

### Recent Quarterly FCC Report on Consumer Complaints Shows Big Increases for Broadcasters

The FCC's Consumer & Governmental Affairs Bureau recently released its report on consumer complaints made to the Commission for the first quarter of 2003, showing a substantial increase in complaints regarding broadcasting. "Radio & Television Broadcasting" complaints increased from 253 in the fourth quarter of 2002 to 439 in the first quarter of 2003. "Programming-General Criticism" complaints were up from 57 in the final quarter of 2002 to 111 for the months of January, February and March 2003.

The informal consumer complaints that are the subject of the report are defined as "a communication received at CGB's consumer centers either via postal mail, fax, email or telephone from or on behalf of an individual that: (i) identifies a particular entity under the FCC's jurisdiction; (ii) alleges harm or injury; and (iii) seeks relief." In its news release announcing the report results, the Bureau noted that the Commission "receives many informal complaints that do not involve violations of the Communications Act, or a rule or order of the Commission. The existence of a complaint does not necessarily indicate wrongdoing by the company at issue."

### Licensee of Washington State FM Station Fined \$12,000 for Broadcast of Indecent Material

The licensee of a Washington state FM station has been fined \$12,000 for the broadcast of indecent material. The broadcasts, on two separate days, occurred between the hours of 6:00 a.m. and 10:00 p.m. The fine was reduced from \$14,000 to \$12,000 based on the licensee's overall history of compliance with the FCC Rules.

The material complained of concerned whether a penis could be used to lift or pull objects. The licensee challenged the imposition of a forfeiture, arguing that "there is a clear absence of any sexual or excretory content or import in the complained

of material because the material does not include discussion, either explicit or implicit, about the sexual or excretory functions of the male genitalia. In addition, [the licensee] contends that the material does not dwell on or repeat at length sexual or excretory descriptions and does not pander, and is not used to titillate or shock. For these reasons, [the licensee] argues that the material is not actionably indecent and requests cancellation of the forfeiture."

Rejecting the licensee's arguments, the Chief of the Enforcement Bureau asserted that there "is no question that the material broadcast . . . referred to sexual organs and that it aired between 6 a.m. and 10 p.m. In this regard, [the licensee] contends that the *NAL* 'is a radical and unexplained departure from past FCC case precedent, where an unmistakable sexual or excretory import has been an indispensable element of an indecency finding.' We disagree. The indecency definition clearly encompasses references to sexual organs, separate and apart from sexual activities. Moreover, as discussed below, we reject [the licensee's] assertion that the broadcasts . . . were not patently offensive, and thus do not meet the Commission's definition of indecent material."

The licensee also argued that a finding of indecency effectively rules that the use of the clinical term "penis" is *per se* indecent (i.e., always indecent), and argued that the material constituted humorous segments containing clinical, non-sexual references to male genitalia in the context of a genuine news story. Rejecting those arguments, the Chief wrote that "the material at issue, in context, was neither clinical nor a news story. In this regard, we evaluate whether material is patently offensive under the three key factors set forth above, and it is the overall context of the material that is critically important."

The "three key factors" under the FCC's *Indecency Policy Statement*, are: "(1) the explicitness or graphic nature of the description; (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."

### Licensee of South Dakota FM Station Fined \$3,000 for Transmitter Rule Violations

The licensee of a South Dakota FM station has been fined \$3,000 for failing to establish monitoring procedures and schedules to determine compliance with its authorized operating power and modulation levels, as well as failing to have positive on/off control of the station, in violation of Sections 73.1350 and 73.1400 of the FCC Rules. The licensee did not respond to the *Notice of Apparent Liability for Forfeiture*, which was summarily affirmed by the Chief of the Enforcement Bureau.

### Licensee of South Dakota FM Station Fined \$10,000 for Operation of an Unlicensed Aural Broadcast Auxiliary Station

The licensee of a South Dakota FM station has been fined \$10,000 for operating an aural broadcast auxiliary station without FCC authorization, in violation of Section 301 of the Communications Act. The licensee did not respond to the *Notice of Apparent Liability for Forfeiture*, which was summarily affirmed by the Chief of the Enforcement Bureau.

### Tower Owner Fined \$117,000 for Seven Rule Violations

The owner of seven antenna structures has been fined \$117,000 for violations of Part 17 of the FCC Rules and Section 303(q) of the Communications Act at each structure, including failure to register, light and paint the structures, and failure to post the antenna registration number at the base of the structures. The base fine for the violations, \$39,000, was tripled by the Commission due to the continuing antenna structure rule violations of the owner: "More importantly, we find it troubling that [the tower owner] apparently continues to violate the antenna structure rules. During the period just prior to the issuance of the *NAL*, the Commission's Field Offices issued three additional NOV's to [the tower owner] as a result of routine tower inspections, two for ASR number posting violations and one for failure to notify the Commission of completion of construction of an antenna structure. In its responses to these NOV's, [the tower owner] admitted that the ASR numbers were not posted at the times of the inspections and that it failed to notify the Commission when it completed construction of the tower. Furthermore, since the issuance of the *NAL*, the Field Offices have issued two more NOV's to [the tower owner], one for an ASR number posting violation and failure to notify the Commission of completion of construction of an antenna structure and one for failure to paint coaxial cable attached to the face of a tower. . . . The Enforcement Bureau continues to investigate these apparent violations, and we note that there has been no adjudication in these cases. Nevertheless, these additional apparent violations reinforce our conclusion in the *NAL*

that [the tower owner's] continuing violations evince a pattern of non-compliance with and apparent disregard for these safety-related rules. We accordingly affirm our decision in the *NAL* to triple the total base forfeiture amount for all of [the tower owner's] violations."

### Licensee of Illinois AM and FM Stations Fined \$17,000 for Rule Violations

The licensee of an Illinois AM and FM station has been fined \$17,000 for failing to have an EAS decoder, failing to post an antenna structure registration number, and failing to enclose the AM antenna structure within effective locked fences or other enclosures, in violation of FCC Rule sections 11.35(a), 17.4(g) and 73.49, respectively. The licensee did not respond to the *Notice of Apparent Liability for Forfeiture*, which was summarily affirmed by the Chief of the Enforcement Bureau.

### California Tower Owner Fined \$15,000 for Five Tower Rule Violations

The owner of a California communications tower has been fined \$15,000 for five rule violations: failing to maintain required lighting; failing to make proper observation of tower lighting; failing to notify the FAA of lighting problems not corrected within 30 minutes; failing to repair or replace tower lights as soon as practicable; and failing to properly notify the Commission of a change in ownership of the structure. The tower owner did not respond to the *Notice of Apparent Liability for Forfeiture*, which was summarily affirmed by the Chief of the Enforcement Bureau.

## ShawPittman LLP

**Editors:** Scott R. Flick, Esq.  
Lauren Lynch Flick, Esq.

**Assistant Editor:** Brendan Holland, Esq.

**Managing Editor  
and Principal Writer:** Ricky A. Pursley

**FCC Enforcement Monitor** is published by the Communications Practice Group of the law firm of Shaw Pittman LLP, 2300 N Street, NW, Washington, DC 20037-1128, telephone 202.663.8000, facsimile 202.663.8007, website [www.shawpittman.com](http://www.shawpittman.com). **FCC Enforcement Monitor** is a service to the Group's clients and friends, and is intended to provide general information only. The contents should not be construed as legal or business advice. Legal and business advice should always be obtained for specific facts and circumstances as the need arises. For more information on any of the subjects discussed in **FCC Enforcement Monitor**, please contact the Editors or any of the other lawyers in the Communications Practice Group. Copyright © 2003, Shaw Pittman LLP. All rights reserved.

rap07282003  
1339507