward with establishing its "Team Wilmington" and taking the first steps toward transition. Part of that process includes continuing, close communication with the stations. Should you have any questions or want more information about this process, please contact the attorney at the firm with whom you normally deal or Anne Goodwin Crump at 703-812-0400, e-mail crump@fhhlaw.com. As it turns out, FHH represents two of the stations in the market.

Up, up and away!!!

FCC Announces Proposed 2008 Regulatory Fees

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It was nice while it lasted, but you had to figure it wasn't going to last long . . . and it didn't. The FCC has announced its proposed regulatory fees for 2008, and the news is that fees in 60 of the 61 categories all went up. (The lone exception is the reg fee for lowly Broadcast Auxiliary licenses, which is proposed to remain the same as last year, $10 a pop.) Since last year's fees had shown *decreases* from 2006 in 32 of the 61 categories, and no change at all in 20 categories, this year's across-the-board increases may be a bit jarring. The list of proposed broadcast-related fees (which would be due for payment later this year) is set out on the next page.

And let's be clear – the increases which the FCC has put on the table are by no means small. Commercial VHF TV stations in Markets 26-50, Class C AM stations in the smallest of markets (*i.e.*, 25,000 and under) and AM construction permit holders get squeezed the hardest proportionately. Their reg fees would zoom up 12.3%, 12.5% and 12.5%, respectively. Close behind are Class B AM stations in markets of more than 150,001 and higher power FM's (Classes B, C, C0, C1 and C2) in markets of 500,001 or more. Their fees all are proposed to go up by more than 11%.

You can expect to get hit with a 25% late payment fee if your reg fee is not received by the Commission prior to the deadline they will be establishing.

Most of the rest of the broadcast industry would not be far behind, with proposed increases ranging from 5% to 10.8%. The only categories of fees which would increase by less than 5% are Class A AM's in the smallest markets, Class A, B1 and C3 FM's in the smallest markets and in markets of 75,001-150,000, and FM construction permit holders.

Since the proceeding is still open, the dates for the payment window have not yet been set. Historically, reg fees are due to be paid sometime between mid-August and the end of September. The Commission is expected to announce the deadline sometime this summer, after comments have been submitted and considered. We'll let you know when it does.

As usual, fee payments must be accompanied by a completed FCC Form 159 (Fee Remittance Advice). Fees can also be paid on line (in which case you can get the FCC's electronic filing system to generate a Form 159 automatically – otherwise, you will need to know the payment type code and other information for the particular fee you are paying). We will, of course, be happy to assist you in the filing of your fee(s).

Note that you can expect to get hit with a 25% late payment fee if your reg fee is not received by the Commission prior to the deadline they will be establishing. That can amount to a hefty penalty in many cases, so it is prudent to take care to make timely payment.

And as we have reminded readers for a couple of years already, timely and full payment of reg fees is particularly important in light of the Commission's "red light" system. Under that system, a licensee which fails to pay the required reg fee is "red lighted". When that occurs, the licensee will ***not*** be granted ***any*** new authorization – including grants of assignment/transfer applications as well as new permits or licenses – unless and until the "red light" is cleared either by payment of the outstanding fee or the making of appropriate arrangements with the Commission for such payment. If a delinquent licensee files an application of any kind, that application will be dismissed if the delinquency is not clear up within 30 days. In view of this, we urge everyone who is subject to regulatory fees to be sure to get their payments made in full and on time.

Comments on the Commission's proposed regulatory fees are due to be filed by May 30. Reply comments are due by June 6. Historically, the opportunity to file comments has seemed somewhat – what's the polite word? – perfunctory. The FCC is required (by the Administrative Procedure Act) to solicit comments, but as a general rule, the Commission does not allow itself to be persuaded by any comments that might wander in. The fact that the FCC has provided a mere seven-day period for replies illustrates the limited extent to which the agency encourages and expects public comment. So we can probably expect with reasonable certainty that the final reg fees will very closely resemble the proposed fees as set out in the table on the next page. The Commission should be releasing its Report and Order with the final reg fee amounts by mid-summer. We'll let you know when that happens.

FEE CATEGORY	PROPOSED FY 2008 Annual Regulatory Fee (USD)
TV VHF Commercial Stations	
Markets 1-10	69,400
Markets 11-25	50,850
Markets 26-50	34,900
Markets 51-100	21,025
Remaining Markets	5,600
Construction Permits	5,600
TV UHF Commercial Stations	
Markets 1-10	21,450
Markets 11-25	20,475
Markets 26-50	11,575
Markets 51-100	6,850
Remaining Markets	1,875
Construction Permits	1,875
Low Power TV, TV/FM Translators/ Boosters	365
Other	
Broadcast Auxiliary	10
Earth Stations	195

Satellite Television Stations	
All Markets	1,175
Construction Permits	595

Commercial Radio Stations						
Population Served	**AM Class A**	**AM Class B**	**AM Class C**	**AM Class D**	**FM Classes A, B1 & C3**	**FM Classes B, C, C0, C1 & C2**
<=25,000	650	500	450	525	600	775
25,001 -75,000	1,325	1,025	650	775	1,225	1,325
75,001 -150,000	1,925	1,275	875	1,300	1,675	2,550
150,001- 500,000	2,975	2,175	1,325	1,550	2,600	3,325
500,001 -1,200,000	4,300	3,325	2,200	2,575	4,125	4,900
1,200,001- 3,000,000	6,600	5,100	3,300	4,125	6,700	7,850
>3,000,000	7,925	6,125	4,175	5,150	8,550	10,200
AM Radio Construction Permits	450					
FM Radio Construction Permits	600					

But the court said we could . . .

FCC Finds Enforcement Of Format-Based Non-Compete Violates Communications Act

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This is the story of a station transaction gone bad, done in by a non-compete agreement that was, apparently, too well-crafted. The FCC's recent resolution suggests a change – or at least a substantial re-emphasis – in the agency's treatment of non-competition agreements. That change may necessitate re-evaluation of non-competes by parties who might otherwise have seen such provisions as advisable for one reason or another.

The facts here are a bit complicated, so bear with us. A few years ago, one Mr. Burns (Gary, not Montgomery) sold a station to Centennial Broadcasting LLC. The station in question apparently featured some form of news/talk format, and as part of the Burns/Centennial deal, Burns agreed to a five-year format-based non-compete. That is, for five years following the Burns/Centennial deal Burns would be contractually prohibited from owning another station in the same market with substantially the same format as the station he sold to Centennial. In return, Burns received $25,000 from Centennial (in addition to the station's purchase price).

In view of this decision, it may be necessary to alter hitherto conventional approaches to non-compete agreement terms in purchase/sale deals.

Less than a year into that five-year period, Burns (through a company he controlled) bought another station in the market and promptly converted it to news/talk (with a few hours of music a day). Centennial, understandably miffed at that turn of events, went to court seeking specific performance in the form of an injunction prohibiting Burns from using the news/talk format. The trial court agreed with Centennial that Burns's new format was a violation (a "blatant" violation at that) of the terms of the non-compete, so the court granted the injunction. An appeals court upheld that ruling.

This, of course, should have been music to the ears of Centennial. Centennial had, after all, bargained for a non-compete, and the resulting contractual provision was so well-crafted that the courts ordered that it be enforced. This is precisely the way things are supposed to work on Planet Contract Guy.

But Burns counterattacked at the FCC. He initially filed a complaint with the Enforcement Bureau, alleging that Centennial was improperly trying to assert control over the programming of Burns's new station. The Enforcement folks apparently did little or nothing in response – but at least they did not reject the complaint. So when Centennial filed an application to acquire a number of stations from an unrelated third party in a deal which had virtually nothing to do with Burns at all, Burns essentially re-filed his complaint with the Media Bureau, this time as an objection to the application. His argument was that Centennial was not qualified to be or remain a licensee because Centennial was improperly trying to assert control over the programming of Burns's station.

Lo and behold, the Media Bureau concluded that Burns might be on to something. In what seems to be the first time the FCC has considered a case with these particular issues, the Bureau's Audio Division decided that Centennial's efforts to enforce the non-compete *did* constitute a violation, but not so serious a violation as to disqualify Centennial from being a licensee. Rather, the violation warranted an $8,000 fine. With that, Centennial was free to acquire the additional stations, provided that Centennial also dissolves the injunction against Burns and refrains from any further attempts to enforce the Burns/Centennial non-compete.

The Audio Division apparently felt that Centennial's successful efforts to enforce the non-compete in court constituted an attempt by Centennial to control the programming of Burns's station. Since programming is one element of a station's operation that is not supposed to be handed off to anyone other than the station's licensee without prior FCC approval, Centennial's injunction constituted (in the eyes of the Division) a kind of unauthorized assumption of control.

This decision raised a number of eyebrows. Seller non-compete agreements are commonly negotiated by buyers as part of radio and television station sale/purchase transactions. And while the specific terms of non-competes can vary widely, the Burns/Centennial non-compete was actually pretty modest: it did not completely prevent Burns from owning another station in the market; rather, it merely prevented Burns from utilizing one particular format if he happened to acquire such a station. Ordinarily,

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this type of bargained-for, voluntary acceptance by a party (in this case, Burns) of a narrow limitation on the range of programming it might provide would not have been seen as implicating any unauthorized transfer of control – particularly since the non-compete had been submitted to the Commission with the Burns/Centennial assignment application and had not apparently triggered any adverse reaction from the Commission's staff. In view of this decision, it may be necessary to alter hitherto conventional approaches to non-compete agreement terms in purchase/sale deals.

There are several lessons to be learned from this decision.

1. ***Narrow is not necessarily better***. As a general contract law principle, the narrower a non-compete agreement is tailored, the more likely it is to be enforced by a court. For example, a non-compete agreement that prohibits someone from competing anywhere in the United States is normally less likely to be enforceable in the courts than an agreement which prohibits competition in just one metropolitan area. In the Centennial case, the non-compete agreement was narrow: it merely banned Burns from owning a station broadcasting with one particular format (*i.e.*, the format of the station he sold to Centennial). But that was apparently unacceptable from the FCC's perspective, since the format restriction impermissibly encroached on a fundamental control factor (at least in the Audio Division's eyes). The irony is that when Centennial and Burns were negotiating their original deal, Centennial wanted Burns to agree to a broad prohibition against owning any other stations in the market, but Burns negotiated for the more narrow format-specific non-compete provision. In the future, if a station buyer wants the seller to sign a non-compete agreement as part of a sale transaction, the ban upon the seller owning another nearby station should apparently be absolute and not format-related.

When applicants certify that their deals comply with the rules, the staff does not "routinely scrutinize" the documents that are filed along with the application.

2. ***Timing is everything***. The FCC's decision in the Centennial case hinged upon the staff's perception that Centennial was exercising programming control over Burns's new station by obtaining an injunction against Burns. At the time Centennial obtained the injunction, Burns (through a company he controlled) was already the FCC-approved licensee of the new station. But suppose Centennial had obtained the injunction *before* Burns acquired the station, and then petitioned against Burns's FCC assignment application on the grounds that the proposed acquisition would violate not only Burns's non-compete agreement with Centennial but also the terms of a court-ordered injunction. It is at least possible that Centennial would have prevailed. Note that the FCC did not address this hypothetical scenario in its decision in the Centennial case, so we can't make this conclusion with absolute certainty.

3. ***Money damages, not injunction***. If the Audio Division's decision is not reversed, we now know that seeking an injunction to enforce a format-based non-compete is apparently a violation of the Communications Act and the FCC's rules. But there are other ways to enforce such provisions. For example, an obvious alternative approach is to sue for monetary damages, rather than for an injunction. In other words, a non-compete violator can continue to program his station any way he wants, he just has to pay money to the other party to the non-compete agreement to compensate for the damage caused by his violation. Actual damages can be difficult to prove, but not impossible. As an alternative to proving damages, the aggrieved party might seek a refund of the money it paid to the violating party. Another alternative would be to require the non-compete payments to be made periodically over time to provide incentive not to violate the non-compete terms until the last payment is made (the incentive being that the payments stop if the non-compete is violated). Note again that the FCC did not address this question in the Centennial case, so we don't know with 100% certainty that the FCC won't consider a suit for monetary damages or a refund of a non-compete payment to be an impermissible exertion of control.

4. ***Full disclosure in applications***. In the Centennial decision, the Audio Division acknowledges that Centennial and Burns did in fact file a copy of their non-compete agreement with their original assignment application. But both parties also certified in the application that their agreement (including the non-compete) complied with the FCC's rules, when, in fact, it did not – at least according to the Audio Division, long after the fact. While the worksheet to the FCC assignment application does not itself suggest that the terms of the Burns/Centennial non-compete were on their face a violation, with the luxury of 20/20 hindsight Centennial and Burns might have elected at least to highlight the terms of the non-compete so that the staff would be sure to see them. On this point the Division's decision contains a startling admission: when applicants certify that their sale/purchase transaction agreements comply with the FCC's rules, the staff does not "routinely scrutinize" copies of such documents that are required to be filed along with the application. (This is something we had suspected, but were nonetheless surprised to see the FCC admit.) Accordingly, approval of an assignment application does *not* establish compliance with the FCC's rules of all transaction documents filed with the application. The FCC cautioned all applicants that they will held "strictly accountable" for disclosing in FCC applications any contract terms that do

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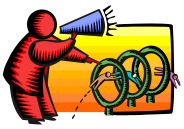
cency and its discontents. Of course, in recent years – and especially since the infamous Janet Jackson Super Bowl appearance in 2004 – there has been a dramatic upsurge in interest in indecency, an upsurge which has been accompanied by an exponential increase in indecency-related complaints. The Commission has even streamlined the indecency complaint process, providing a handy on-line fill-in-the-blanks template that can be submitted to the Commission with a mere mouse click. So it's probably not surprising that the new *Public and Broadcasting* devotes considerable attention to that area. But if the Commission is *already* receiving hundreds of thousands of indecency complaints, why does the Commission think that additional coaching in that particular area is necessary?

We could ponder such questions until the cows come home, but that would not change the essential message here: there is a new edition of *The Public and Broadcasting*, and if you have a public file, you must make sure that that public file contains a copy of that new edition as soon as possible. And since the FCC also requires broadcasters to make copies available to people who walk in off the street and ask for one (Note to readers: please let us know if and when that happens), you might want to run off a couple of extra copies to have on hand for that purpose.

The 2008 edition of *The Public and Broadcasting* is available for download at*:* http://www.fcc.gov/mb/audio/decdoc/public_and_broadcasting.html. If you run into any problems getting it there, contact the FHH attorney with whom you normally work, and we'll get you a copy right away.



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fied to that without knowing it to be true warranted sanction in the Commission's view.

The Feds required the company to institute a Compliance Plan relating to future adherence to the requirements of NPARTS106NHPAR, including such chores as discussing recent FCC developments with their communications counsel and a self-reporting requirement that compels the company to report to the FCC any compliance problems. Oh yeah, and the Commission wrung a $16,500 "voluntary" contribution to the U.S. Treasury out of the company.

So you have warned (again). Before you certify that your proposal does not raise any environmental concerns, make sure that you have confirmed that you have taken all the necessary steps to comply with environmental and historic preservation requirements. Failure to do so can be dangerous to your bottom line.

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erly requested permission to operate with previously unauthorized facilities. In similar circumstances, the FCC has held that Section 312(g) mandates loss of the license.

Here, though, the Commission reinstated the license, whacked SSB for an $18,000 fine, and renewed the license, albeit for a less-than-full term. The renewal alone was a surprise, since the station is *still* not operating with licensed facilities, and the Commission routinely declines to renew licenses under those circumstances.

What about the 12-month off-air question? According to the Commission, it could not conclude that the station was off the air for any 12 consecutive month period, even though it seems that most of the time the station supposedly operated between 2000-2003, it did so with unauthorized facilities – and the Commission's historical position has been that such unauthorized operation does *not* permit a licensee to get around the strictures of Section 312(g).

We won't second-guess the FCC staff. But for sure, we should all hope that the Commission is prepared to be as lenient with the rest of us as it was with SSB – and we might also question why the Commission chose to apply this seemingly benevolent policy in this case but chose not to do so in a couple of other recent, similar cases. The folks who didn't get the same kind of break may legitimately believe that the FCC staff's actions are inexplicably arbitrary and capricious.

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not comply with the Commission's rules and policies.

As noted, this decision has been met with some surprise and criticism. It is possible that review or reconsideration may be sought, or that the staff may choose to re-think this case on its own. But it's not clear that either Burns or Centennial has much motivation to go another round on this, and the staff is not known for second-guessing itself. Accordingly, it is probably best to assume that, for the time being, the law of non-competes is as the Audio Division says it is. Given that, anyone looking to enter into a new non-compete, or enforce an existing non-compete, should take a very careful look at the staff's opinion before going forward.

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The two were able to reduce the power of the station but they could not turn off the transmitter. Three days after the tour, the station contacted the FCC and admitted that they were still unable to shut off the transmitter. Not pleased that a daytime-only AM station could not turn off at night, the FCC sent the station a $3,200 fine.

"Out, damn'd spot! Out, I say!" (Macbeth, Act V, Scene 1)

FCC Rejects Love, Family And Tastefulness In NCE FM Underwriting Announcements

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Noncommercial licensees were recently reminded of one of the major limitations their noncommercial status imposes on them. And at the same time they were reminded of the largely undefined limits of those limitations.

We are talking about underwriting announcements and, in particular, what such announcements can say and what they can't say. Since there had been little if any regulatory activity in this area in recent years – a couple of less-than-informative consent decrees in 2007, and nothing at all in 2006 – it might have appeared that the FCC had lost interest in parsing the precise verbiage of NCE underwriting announcements. But apparently that was not the case.

As we all know, NCE stations can*not* accept payment in return for the on-air promotion of commercial activities. But they *may* accept "underwriting" contributions and may, in turn, acknowledge the generosity of the contributing underwriter by giving an on-air shout-out mentioning the underwriter. The essential question, then, is: when does such an announcement cross the line from mere acceptable acknowledgement to punishable promotion?

Historically, the Commission has held that *verboten* "promotional" language includes comparative or qualitative descriptions, price information, calls to action, or any inducement to partake of the underwriter's goods or services. BUT it's always OK to "identify" the underwriter. Recognizing that it is "at times difficult" to distinguish between the two, the Commission accords licensees some latitude in the exercise of their good faith judgment in this area.

In a recent decision by the Enforcement Bureau, an NCE FM licensee in South Zanesville, Ohio, got the bad news that its good faith judgment fell outside the latitude the FCC was willing to accord it.

Below we are providing the texts of three of the announcements the FCC took a look at. Before reading on, check them out and see if you can see any problems with any of them.

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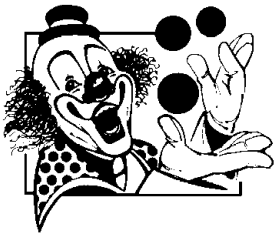
SPOT THE SPOT

Fun for the whole family!!!

Can you tell the difference between a good underwriting acknowledgement and a bad promotional announcement? Give it a try! Here are three actual on-air announcements – the FCC thought one was good ☺ but the other two were bad ☹. Can you tell which was which?



Good luck!!!

Tasty Freeze

Planning a special occasion? Tasty Freeze, at the airport exit off of I-70, has ice cream cakes for that office celebration, birthdays, anniversaries, or for that special event you've planned. These cakes, tastefully decorated by Bobby Tim, are available in 8 or ten inch. Tasty Freeze, at the airport exit off of I-70, is open 7 days a week from noon until 10 p.m. Also available at Tasty Freeze: Hearth and Home Ohio Bicentennial candles by lum-lite, ice cream treats or ice cream cakes, it's Tasty Freeze, 588-9314.

Prindle GMAC Real Estate

Prindle GMAC Real Estate is proud to be an underwriter of Christian radio, located at 1805 Maple Avenue in Zanesville. Prindle GMAC Real Estate is experienced in all types of real estate sales. At Prindle GMAC Real Estate, we're all about family. Dick Pryor of Prindle GMAC Real Estate offers over 25 years of home buying and home selling experience. Dick Pryor and Prindle GMAC Real Estate, we love selling real estate. Dick Pryor, 454-9191.

The School House

Are you looking for creative learning materials? The School House, your parent-teacher supply store, has two locations, in Newark and Zanesville, to serve you. The School House has accessories for teachers, schools, home-schoolers, including Alpha-Omega home school curriculum, grandparents, youth-serving organizations, and anyone working with children. The School House, where learning and fun come together, 1218 Brandywine Boulevard in Zanesville, and 36 South Third Street in Newark. Zanesville, 455-6445; Newark, 345-7710.

May 29, 2008

DTV PSIP Compliance – All *DTV* facilities must comply with the new Program System and Information Protocol by this date.

June 1, 2008

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

EEO Mid-Term Reports – All *television station employment units with five (5) or more full-time employees* and located in the **District of Columbia**, **Maryland**, **Virginia**, or **West Virginia** must file EEO Mid-Term Reports electronically on FCC Form 397. All *radio station employment units with eleven (11) or more full-time employees* and located in **Michigan** or **Ohio** must file EEO Mid-Term Reports electronically on FCC Form 397. For both radio and TV stations, this report includes a certification as whether any EEO complaints have been filed and copies of the two most recent EEO Public File Reports for the employment unit.

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

Radio Ownership Reports – All *radio* stations located in **Michigan** and **Ohio** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323 or 323-E.

June 19, 2008

DTV Construction Permit Extension Applications – All *DTV permittees* which have a construction deadline of August 18, 2008, and which will require an extension of time in which to complete construction must file an extension application on FCC Form 337.

DTV Construction Permit Applications – All *television stations with a DTV construction deadline of February 17, 2009*, must file applications for construction permit to implement DTV facilities on their final channels.

July 10, 2008

DTV Consumer Education Quarterly Activity Reports – All *television* stations must file a report on FCC Form 388 and list all station activity to educate consumers about the DTV transition. This will be the second such report but the first to cover an entire quarter. The period to be included is April 1 through June 30, 2008. The report must be filed electronically through the FCC's Electronic Comment Filing System.

Children's Television Programming Reports - Analog and Digital – For all *commercial television* and *Class A television* stations, the second quarter reports on revised FCC Form 398 must be filed electronically with the Commission, and a copy must be placed in each station's local public inspection file. Once again, information will be required for both the analog and DTV operations.

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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 must be placed in the public inspection file.

Website Compliance Information – *Television station licensees* must place and retain in their 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 *radio*, *television*, and *Class A television* stations, a listing of each station's most significant treatment of community issues must be placed in the station's local public inspection file. The list should include a brief narrative describing the issues covered and the programs which provided the coverage, with information concerning the time, date, duration, and title of each program.

August 1, 2008

EEO Public File Reports – All *radio* and *television employment units with five (5) or more full-time employees* located in **California**, **Illinois**, **North Carolina**, **South Carolina**, or **Wisconsin** must place EEO Public File Reports in their public inspection files. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

EEO Mid-Term Reports – All *television station employment units with five (5) or more full-time employees* and located in **North Carolina** or **South Carolina** must file EEO Mid-Term Reports electronically on FCC Form 397. All *radio station employment units with eleven (11) or more full-time employees* and located in **Illinois** or **Wisconsin** must file EEO Mid-Term Reports electronically on FCC Form 397. For both radio and TV stations, this report includes a certification as whether any EEO complaints have been filed and copies of the two most recent EEO Public File Reports for the employment unit.

Television Ownership Reports – All *television* stations located in **California**, **North Carolina**, or **South Carolina** must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All reports must be filed electronically.

Radio Ownership Reports – All *radio* stations located in **Illinois** or **Wisconsin** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323 or 323-E.

Late Breaking News???

If you're looking for information and insight about late-breaking developments (like, for example, the release earlier this month of the updated edition of *The Public and Broadcasting*), check out the Fletcher Heald blog. You can find it at:

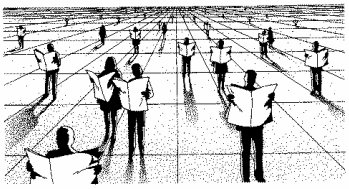
www.CommLawBlog.com

We cover the gamut of communications issues – plus, if you feel so moved, you can submit your own views for posting. We've had more than 80,000 visits to our site to date! Click on over and see why.

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

Updates on the News

DTV window opening sooner? – Most everybody in TV-land has been waiting for the opportunity to file upgrade proposals to boost their DTV facilities beyond the replication limits initially authorized by the FCC. For the last six-nine months, the conventional wisdom has been that the window for filing such maximization applications would not be opened until August, at the earliest. But according to rumors circulating recently, the maximization window might open as early as late June, shortly after the June 19 deadline for the few remaining initial DTV construction permits that still need to filed. Word is that we should be looking for an announcement in the next few weeks advising that a window period for such maximization filings will start around the last week of June – with all applications filed during the window being deemed to have been filed on the same date. Keep your eyes peeled.



DTV education status reports, redux – When the next Form 388 (DTV Quarterly Activity Station Report – *i.e.*, the form used to report the steps each TV station has taken to educate the public about the DTV Transition) is due from TV licensees, it should be filed through CDBS, rather than ECFS. As you may recall, when the Form 388 was adopted a couple of months ago, it could only be filed as a rulemaking comment through the ECFS system. The Commission has thought better of that approach and, according to one Media Bureau official, the next time around the form will be available for filing through CDBS.

Cycle for TV Mid-Term EEO reports about to start – Attention TV licensees: Form 397 is about to enter your lives. That's the mid-term EEO report, the filing requirement for which was imposed a couple of years ago. It's due to be filed the next business day after the four-year anniversary of the filing deadline for the station's last renewal. That means that the first batch of TV filers – those in Maryland, Virginia, West Virginia and the District of Columbia – should be getting their reports ready to file by June 2, 2008. Need more information? Check out the FCC's public notices (DA 07-964, dated 3/9/2007, and DA-07-2074, dated 5/16/2007) which can be found at http://www.fcc.gov/mb/policy/eeo/.

CORES beefs up – The Commission has modified its CORES system for issuing FCC Registration Numbers (FRNs) and related passwords. The changes do ***not*** affect passwords which have already been established and are in use. ***BUT*** if you create a new password, or want to change or reset an existing password, or try to update your CORES information, the new standards will kick in. All new passwords must contain at least six characters and at least three of the following four character types: numeric, upper case letters, lower case letters, special characters (*i.e.*, !, #, $, *, etc.). New passwords cannot be identical to any of the user's previous four passwords. The revised system also includes a lock-out feature. After five unsuccessful login attempts, the account will be locked for 15 minutes (you'll get a warning of how many attempts you've made, in case you weren't already feeling any pressure to get it right the next time). To unlock the account, wait 15 minutes, or get a password reset at http://support.fcc.gov/password.htm, or just call the help line (877-480-3201, option 1) between 8:00 a.m.-6:00 p.m. ET).

For the birds – As we reported in the February, 2008, *Memo to Clients*, the Commission was ordered by the U.S. Court of Appeals in D.C. to take a closer look at claims that communications towers are killing migratory birds by the millions (and, if that turns out to be the case, what might be done about it). The FCC's Wireless Bureau has now opened a docket (WT Docket No. 08-61) for the submission of comments on the subject. If you've got something to say, let the Wireless folks know. The Bureau has assigned the proceeding "permit but disclose" status under the *ex parte* rules, which means that parties may make *ex parte* presentations as long as they are properly disclosed in a written memo filed in the docket.

That's news to the FCC – The Commission has officially declared the entertainment news program *TMZ* and certain portions of the long-running Christian program *The 700 Club* to be newscasts. The programs' producers requested the rulings so that any appearances by political candidates would be exempt from the equal opportunities provisions of the political broadcast rules. *TMZ* and *The 700 Club* now take their rightful places alongside *Celebrity Justice*, *Access Hollywood*, *Entertainment Tonight*, *Geraldo*, *The Jerry Springer Show*, *The Howard Stern Show* and last but not least, the ironically-named *Not Just News*, all of which have been dubbed to be "newscasts" (in whole or in part) by the FCC. Apparently sensitive to the fact that these programs aren't likely to be confused with, say, *Meet the Press* or *Face the Nation*, the FCC somewhat defensively explains that the agency's "role is not to decide, by some qualitative analysis, whether one kind of news story is more *bona fide* than another". The FCC's understandable reluctance to be drawn into a debate about what really constitutes a "news" program is particularly interesting in view of its insistence (as part of the on-going localism juggernaut) that TV (and, in all likelihood, radio) licensees keep diligent track of, among other things, their own "news" programming. Will licensees, in preparing their Form 355 programming reports, be permitted to rely on the Commission's own determinations of what may be deemed "news"?

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If you guessed that "Tasty Freeze" and "Prindle GMAC Real Estate" were trouble, but "The School House" was AOK, you're right – but the more important question is what was it about the first two that made them bad?

Here's what the Enforcement folks had to say about "Tasty Freeze": "The announcement made on behalf of Tastee [sic] Freeze characterizes the underwriter's ice cream products in prohibited qualitative terms, by noting that they are 'tastefully decorated,' and by attempting to induce patronage by asking listeners whether they are 'planning a special occasion' which might require use of the underwriter's products."

And as for the GMAC Real Estate announcement, the Feds said: "The Prindle GMAC Real Estate announcement also impermissibly adverts to favorable qualities possessed by the underwriter that seek to distinguish its business from similar enterprises, and thus seeks to induce patronage by stating that 'we're all about family,' and that 'we love selling real estate.' . . . The references concerning the underwriter's real estate agency imply that the agency possesses special business affinity or experience that attempts to favorably distinguish it from others."

Summarizing its conclusions, the Enforcement Bureau found that these announcements used "qualitative terms" and sought to "induce business patronage."

In view of the relatively sparse explanation offered by the Commission, it's difficult to draw with confidence any conclusions as to the precise problems here. To describe cakes as "tastefully decorated" is apparently qualitative – but if the word "tastefully" were to be omitted, would it still be all right to describe them as "decorated by Bobby Tim"? What if it turned out that Bobby Tim were a local celebrity, so that any involvement by him might be a Big Deal – would that make the announcement "qualitative", too, even if "tastefully" were taken out? Why did the FCC not find any problem with a specific mention, by name and manufacturer, of candles that are available at Tasty Freeze? Does that not suggest some level of inducement?

And while the Commission might think that the Prindle Real Estate claims about loving the business and being "all about family" are somehow qualitative, why are those claims more "qualitative" than the statement that one of the company's agents "offers over 25 years of home buying and home selling experience"?

In short, this decision tends to reinforce the perception that the Commission's policy on proper underwriting announcements is grossly subjective and dependent not on any clearly discernible and articulable standards, but rather on how any particular FCC staffer happens to react to any particular verbiage on any particular day. Because of this, NCE licensees should continue to exercise caution and err on the side of blandness and absolute neutrality if they want to minimize their risk of forfeiture.

Oh, by the way, the folks in South Zanesville got whacked $9,000 for these announcements (and several others that the licensee apparently chose not to dispute).

FHH - On the Job, On the Go

On May 20, **Frank Jazzo** attended a meeting of the Advisory Board of the Rockefeller College of Public Affairs and Public Policy of the University of Albany, State University of New York.

On June 23, **Frank J** and **Vince Curtis** will join the FCC's **Roy Stewart** to anchor the "What's Up With The FCC" session at the annual convention of the Mississippi Association of Broadcasters in Philadelphia, Mississippi.

Howard Weiss will be attending the Virginia Association of Broadcasters Summer Conference in Virginia Beach from June 26-28.

And jumping into the spotlight as the *Media Darling of the Month* is **Peter Tannenwald**, whose article "Political Broadcasting: *Get In The Game, But Stay Out Of The Sand Trap*" graced the pages of the May 5 edition of *Radio Ink.*

Do you prefer this . . .

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If you would prefer to receive the *Memo* on-line - saving yourself the burden of extra paper to deal with - please contact us at cole@fhhlaw.com.

Same content – less paper.

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