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## FCC Issues Decisions Regarding Broadcast of Indecent Material

The Enforcement Bureau of the Federal Communications Commission (the "FCC") recently issued three noteworthy decisions pertaining to the scope of the FCC's prohibition on the broadcast of indecent material between the hours of 6:00 a.m. and 10:00 p.m.

**1. Fleeting "Joke" Constituted Indecent Material.** The FCC issued a *Notice of Apparent Liability for Forfeiture* in which it determined that Rubber City Radio Group ("Rubber City"), licensee of WONE-FM, Akron, Ohio, broadcast a "joke" that referred to an infant's excretory organ and to sexual activity associated with that infant. The FCC imposed a forfeiture in the amount of \$7,000 for the broadcast, which aired at 8:30 am.

Rubber City acknowledged that its host should have anticipated the need to use a time-delay device based on the known background of the on-air guests who told the "joke" and the tenor of the comments the guests made prior to the broadcast. Nonetheless, Rubber City argued that the host did not know where the "joke" was going, and that the broadcast was not indecent because it was merely "a fleeting reference."

The FCC rejected these arguments, determining that the "joke" graphically depicted sexual activity with a child in an apparent attempt to shock. Accordingly, the FCC held that the broadcast was indecent, noting that broadcasting references to sexual activities with children, "even if relatively fleeting, may be found indecent where, as here, other factors contribute to a finding of patent offensiveness." Furthermore, the FCC held that the failure of Rubber City's host to edit a guest's indecent material, especially when the host was aware of the questionable nature of the guest's material and could have used a time-delay device, does not relieve Rubber City of liability.

**2. On-air Discussion of Sexual Enhancement Product Does Not Constitute Indecent Material.** The FCC issued a *Memorandum Opinion and Order*, dismissing a complainant's request for reconsideration of three FCC decisions issued in January and February

2002 that denied the complainant's indecency complaints against Emmis Radio License Corporation, licensee of WKQX(FM), Chicago, Illinois. The complaints alleged that during "*Mancow's Morning Madhouse*" ("*Mancow*"), WKQX(FM) broadcast indecent material concerning "Viacreme," a product designed to improve a female's sexual response and performance.

The FCC had denied the complainant's initial allegations, finding that even though the sexual references concerning the use of Viacreme were explicit and repeated, in context, the presentation of the material was not pandering and did not appear to have been used to titillate or shock, and was therefore not indecent. The complainant sought reconsideration, challenging the FCC's conclusion. The complainant asserted that the *Mancow* program was not about providing useful information, but "survives on its shock value, which is often pandering and titillating." Rather than consider the material in the context of the specific words and language used during the broadcast in question, the complainant argued that the FCC should have considered the material within the entire history and context of the *Mancow* program in general.

The FCC rejected the complainant's assertions, stating that the FCC evaluates the facts of a particular complaint based upon the actual words and language used during the broadcast, not on material broadcast on other occasions. The FCC relied on a Supreme Court decision holding that indecency determinations must be confined to the specific facts of a particular broadcast.

### **3. Licensee Liable for Indecent Broadcast Even Though Licensee Had Subsequently Changed Hands.**

The FCC denied a *Petition for Reconsideration* filed by WLDI, Inc. ("*WLDI*"), licensee of WCOM(FM), Bayamon, Puerto Rico, in which WLDI sought to have the FCC rescind or reduce a \$16,800 forfeiture for broadcasting indecent material on the basis that ownership of WLDI changed following the broadcast. Chancellor Media Corp. owned all WLDI stock at the time of the indecent broadcast. Three months after the broadcast, Chancellor transferred ownership of the WLDI stock to the Spanish Broadcasting System, Inc.

In its *Petition*, WLDI raised substantively the same arguments it raised previously ? namely, that WLDI was not liable for the indecent broadcast since ownership of WLDI changed following the broadcast. The FCC rejected the *Petition* on the basis that WLDI did not raise new facts or arguments, but took the opportunity to explain its prior order. First, the FCC reiterated that liability for violations of FCC rules inures to the licensee regardless of an intervening transfer of control. Second, the FCC stressed that its approach is "good public policy" because, among other reasons, an entity's employees often remain with the company after a transfer of control.