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1776 K STREET, N.W.
WASHINGTON, D. C. 20006
(202) 429-7000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

FACSIMILE
(202) 429-7049

WRITER'S DIRECT DIAL NUMBER
(202) 429-7303

November 3, 1994

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222, Stop Code 1170
1919 M Street, N.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: Notification of Permitted Ex Parte Presentation
With Regard MM Docket No. 92-265

DOCKET FILE COPY ORIGINAL

Dear Mr. Caton:

Pursuant to Section 1.1206(a)(2) of the Commission's rules, the undersigned hereby submits an original and one copy of this letter regarding a permitted ex parte presentation to Commission personnel.

On November 3, 1994, Lawrence W. Secrest, III of this firm, Ellen Schned of Viacom International Inc., and Judith McHale of Discovery Communications, Inc. met with Commissioner Susan Ness and Jim Casserly to discuss program access issues. The discussion related to matters raised in Viacom and Discovery's pleadings in Docket No. 92-265. In addition, a copy of the attached material was presented to them. This presentation occurred prior to the release of the Commission's November 10, 1994 meeting agenda.

Kindly direct any questions regarding this matter to the undersigned.

Respectfully submitted,

Wayne D. Johnsen
Wayné D. Johnsen

WDJ:lmb

cc: Commissioner Susan Ness
Jim Casserly

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List A B C D E

Outline on Remedies Issue

Legal Authority

- a. FCC does not have inherent power to impose damages/attorney fees
- b. 628(e) does not grant such power
 - (e)(1) ("appropriate remedies, including...") where specific terms follow a general one, the scope of the provision should be read to include items "similar" to those enumerated or those of lesser magnitude. Sutherland Stat Const (5th Ed), §§47.17 and 47.19.
 - (e)(2) ("ADDITIONAL REMEDIES") would be surplusage if appropriate remedies already included all remedies of any character or magnitude
 - §§ 206 and 207 damage provisions relate only to common carriers. Cable is not deemed to be common carriage.

Policy

- a. Damages generally not available in mass media cases.
- b. Even in important areas such as EEO, enforcement is generally remedial in nature.
- c. In the case of the "program access rule," a remedial approach is especially appropriate
 - rules intended to grant flexibility.
 - criteria identifying permitted activities are general -- law in the area not fully developed.
 - parties are called upon to make good faith judgments -- should not be subject to huge damage awards where they acted in good faith.
- d. Availability of forfeitures plus parties concern for good reputation at FCC provides adequate assurance of compliance.

§47.16

STATUTORY CONSTRUCTION

Southwest Areas Pension & Health & Welfare Funds v. C.J. Rogers Transp. Co., 544 F Supp 308 (SD Mich 1982).

Connecticut. State v. Roque, 190 Conn 143, 460 A2d 26 (1983).

Hawaii. Kam v. Noh, 70 Hawaii 321, 770 P2d 414 (1989).

New Jersey. Falcone v. Branker, 135 NJ Super 137, 342 A2d 875 (1975).

Pennsylvania. Commonwealth v. MacDonald, 464 Pa 435, 347 A2d 290 (1975).

Rhode Island. The word "education" is read in light of the less comprehensive idea "public education." Members of Jamestown School Committee v. Schmidt, 405 A2d 16 (RI 1979).

Virginia. Kohlberg v. Virginia Real Estate Commission, 212 Va 237, 183 SE2d 170 (1971).

See ch 51.

¹⁵**Iowa.** Fleur de Lis Motor Inns, Inc. v. Bair, 301 NW2d 685 (Iowa 1981).

Louisiana. State v. Arkansas Louisiana Gas Co., 227 La 179, 78 So 2d 825 (1955).

Utah. In re Disconnection of Certain Territory from Highland City, 668 P2d 544 (Utah 1983).

¹⁶**United States.** Kifer v. Liberty Mut. Ins. Co., 777 F2d 1325 (CA8 1985).

Maryland. Supervisor of Assessments of Baltimore City v. Chase Associates, 306 Md 568, 510 A2d 568 (1986).

Texas. Boriack v. Boriack, 541 SW2d 237 (Tex Civ App 1976).

Virginia. Board of Sup'rs of Albemarle County v. Marshall, 215 Va 756, 214 SE2d 146 (1975).

§47.17. Eiusdem generis.

A variation of the maxim of noscitur a sociis is ejusdem generis.¹ Where general words follow specific words² in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.³ Where the opposite sequence is found, i.e., specific words following general ones, the doctrine is equally applicable, and restricts application of the general term to things that are similar to those enumerated.⁴ Eiusdem generis has been called a common drafting technique designed to save the legislature from spelling out in advance every contingency in which the statute could apply.⁵

The application of the maxim has been wide and varied. For example, a statutory list of particular causes for dismissal of teachers was found to embody a principle of relevance to ability to perform satisfactorily the functions of a teacher, which principle applied to limit the meaning of the catchall phrase "other due and sufficient cause" which followed the list.⁶ The term "other materials" in a statute granting the Department of Conservation authority to sell "gravel, sand, earth or other material" from state-owned land could only be interpreted to include materials of the same

general type and the phrase does not include commercial timber harvested on state parkland.⁷ Since the words "sell" and "give" are more specific than "otherwise supply," the latter words should be construed to embrace meanings similar in nature to "sell" and "give" rather than a different and much broader meaning.⁸ Since the list of permissible activities in the statute included social, civic and recreational meetings and entertainments, which could mean activities that involve group interaction, emotional release, participation of a portion of the community and character building, neither religious education nor religious services would be precluded.⁹ When the term "costs" is followed by the explanation "whether in the form of insurance premiums or otherwise," it is clear that "costs" refer only to the various kinds of medical costs and does not describe an unlimited period of time for incurring various costs.¹⁰

The doctrine of *eiusdem generis* is an attempt to reconcile an incompatibility between specific and general words¹¹ so that all words in a statute and other legal instruments¹² can be given effect, all parts of a statute can be construed together and no words will be superfluous.¹³ If the general words are given their full and natural meaning, they would include the objects designated by the specific words, making the latter superfluous.¹⁴ If, on the other hand, the series of specific words is given its full and natural meaning, the general words are partially redundant. The rule "accomplishes the purpose of giving effect to both the particular and the general words, by treating the particular words as indicating the class, and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words."¹⁵

The resolution of this conflict by allowing the specific words to identify the class and by restricting the meaning of general words to things within the class is justified on the ground that had the legislature intended the general words to be used in their unrestricted sense, it would have made no mention of the particular words.¹⁶

The doctrine of *eiusdem generis* has been said to be "especially applicable to penal statutes."¹⁷ It must be remembered that where there is no inconsistency between specific factors and those based on general statutory language *eiusdem generis* does not apply.¹⁸ Meaning literally, "of the same kind." The doctrine, often called Lord Tenterden's Rule, is of ancient vintage, going back to Arch-

§47.19. — Matters of degree.

One of the more common applications of *ejusdem generis* is that where general words are subjoined to specific words, the general words will not include any objects of a class superior to that designated by the specific words.¹ The general term is construed to embrace only those objects said by the court to be of equal or inferior rank to those enumerated.² For example, frequent references are encountered to an early English case holding that a 1571 Act of Parliament which applied to colleges, deans and chapters, parsons, vicars "and others having spiritual promotions" did not apply to bishops because they stood higher in the clerical hierarchy than those mentioned.³ A statute applying to "copper, brass, pewter and tin and all other metals not enumerated" was inapplicable to gold and silver, they being of a superior kind.⁴ A provision relating to agreements not to file liens not applicable to main contractor where enumeration was "any subcontractor material man or other person."⁵ Under a statute prohibiting breaking into a "coin operated box" a bus fare box did not come under the enumerated terms.⁶

The human mind generally enumerates things in descending order.⁷ In case of any doubt, therefore, it is assumed that things of a higher order are named at the beginning of an enumeration. If not so named they are intended to be excluded from the statute.⁸

Where the specification of those objects classed as inferior is exhaustive and general words are added, then objects of a superior nature are embraced within the meaning of the general words in order to prevent their rejection as surplusage.⁹

¹United States. *Maier v. Patterson*, 511 F Supp 436 (ED Pa 1981).

New Hampshire. *Merrill v. Great Bay Disposal Service, Inc.*, 125 NH 540, 484 A2d 1101 (1984).

²United States. *Fourco Glass Co. v. Transmira Products Corp.*, 353 US 222, 1 L Ed 2d 786, 77 S Ct 787 (1957); *Hodgson v. Mountain & Gulf Oil Co.*, 297 F 269 (DC Wyo 1924) (right of a collocator of a mining claim is superior to right by "lease, contract or otherwise").

Alabama. Alabama adheres to the rule. *Nathan Rodgers Const. Co. v. City of Saraland, Alabama*, 670 F2d 16 (CA5 1982).

Illinois. *Woodworth v. Paine's*

Adm'rs, 1 Breese (1 Ill) 374 (1830); *Hall v. Byrne*, 1 Scam (2 Ill) 140 (1834) (mortgage not included within statute providing for plea of want or failure of consideration in action upon "any note, bond, bill, or other instrument in writing for the payment of money or property"); *Ambler v. Whipple*, 139 Ill 311, 28 NE 841 (1891) (judgment not included in statute of limitation as to "bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidence of indebtedness in writing"); *Bullman v. City of Chicago*, 367 Ill 217 NE2d 961 (1937) (dealer in secondhand vehicles not included in statute authorizing city to tax and license dealers in junk, rags and

(e) REMEDIES FOR VIOLATIONS.—

(1) REMEDIES AUTHORIZED.—Upon completion of such adjudicatory proceeding, the Commission shall have the power to order appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel video programming distributor.

(2) ADDITIONAL REMEDIES.—The remedies provided in paragraph (1) are in addition to and not in lieu of the remedies available under title V or any other provision of this Act.

LIABILITY OF CARRIERS FOR DAMAGES

SEC. 206. [47 U.S.C. 206] In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

RECOVERY OF DAMAGES

SEC. 207. [47 U.S.C. 207] Any person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

ORDERS FOR PAYMENT OF MONEY

SEC. 209. [47 U.S.C. 209] If, after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

FORFEITURES IN CASES OF REBATES AND OFFSETS

SEC. 503. [47 U.S.C. 503] (a) Any person who shall deliver messages for interstate or foreign transmission to any carrier, or for whom as sender or receiver, any such carrier shall transmit any interstate or foreign wire or radio communication, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transmission of such messages as fixed by the schedules of charges provided for in this Act, shall in addition to any other penalty provided by this Act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

(b)(1) Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have—

(A) willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission;

(B) willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act or under any treaty, convention, or other agreement to which the United States is a party and which is binding upon the United States;

(C) violated any provision of section 317(c) or 508(a) of this Act; or

(D) violated any provision of section 1304, 1343, or 1464 of title 18, United States Code;

shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be in addition to any other penalty provided for by this Act; except that this subsection shall not apply to any conduct which is subject to forfeiture under title II, part II or III of title III, or section 506 of this Act.

(2)(A) If the violator is (i) a broadcast station licensee or permittee, (ii) a cable television operator, or (iii) an applicant for any broadcast or cable television operator license, permit, certificate, or other instrument or authorization issued by the Commission, the amount of any forfeiture penalty determined under this section shall not exceed \$25,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$250,000 for any single act or failure to act described in paragraph (1) of this subsection.

(B) If the violator is a common carrier subject to the provisions of this Act or an applicant for any common carrier license, permit, certificate, or other instrument of authorization issued by the Commission, the amount of any forfeiture penalty determined under this subsection shall not exceed \$100,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$1,000,000 for any single act or failure to act described in paragraph (1) of this subsection.

(C) In any case not covered in subparagraph (A) or (B), the amount of any forfeiture penalty determined under this subsection shall not exceed \$10,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$75,000 for any single act or failure to act described in paragraph (1) of this subsection.

(D) The amount of such forfeiture penalty shall be assessed by the Commission, or its designee, by written notice. In determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

(3)(A) At the discretion of the Commission, a forfeiture penalty may be determined against a person under this subsection after notice and an opportunity for a hearing before the Commission or an administrative law judge thereof in accordance with section 554 of title 5, United States Code. Any person against whom a forfeiture penalty is determined under this paragraph may obtain review thereof pursuant to section 402(a).

(B) If any person fails to pay an assessment of a forfeiture penalty determined under subparagraph (A) of this paragraph, after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the Commission, the Commission shall refer the matter to the Attorney General of the United States, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the forfeiture penalty shall not be subject to review.

(4) Except as provided in paragraph (3) of this subsection, no forfeiture penalty shall be imposed under this subsection against any person unless and until—

(A) the Commission issues a notice of apparent liability, in writing, with respect to such person;

(B) such notice has been received by such person, or until the Commission has sent such notice to the last known address of such person, by registered or certified mail; and

(C) such person is granted an opportunity to show, in writing, within such reasonable period of time as the Commission prescribes by rule or regulation, why no such forfeiture penalty should be imposed.

Such a notice shall (i) identify each specific provision, term, and condition of any Act, rule, regulation, order, treaty, convention, or other agreement, license, permit, certificate, instrument, or authorization which such person apparently violated or with which such person apparently failed to comply; (ii) set forth the nature of the act or omission charged against such person and the facts upon which such charge is based; and (iii) state the date on which such conduct occurred. Any forfeiture penalty determined under this paragraph shall be recoverable pursuant to section 504(a) of this Act.

(5) No forfeiture liability shall be determined under this subsection against any person, if such person does not hold a license, permit, certificate, or other authorization issued by the Commission, and if such person is not an applicant for a license, permit, certificate, or other authorization issued by the Commission, unless, prior to the notice required by paragraph (3) of this subsection or the notice of apparent liability required by paragraph (4) of this subsection, such person (A) is sent a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission which is nearest to such person's place of residence; and (C) subsequently engages in conduct of the type described in such citation. The provisions of this paragraph shall not apply, however, if the person involved is engaging in activities for which a license, permit, certificate, or other authorization is required, or is a cable television system operator, if the person involved is transmitting on frequencies assigned for use in a service in which individual station operation is authorized by rule pursuant to section 307(e), or in the case of violations of section 303(q), if the person involved is a nonlicensee tower owner who has previously received notice of the obligations imposed by section 303(q) from the

Commission or the permittee or licensee who uses that tower. Whenever the requirements of this paragraph are satisfied with respect to a particular person, such person shall not be entitled to receive any additional citation of the violation charged, with respect to any conduct of the type described in the citation sent under this paragraph.

(6) No forfeiture penalty shall be determined or imposed against any person under this subsection if—

(A) such person holds a broadcast station license issued under title III of this Act and if the violation charged occurred—

(i) more than 1 year prior to the date of issuance of the required notice or notice of apparent liability; or

(ii) prior to the date of commencement of the current term of such license,

whichever is earlier; or

(B) such person does not hold a broadcast station license issued under title III of this Act and if the violation charged occurred more than 1 year prior to the date of issuance of the required notice or notice of apparent liability.

For purposes of this paragraph, "date of commencement of the current term of such license" means the date of commencement of the last term of license for which the licensee has been granted a license by the Commission. A separate license term shall not be deemed to have commenced as a result of continuing a license in effect under section 307(c) pending decision on an application for renewal of the license.