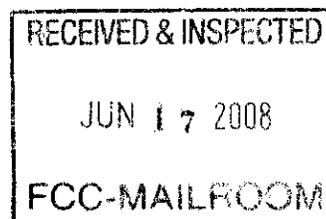


William F. Crowell

Attorney at Law

June 13, 2008

Marlene H. Dortch, Secretary
Federal Communications Commission
445 – 12th Street S.W.
Washington, D.C. 20554



Re: Application of William F. Crowell to renew Amateur Service license W6WBJ
WT Docket No. 08-20; FCC file no. 0002928684

Dear Secretary Dortch:

I am the applicant-licensee in the above-entitled case.

Enclosed you will please find the original and six (6) copies of my Opposition to the Enforcement Bureau's Motion to Compel Responses to its First Request for Production of Documents therein. Please file this document and direct it to assigned ALJ Steinberg in the manner that you deem appropriate. I would also appreciate it if you would kindly make sure that this document is entered in the Commission's case docket.

Thank you for your cooperation.

Yours very truly,

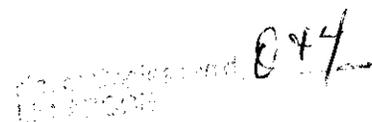

WILLIAM F. CROWELL

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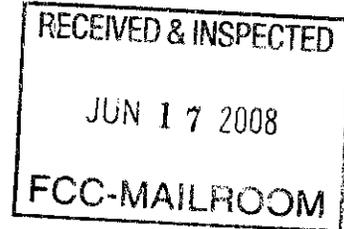
cc: Rebecca A. Hirselj, Ass't. Chief, Investigations & Hearings Div., Enforcement
Bureau, Federal Communications Commisison, 445 12th Street, S.W., Room 4-A236
Washington, D.C. 20554

Kris A. Monteith, Chief, Enforcement Bureau, Federal Communications
Commission, 445 12th Street, S.W., Room 7-C723, Washington, D.C. 20554

1110 Pleasant Valley Road, Diamond Springs, California 95619
telephone: (530) 295-0350; fax: (530) 295-0352


04/7
11/13/08

**Before the
Federal Communications Commission
Washington, D.C. 20554**



In the Matter of)	WT Docket No. 08-20
)	
WILLIAM F. CROWELL)	FCC File No. 0002928684
)	
Application to Renew License for)	
Amateur Service Station W6WBJ)	

To: Marlene H. Dortch, Secretary
Federal Communications Commission

Attn: Arthur I. Steinberg
Administrative Law Judge

**APPLICANT'S OPPOSITION TO ENFORCEMENT BUREAU'S MOTION
TO COMPEL RESPONSES TO ITS FIRST
REQUEST FOR PRODUCTION OF DOCUMENTS
[47 C.F.R., Part I, Subpart A, § 1.45(b)]**

Introduction

The Enforcement Bureau claims that Applicant violated Part 97 and its Character Rule, while Applicant denies committing any Part 97 violations, alleges that the Bureau cannot possibly support its burden of proof, and says that the Character Rule is inapplicable to his case.

Applicant timely responded and objected to the Enforcement Bureau's First Request for Production of Documents, whereupon the Bureau filed a Motion to Compel Further Responses thereto. Pursuant to 47 C.F.R., Part I, Subpart A, §1.45(b), Applicant hereby files his Opposition to that Motion.

The Enforcement Bureau seeks three (3) broad categories of documents: (1) those evidencing on-the-air statements made by Applicant of which the Bureau does not approve (which Applicant claims is non-FCC-related conduct due to free-speech protections); (2) Applicant's postings on the internet of which the Bureau does not approve (non-FCC-related conduct); and (3) Applicant's statements made to the Commission in response to its Warning Notices and in connection with this renewal proceeding (FCC-related conduct). Applicant did provide the Bureau with the items in category no. (3), above, so the only categories of items that remain unresolved, and should be decided on this motion, are categories (1) and (2).

Argument

Commission Rule 1.325(a) [47 C.F.R. §1.325(a)] provides that the scope of discovery on a Motion for Production of Documents in an FCC ALJ case is, in turn, specified in 47 C.F.R. §1.311, which provides in pertinent part as follows:

(b) Scope of examination. Persons and parties may be examined regarding any matter, not privileged, which is relevant to the hearing issues, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection to use of these procedures that the testimony will be inadmissible at the hearing if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.[.]

Applicant claims the additional documents requested by the Enforcement Bureau on its Motion are not subject to discovery under Rule 1.311(b) because

they are entirely irrelevant to the hearing issues on any cognizable legal theory, and therefore represent merely a fishing expedition intended to harass and annoy him.

The Bureau still has not answered Applicant's First Set of Interrogatories herein, and Applicant's Second Motion to compel answers thereto is presently pending before the ALJ for decision. Applicant believes the Bureau is trying to conceal the fact that it cannot possibly support its burden of proof herein, and is abusing the hearing process in order to harass Applicant. This Motion displays the Bureau's same failure to understand the amateur radio law as have its previous filings.

Applicant is aware that the Commission undoubtedly has ancillary jurisdiction under §154(i) of the Act to, among other things, effectuate discovery. Section 154(i) provides as follows:

- (i) Duties and powers. The Commission may perform any and all acts, make such rules and regulations, and issue such orders, non inconsistent with this chapter, as may be necessary in the execution of its functions.

However, for the following reasons the Commission should not exercise its ancillary jurisdiction in aid of the Bureau's discovery in this case because doing so would not be in furtherance of any of the Commission's proper functions.

Free Speech

Part 97, §97.3(4) defines the Amateur Service as "a radiocommunications service for the purpose of self-training, intercommunication and technical investigations carried out by amateurs; that is, duly-authorized persons interested in radio technique with a personal aim and without pecuniary interest." There is no evidence indicating that all of Applicant's transmissions, complained of by the Bureau, were not made pursuant to his license grant from the Commission; were

within the frequency bands permitted by his Advanced class of amateur license; were purely personal in nature; and were made totally without any pecuniary interest or compensation. Said transmissions therefore met all the requirements of §§97.3(4) and 97.113(a)(2) as valid two-way communications in the amateur service, but the Enforcement Bureau is looking behind them anyway. In other words, the Commission gave Applicant a license grant, and then reneged on that grant for legally-impermissible reasons (because they didn't like what he said).

In becoming a radio amateur, Applicant never agreed to waive his First Amendment right to free speech. Part 97 contains no free-speech limitations, nor did the Commission ever pay or give Applicant any consideration, or anything of value whatsoever, to support such a waiver, even if there *had* been one. The only agreements Applicant ever made with the Commission when he obtained his amateur radio license were to obey 47 C.F.R. Part 97 (the amateur radio rules) and to be honest and candid in all his dealings with the Commission. Nor does the license grant contain anything of inherent value which could serve as consideration for such a waiver, since §97.113(a)(2) provides that the license grant contains nothing of any pecuniary value whatsoever; §97.113(b) that Amateurs may not broadcast, and §97.101(b) that there is no specific frequency assignment, and that amateurs must cooperate in sharing their assigned frequency bands.

The U.S. Supreme Court made it clear in Red Lion Broadcasting Co. v. F.C.C. 395 U.S. 367 (1969) that it is only the “natural monopoly” theory (*i.e.*, the economic scarcity created by the absolute technical limitation on the number of available broadcast frequency assignments) that allows the Commission to have its limited control over broadcasters’ free-speech rights, but the “natural monopoly” theory simply doesn’t fit the law in the amateur radio service. However, even the free-speech control that the Commission *does* have over broadcasters can *only* be exercised in the public interest; for example, in order to guarantee the public’s

access to the full marketplace of ideas. F.C.C. v. League of Women Voters 468 U.S. 364 (1984).

Although different types of media get different degrees of protection from the First Amendment [Southeastern Promotions, Ltd. v. Conrad 420 U.S. 546, 557 (1975)], “application of a lesser standard of protection, however, is an exception to the rule that must be justified by a particular difference.” Century Federal, Inc. v. City of Palo Alto 648 F.Supp. 1465, 1470 (N.D.Cal. 1986). The natural monopoly theory has been held *not* to apply to newspapers [Miami Herald Publishing Co. v. Tornillo 418 U.S. 241, 258 (1974)] and to cable television [Cox Cable Communications, Inc. v. U.S. 774 F.Supp. 633; 636-637 (M.D.Ga. 1991)] even though, obviously, not everyone who might desire to do so is able to go into the newspaper or cable television business. On the contrary, however, anyone who wants to become an amateur radio operator can do so by passing the FCC examination.

“Since the number of cable channels is practically limitless, the standard of First Amendment review applied to *physically scarce* radio airwaves cannot apply here.” Cox Cable, supra, at p. 637, citing Quincy Cable TV, Inc. v. FCC 768F.2d 1434, 1450 (D.C. Cir., 1985), cert denied 476 U.S. 1169 (1986). “As one court has stated, “[s]o long as physical scarcity does not make some limitation on access to the market unavoidable, First Amendment considerations preclude vesting the power to control access in a governmental agency.” Group W Cable, Inc. v. City of Santa Cruz 669 F.Supp. 954, 965-966 (N.D.Cal. 1987).

The amateur radio airwaves are *not* scarce. This is clearly shown by the Commission’s own recent actions in, for example, (1) eliminating the radiotelegraph exam, (2) reducing the difficulty of the technical examination questions and (3) ongoing recruitment efforts jointly undertaken by the Commission and the American Radio Relay League to bring more people into the hobby. If there were any limitation of frequencies, the Commission and the League wouldn’t be trying

to recruit new amateurs. Ham radio operators choose their own operating frequencies. They tend to congregate primarily on certain well-known frequencies for “roundtable QSOs” (conversations involving multiple stations in which, ideally, they all take turns transmitting and no two stations transmit at the same time). Some amateurs engage in old-fashioned one-on-one QSOs. In tuning across the amateur bands, one finds huge gaps of empty frequencies between these QSOs, or often that *nobody else at all* can be heard on the band at the time. Then again, with the advent of Single Sideband transmission since the 1960s, the bandwidth of an amateur service telephony signal is only about one-quarter or less of what it used to be, back when hams used ordinary amplitude modulation, so many more hams can now fit their voice signals on the band. There is simply no shortage of amateur frequencies. Just as many ham radio frequencies are available as there are cable channels, and there is no physical scarcity as is required for the “natural monopoly” theory to apply. And because the amateur service is completely non-remunerative, there is no economic scarcity, which is necessary to support the application of the “natural monopoly” theory.

The natural monopoly theory also fails when applied to amateur radio because there is no “market place”, there is no “broadcaster” and there is no “public” to protect. The cases have made it clear that the only purpose for the Commission’s power to regulate broadcasters’ speech is in order to balance the First Amendment rights of the broadcasters and the public. Time Warner Entertainment Co., L.P. v. FCC 93 F.3d. 957, 975. But, unlike the case with broadcast service applicants, there is no *economic* demand by many people to obtain an amateur radio license, since §97.113(a)(2) provides that the license grant contains nothing of any pecuniary value whatsoever; §97.113(b) that Amateurs may not broadcast, and §97.101(b) that there is no specific frequency assignment. Not surprisingly, there is no economic incentive to obtain a license that is specifically

provided by law as being entirely non-remunerative in nature.

Furthermore, since radio amateurs cannot broadcast, there is no “public” to be protected by Commission regulation of free-speech. Since they are talking to each other, amateurs are their own “public”, and any attempt to regulate their speech would derogate from, rather than enhancing, their access to the full marketplace of ideas, as required by FCC v. League of Women Voters, *supra*. And neither is there any “broadcaster”, since amateurs are specifically prohibited by §97.113(b) from broadcasting.

Further, to the extent that the “natural monopoly” theory relies upon efficiency concerns, it simply does not apply to the amateur radio service because, by law, it is a non-remunerative radio service, so by definition there is no economic savings to be obtained by pursuing “efficiency”, and therefore no *reason* to pursue it. Nobody is going to be making any more, or less, money if the Commission does, or does not, attempt to regulate amateur radio operators’ free-speech rights, so there simply is no “efficiency” interest to be served herein as any possible justification for limiting the free-speech rights of ham radio operators.

In short, the “natural monopoly” theory expressed in Red Lion Broadcasting fails miserably on both the facts and the law when an attempt is made to analogize it to amateur radio, and it must therefore be held that the Commission has no power to regulate the free-speech rights of amateur radio operators.

There is obviously a substantial risk that amateurs will censor themselves if they think the FCC is going to second-guess their on-the-air speech; indeed, it seems clear that this is exactly what the Enforcement Bureau is trying to do in this case. But as the U.S. Supreme Court held in City of Lakewood v. Plain Dealer Publishing Co. 486 U.S. 750, when a statute significantly threatens the risk of self-censorship by speakers in order to avoid being denied a license, it creates a risk that it will be difficult or impossible to detect and correct the content-based censor-

ship, the courts will entertain an immediate facial attack on the law. Such a facial challenge lies under the First Amendment whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or the viewpoint of speech by suppressing disfavored speech or disliked speakers. City of Lakewood, *supra*, at page 763.

Of course the restrictions that the Enforcement Bureau wants to impose on my speech are content-based. They want me to produce my internet postings because they feel I have been disrespectful to the Commission. After all, if the Bureau had been inclined to take a “content-neutral” approach to this case, it would only have alleged Part 97 violations. But even if the Bureau argues that the documents it desires from the internet are content-neutral, the fact remains that it claims to have “boundless discretion” to determine what is discoverable and what is not, which again renders the law subject to facial challenge. City of Lakewood at page 764. This is because, by vesting unbridled power in the decision maker, such licensing schemes enable government officials to self-censor protected expression. Weinberg v. City of Chicago 310 F.3d 1029, 1044 (C.A.7-Ill. 2002); rehearing denied *en banc* 320 F.3d 682; cert. denied 540 U.S. 817.

But even assuming, *arguendo*, that the Commission *could* second-guess Applicant’s internet activities as a condition of renewing his license, *what standards would it apply* in doing so? When a government official proposes to regulate speech, the official granting permission must be provided with specific standards on which to base his decision. Lewis v. Wilson 253 F.3d 1077, 1080 (C.A.8-Mo. 2001). Such standards must not be based on the content of the message; they must be narrowly-tailored in order to serve a significant governmental interest; and must leave open ample opportunities for communication. The Commission has no such standards. Were it to enact any, it would have to do so through the rulemaking process. Applicant is entitled to have notice of rulemak-

ing, and an opportunity to respond to the notice of the proposed rules if the Commission wants to regulate his conduct on the internet as a condition of holding an amateur radio license. To date, the Commission has not done so.

Alleged Part 97 Violations

As relevant to this case, Part 97 only prohibits a few practices, all of which Applicant denies:

Amateurs are prohibited from willfully or maliciously interfering with, or causing interference to, any radio communication or signal. §97.101(d). Rule 97.3(23) defines “harmful interference” as “interference which seriously degrades, obstructs, or repeatedly interrupts a radiocommunications service operating in accordance with [the Commission’s] regulations.” Applicant denies ever causing any such interference.

Amateurs are prohibited from making one-way transmissions or “broadcasts”. With limited exceptions, all transmissions must be part of a two-way communication. §97.113(b). Rule 97.3(10) defines a “broadcast” as “a transmission intended for reception by the general public, either direct or relayed.” Applicant denies making any one-way transmissions or “broadcasts”. In all of the transmissions complained of by the Bureau, Applicant is in conversation with one or more other amateur stations.

Amateurs are also prohibited from receiving any pecuniary compensation whatsoever for their communications. §97.113(a)(2). The Bureau does not allege that Applicant ever did so.

Unlike most of the other radio services governed by the Commission, no specific frequency assignment accompanies a license grant in the amateur service. Instead, amateurs are required to cooperate in sharing their assigned frequency bands. §97.101(b).

The Enforcement Bureau is alleging both FCC-related and non-FCC-related conduct as grounds for non-renewal of Applicant's license. The FCC-related misconduct consists of alleged Part 97 violations, and perhaps the Bureau's claim that Applicant filed false responses to its Warning Notices, while the non-FCC-related conduct consists of Applicant's alleged internet activities which apparently don't meet with the Bureau's approval.

In order to prove that Applicant's license renewal would not serve the public interest, convenience and necessity under §309(a) of the Act, the Bureau must prove that he either violated Part 97 or that he is not a fit and proper individual to hold a Commission license under its Character Rule. The Bureau's problem is that it has no admissible evidence of any Part 97 violations and the Character Rule does not apply to Applicant. Therefore, the Bureau's Request for Production of Documents is nothing but a fishing expedition because the requested discovery would only be relevant to either of the Bureau's two legally-incorrect theories of non-renewal. It represents merely another example of how the Bureau is trying to harass Applicant as long as it can, until the ALJ discovers that it cannot possibly support its burden of proof.

The Bureau should not be permitted to conduct discovery unless and until it responds to Applicant's First Set of Interrogatories, among which Applicant asked the Bureau whether or not it has any actual intercepts of Applicant's transmissions that were made by either Commission personnel or §154(f)(4) Volunteers. The Commission's decisions and the law are clear in this regard: first, that the Bureau must have *actual intercepts of transmissions* from Applicant which violate Part 97, and, second, that those intercepts must have been made either by Commission personnel or by §154(f)(4) Volunteers. Myron Henry Premus 17 FCC 251 (1953) and Richard G. Boston, July 29, 1977 (M O & O of Safety and Special Services Bureau Chief Charles A. Higginbotham; a copy of Chief Higgin-

botham's M O & O in the Boston case is attached hereto as "Exhibit A"). This is because too much opportunity exists for the manufacture of fake evidence if, as in this case, recordings are received by the Bureau in response to an orchestrated letter-writing campaign. Boston at p. 3.

The Bureau has no actual intercepts, and it is trying to conceal said fact. All it has is a bunch of complaint letters and recordings, many of which do not rise to the level of a Part 97 violation in the first place.

Moreover, the complaints that the Bureau *does* have weren't made by §154(f)(4) Volunteers, as is required by 47 U.S.C. §154(f)(4)(A) and (B), which statutes were added to the Communications Act by the Communications Amendments Act of 1982 as Public Law 97-259.

The Bureau displays its lack of understanding of the amateur radio law by denying in its Motion that §154(f)(4) requires that intercepts be prepared by Commission personnel or §154(f)(4) Volunteers. This is rather frustrating for Applicant, who witnessed the enactment of the Communications Amendments Act of 1982 and is familiar with its legislative history, whereas Bureau Counsel is apparently not aware of same; but when I try to inform Bureau Counsel about it, they ignore me. If the Bureau had a proper motive herein, why would they ignore me in such a fashion?

The bill containing what eventually became §154(f)(4) was introduced into the U.S. Senate by Senator Barry Goldwater in 1981, during the First Session of the 97th Congress, as Senate bill 929, later to become part of the Communications Amendments Act of 1982. When he introduced it, Sen. Goldwater made the following statement concerning S.929 (as pertinent hereto):

"The FCC's Field Operations Bureau is now operating at below minimum efficiency levels due to budget and manpower cutbacks. At the same time, interference complaints within the amateur bands are constantly increasing. While we expect the Commission to correct this matter, *it would be*

beneficial to the FCC to utilize the voluntary services of licensed amateurs to...monitor illegal activity in the amateur bands. This bill would allow amateurs to detect, locate and monitor illegal operators, interference problems and the like, to save FCC field personnel huge amounts of time and expense in locating rule violators. Armed with the information obtained from amateur volunteers, FCC personnel can proceed right to the source of the problem, monitor at the predicted times, and gather evidence much faster than would otherwise be possible."

Congressional Record - Senate, 97th Congress, First Session, Vol. 127, Part 5, page 6958 (April 8, 1981), attached hereto as "Exhibit B".

In the House Conference Report on the Communications Amendments Act of 1982 (House of Representatives, 97th Congress, 2nd Session, Report No. 97-765, attached hereto as "Exhibit C"), the conferees first state (at page 4) that the new provision, enabling the acceptance of volunteer labor to enhance amateur enforcement by the Commission, is being added as new paragraph (4)(B) at the end of §154(f) of the Act. The Conference Report then states, at pages 4-5, that said amendment reads as follows:

(f) Employees and assistants; compensation of members of Field Engineering and Monitoring Bureau; use of amateur volunteers for certain purposes; commercial radio operator examinations

(4)

(B)

(i) The Commission, for purposes of monitoring violations of any provision of this chapter (and of any regulation prescribed by the Commission under this chapter) relating to the amateur radio service, may—

(I) *recruit and train* any individual licensed by the Commission to operate an amateur station; and

(II) *accept and employ the voluntary and uncompensated services* of such individual.

(ii) The Commission, for purposes of recruiting and training individuals under clause (i) and for purposes of screening, annotating, and summarizing violation reports referred under clause (i), may accept and employ the voluntary and uncompensated services of any amateur station operator organization.

(iii) *The functions of individuals recruited and trained under this subparagraph shall be limited to...*

(I) the detection of improper amateur radio transmissions;
(II) the conveyance to Commission personnel of information which is essential to the enforcement of this chapter (or regulations prescribed by the Commission under this chapter) relating to the amateur radio service; and
(III) issuing advisory notices, under the general direction of the Commission, to persons who apparently have violated any provision of this chapter (or regulations prescribed by the Commission under this chapter) relating to the amateur radio service.

Nothing in this clause shall be construed to grant individuals recruited and trained under this subparagraph any authority to issue sanctions to violators or to take any enforcement action other than any action which the Commission may prescribe by rule.

(F) Any person who provides services under this paragraph shall not be considered, by reason of having provided such services, a Federal employee.

(G) The Commission, in accepting and employing services of individuals under subparagraphs (A) and (B), shall seek to achieve a broad representation of individuals and organizations interested in amateur station operation.

(H) The Commission may establish rules of conduct and other regulations governing the service of individuals under this paragraph.

(5)

(B) The Commission may prescribe regulations to select, oversee, sanction, and dismiss any person authorized under this paragraph to be employed by the Commission.

(C) Any person who provides services under this paragraph or who provides goods in connection with such services shall not, by reason of having provided such service or goods, be considered a Federal or special government employee.

The House Conferees clearly state (at pages 29-30) that the legislation makes it possible for the Commission to accept donated labor from §154(f)(4) Volunteers for both Volunteer Examiner *and rules enforcement assistance* that it was previously unable to accept, citing former 31 U.S.C. §665(d) (re-enacted in 1982 as 31 U.S.C. §1342) as the statute which prevented such a practice, and which §1342 still prevents [except as permitted by §154(f)(4)]. The present 31 U.S.C. §1342 provides, in pertinent part, as follows:

Applicant is aware was that in Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179 (1986), *recon. granted in part, denied in part*, 1 FCC Rcd. 421 (1986). Therein, the Commission said it “would concern itself with ‘misconduct which demonstrates the proclivity of an applicant or licensee to deal truthfully with the Commission and to comply with our rules and practices.’ 102 FCC 2d at 1190-91. We therein generally indicated that the Commission would consider only *adjudicated* (a) fraudulent representations to governmental units, (b) criminal misconduct involving false statements or dishonesty, and (c) broadcast-related violations of anti-trust or other laws dealing with competition.” 102 FCC 2d, 1195-1197; 1200-1203. In 1990 the Commission added the *conviction of other felonies* as misconduct disqualifying an applicant from obtaining a license from the Commission. In the Matter of Policy Regarding Character Qualification in Broadcast Licensing, 5 FCC Rcd. 3252 (May 10, 1990 Policy Statement and Order). The Commission stated therein, regarding pending proceedings relating to non-FCC misconduct:

7. We continue to believe that it is appropriate to refrain from making licensing decisions based on mere allegations of relevant non-FCC misconduct, *even where those allegations have resulted in an indictment* or are otherwise in the process of being adjudicated by another agency or court.

Next, in an amateur case, the Commission held that the licensee’s conviction of a felony for fraudulently using counterfeit access codes to obtain long-distance telephone services, as well as his misrepresentations to the Commission in his renewal process, were grounds for non-renewal. Herbert L. Schoenbohm, 13 F.C.C Rcd. 15,028 (1998); affirmed, Court of Appeals for the D.C. Circuit, February 29, 2000. (It goes without saying that, had it not been for Schoenbohm’s criminal fraud conviction, nothing would have triggered the application of the Character Rule; Schoenbohm’s renewal would have been granted; and in such a case there would have been no occasion for him to have made any alleged misrep-

resentations to the Commission.)

The Commission next re-visited the Character Rule in 1992, in the case of In Re: Applications of Univision, etc., et al, 7 FCC Rcd. 6672, in which the Commission said it would defer to other regulatory agencies to determine issues of alleged anticompetitive conduct and, in the absence of a judgment by such other agency, that the Character Rule would no longer apply to such alleged conduct in licensing matters. Id. at p. 6682.

The next Character Rule case issued by the Commission was that of Verizon Communications, et al, which involved charges of FCC-related character violations by one licensee against another, in which the Commission found no character rule violation on the facts. 20 FCC Rcd. 18433 (2005). However, in Verizon Communications the Commission took the opportunity to re-state its existing rule concerning “certain forms of adjudicated, non-FCC related misconduct that includes: (1) felony convictions; (2) fraudulent misrepresentations to governmental units; and (3) violations of antitrust or other laws protecting competition.” Id. at 20 FCC Rcd. 18526.

Next, in Emmis Television License, LLC, 20 FCC Rcd. 19073 (2005), the Chief of the Commission’s Media Bureau issued the licensee a letter stating that filing a “strike petition” against another licensee in Section 325 proceedings would constitute an abuse of the Commission’s processes sufficient to trigger the character rule, but found no character rule violation on the facts. Id. at 20 FCC Rcd. 19075.

Philip J. Plank, 21 FCC Rcd. 8686 (2006), was another Section 325 case wherein the Chief of the Media Bureau advised the licensee that it found, on the facts, no violation of the character rule due to the filing of an alleged “strike petition” by another licensee. Id. at 21 FCC Rcd. 8688.

The next Character Rule case to be decided was an amateur case. In

Robert D. Landis (N6FRV), FCC Docket No. 06-149 (2006) the Chief of the Enforcement Bureau ruled that conviction of a state felony (child molestation) triggered the Character Rule, resulting in license revocation.

Harold D. Pick, DA 07-179 (January 23, 2007 Order of Reconsideration from the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau) denied a Character Rule finding for alleged FCC-related misconduct on the facts. The Pick decision states, *inter alia*, that “copyright infringement is not a matter that we would normally consider in reviewing an application”, citing Univision Holdings, Inc. [M O & O, 7 FCC Rcd. 6672, 6687 (1992)]. Id. at p. 3.

In David L. Titus, FCC Docket No. 07-13 (Order to Show Cause issued January 30, 2007), another amateur case, the license was revoked because the licensee had been convicted under state law of “communicating with a minor for immoral purposes”.

Applicant’s internet activity must, of course, be considered to be non-FCC related conduct.

Ever since its 1990 Policy Statement, the Commission has emphasized that either *conviction of a felony; fraudulent misrepresentations to a governmental unit*; or perhaps *convictions for noncompetitive conduct (antitrust)* is necessary before the Character Rule is triggered against a licensee for non-FCC-related conduct. But it is not necessary for Applicant to travel to Washington, D.C. from California in order to establish the fact that, not only have I never been convicted of any felony, I have never even been *charged* with one! I hereby so state, under penalty of perjury. Neither have I ever been charged with, much less found guilty of, making any misrepresentations to any agency of government. I have never said or done anything illegal on the internet. Therefore, under the Commission’s own Character Rule cases, no legal basis exists for triggering a Character Rule inquiry for non-FCC-related conduct on my renewal application. I did nothing illegal on

the internet to trigger any Character Rule inquiry by the Bureau.

Perhaps the Enforcement Bureau believes a Character Rule violation can be based on the fact that some of my letters to the Commission in response to its Warning Notices were disrespectful. But assuming, arguendo, that such is the case, my right to make statements critical of the Commission is protected by the First Amendment and the license grant cannot be conditioned upon a waiver of those rights. See, for example, Perry v. Sinderman, 408 U.S. 593, 597-598 (1972), in which the Supreme Court found that a non-tenured teacher's appointment could not be terminated due to his criticism of his employer. Such holdings later became known as the "Doctrine of Unconstitutional Conditions". In general, no license or grant may be withheld or denied by any branch of the government based on the imposition of an unconstitutional premise. This is even true where, as in Perry v. Sindermann, supra, the licensee was receiving a valuable benefit from the government agency involved (he was an employee of the agency). Thus, the Perry v. Sindermann rationale applies a fortiori to Applicant, since both by legal definition [§97.113(a)(2) and (3)], and in fact, he has received nothing of value from the Commission.

The Commission has never claimed to have general subject matter jurisdiction over the internet. For example, in 2003 the Commission considered enacting "fair access rules" for Internet Service Providers, but it backed down from the issue, saying the proposed regulation was unnecessary. On September 12, 2006, FCC Chairman Martin said that he did not think it was necessary for the Commission to regulate internet video services. Nor has the Commission yet attempted to regulate Voice Over Internet Protocol (internet telephony) services. The Commission did investigate Comcast's ISP services to consider whether broadband providers were discriminating unilaterally against categories of users or types of traffic, but only for the purpose of requiring "net neutrality", or free access to all

websites by all internet users. In 1999 Commission Chairman Kennard suggested that the Commission should regulate high-speed access to the internet, but the issue seems to have bogged down over the issue of whether cable system owners will be required to spend a lot of money to upgrade their systems, only to be forced to allow competing ISPs onto the system. Many issues remain unresolved in this area. As Professor Speta of Northwestern School of Law stated it in his law 2004 review article,

“The FCC’s attempt to claim ancillary authority in the second class of cases – where the new Internet service competes with a traditional service – runs square into the central theme of the Telecommunications Act of 1996 (“1996 Act”), which was the introduction of competition into all telecommunications markets. This presents the most significant barrier to the use of the agency’s Title I authority. *Southwestern Cable* permitted the FCC to regulate cable companies in order to protect broadcasters, and hence broadcast regulation (citing *Southwestern Cable* at 172-173). But the 1996 Act conclusively states that the FCC should encourage competitive entry into all telecommunications markets [citing 47 U.S.C. §253(a)(2000)]. Indeed, the 1996 Act instructs the FCC to dismantle the Communications Act’s regulatory structure when additional competition proves it unnecessary [citing 47 U.S.C. §§160-161(2000)]. Under the 1996 Act, a Title I regulatory theory that depends on an argument that broadband carriers are providing competition to traditional Title II carriers should be met with an elimination of regulation, not the creation of an entirely new, untethered regulatory power for the FCC.”

Speta, James B.: FCC Authority to Regulate The Internet: Claiming It and Limiting It, 35 Loyola University Chicago Law Journal 15 (2004).

Nor can regulation of Applicant’s speech, either on the air or on the internet, be justified on the grounds of “indecenty”. The first part of Section 326 of the Act prohibits censorship by the Commission, while the second half prohibits the utterance of “any obscene, indecent, or profane language by means of radio communication”. While at first blush §326 might appear not to require a broadcast in order for its obscenity prohibition to apply (it uses the term “transmission”), all the cases interpreting §326 speak of “broadcast obscenity”. Actually, it is the U.S. Supreme

Court case of Reno v. A.C.L.U. 521 U.S. 844 (1997) that resolves the issue. In evaluating the constitutionality of the Communications Decency Act of 1996 (47 U.S.C §223, et sequitur; Congress's attempt to regulate decency on the internet) the Supreme Court said the statute was invalid for, among other reasons, because it was not limited to commercial transactions (broadcasts are commercial in nature, while ham radio transmissions are not); failed to provide any definition of the term "indecent" and omitted any requirement that the proscribed "patently offensive material" lack socially-redeeming value; did not limit its broad categorical prohibitions to certain places or times; was punitive; applied to a medium (the internet) that, "unlike radio" (undoubtedly the Supreme Court meant broadcast radio, not amateur radio), receives full First Amendment protection; and could not be properly analyzed as a form of time, place and manner regulation because it was a content-based blanket restriction on speech. The Bureau's attempt to regulate my speech by labeling it "indecent" fails on all the criteria specified in Reno v. A.C.L.U., which found statutory language very similar to §326 to be unconstitutional as applied to a medium, such as amateur radio, that is entitled to First Amendment protection.

"Indecent" speech is *protected* by the First Amendment. Sable Communications v. FCC 492 U.S. 115, 126 (1989); Industry Guidance On The Commission's Case Law Interpreting 18 U.S.C. §1464, 16 FCC Rcd. 7999, 8001.

Applicant requests that the ALJ take judicial notice of the decision of the U.S. Court of Appeals for the Second Circuit in Fox Television Stations, Inc., etc., et al v. FCC 489 F.3d 444 (C.A.2 2007), not because it is citable as legal precedent, which it is not because the Supreme Court has granted certiorari (Order List at 552 U.S. Reports, page 3, March 17, 2008), but simply in order to understand the kinds of arguments that the parties are making in that case. For example there is a serious question about whether, in the broadcast world, "profanity" is an

inherently-religious term, based on the concept of blasphemy, of which any attempted governmental prohibition would violate the separation of church and state; whether the non-literal use of words such as “fuck” (i.e., used as an adjective or expletive to emphasize an exclamation, rather than as a reference to the sexual function) is indecent; whether or not the government can regulate a “fleeting expletive”; whether or not scienter is required for an indecency or obscenity violation; and whether relying “entirely on context” to determine what is indecent and what is not, as the Commission purports to do, is inherently unconstitutionally vague. Ham radio is *not* uniquely invasive, as are radio and television. Hams comprise only a very small portion of the population. If they don’t like what they hear, they can tune to another frequency. Due to its examination requirements, and the fact that youngsters don’t desire to speak to all of the older hams on the air, amateur radio cannot be considered to be particularly child-friendly. In no way can it be said that ham radio is “uniquely accessible to children” within the meaning of Reno v. A.C.L.U., supra. In short, it would be impossible for Commission regulation of amateurs’ speech to be “narrowly-tailored to further a substantial governmental interest”. At the very least, the ALJ should defer making any important decisions regarding amateur obscenity and indecency herein until the Supreme Court either decides the Fox v. FCC case or, as it does in many cases and may well do in Fox, has second thoughts about the matter and therefore dismisses the writ of certiorari sua sponte prior to oral argument, in which case the Second Circuit’s 2007 decision would become settled law.

Conclusion

In obtaining his amateur radio license, Applicant never agreed to let the Commission judge the social value of his legal, non-FCC-related activities. The Commission has no right to second-guess Applicant’s on-the-air speech because amateur radio is not a broadcast medium, and it has no right to judge his internet

speech under League of Women Voters. The Bureau is being disingenuous at best by claiming that radio amateurs' speech is restricted in a manner similar to that of broadcasters, while simultaneously prohibiting hams from broadcasting. Nor does the Commission have any right to examine Applicant's speech under the Character Rule. Applicant has engaged in no non-FCC conduct (conviction of a felony, etc.) that would in any way trigger the application of the Character Rule, and any alleged FCC-related misconduct (presumably consisting of the alleged Part 97 violations themselves and the Commission's possible claim that he *falsely denied* them all) depends on whether or not Applicant committed the Part 97 violations in the first instance. Here again, the Bureau is being disingenuous in denying any knowledge of the legislative history of 47 U.S.C. §154(f)(4)(A) of the Act because at the time it issued the Hearing Designation Order the Bureau apparently did not realize that, in order to support its burden of proof, it must have actual intercepts made by either Commission personnel or §154(f)(4) Volunteers showing Applicant to be in violation Part 97, and now it is trying to cover up the fact. Last, the Bureau is also being disingenuous, and engaging in a classic bootstrap argument, by claiming its requested discovery is relevant to Applicant's character when Applicant did nothing to trigger the application of the Character Rule. Therefore the Bureau's entire case fails, and discovery cannot be permitted on any cognizable legal theory of license non-renewal.

Accordingly, Applicant respectfully requests that the Enforcement Bureau's Motion to Compel Responses to its First Request for Production of Documents be denied in its entirety.

Dated: June 13, 2008

Respectfully submitted,

William F. Crowell, Licensee/Applicant

PROOF OF SERVICE BY MAIL
[47 C.F.R. Part I, Subpart A, §1.47]

I am a citizen of the United States and a resident of El Dorado County, California. I am the Applicant-licensee herein. I am over the age of 18 years. My address is: 1110 Pleasant Valley Road, Diamond Springs, California 95619-9221.

On June 13, 2008 I served the foregoing Applicant's Opposition to Enforcement Bureau's Motion to Compel Responses to Its First Request for Production of Documents on all interested parties herein by placing true copies thereof, each enclosed in a sealed envelope with postage thereon fully prepaid, in a United States mail box at Diamond Springs, California, addressed as follows:

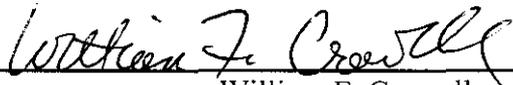
Marlene S. Dortch, Secretary, Federal Communications Commission
445 - 12th Street S.W., Washington, D.C. 20554
(original and 6 copies)

Kris Monteith, Chief, Enforcement Bureau, Federal Communications Commission
445 - 12th Street, SW, Room 7-C723, Washington, D.C. 20554

Rebecca A. Hirselj, Ass't. Chief, Investigations & Hearings Division,
Enforcement Bureau, F.C.C.
445 - 12th Street, S.W., Room 4-A236, Washington, D.C. 20554 (Bureau Counsel)

I further declare that, on this same date, pursuant to the April 2, 2008 Order of Presiding Administrative Law Judge Steinberg, I today emailed copies of this document to all of the above parties.

I declare under penalty of perjury that the foregoing is true and correct, and that this proof of service was executed on June 13, 2008 at Diamond Springs, California.



William F. Crowell

corporation, chartered in the State of California. It currently has approximately 600 dues-paying members. The net has selected the frequency 7255 kHz, in the 40-meter Amateur band, on which to conduct its operations. The principal purpose of the net is to facilitate radio contacts among Amateurs by continuously monitoring that frequency. Under normal radio wave propagation conditions, the net covers the entire West Coast, including California, Oregon, Washington, Nevada, Utah and Arizona. The net operates "all day, every day."

5. The net functions as a meeting place for Amateur radio contacts. Once a contact has been made on 7255 kHz, the stations agree on and move to another frequency where they can carry on their conversation. In this way, 7255 kHz is kept open for similar use by others. Any Amateur may use the net in this way, although frequent users are encouraged to become members of WCARS.

6. Each day the net calls the roll of its members. Although not all members are on the roll-call, approximately 300 stations are called on a typical day. The only other sustained conversational use of the frequency occurs when the net conducts its monthly, on-the-air, board of directors meeting.

7. The gravamen of the several complaints is that Boston has deliberately interfered with the operation of the net, in contravention of Section 97.125 of the Rules, 1/ and in so doing has used language violative of Section 97.119. 2/ The petitioners have alleged specific instances of such conduct and have charged that such instances are part of an on-going pattern of conduct. They allege that Boston has operated on the frequency 7255 kHz while the net was in operation; that Boston has interrupted net operations with long diatribes directed toward certain individuals; that Boston has sought out the conversations of net members and interrupted them; that Boston has refused to relinquish use of the frequency 7255 kHz for 15 minutes or more while only calling another station; and that Boston has used vulgar epithets in carrying out this crusade against WCARS. None of the petitioners has claimed to have personal, first-hand knowledge of such operation by Boston. The allegations are based on asserted familiarity with Boston's voice, the characteristics of his radio signal and the interferor's use of the call sign K6AU.

1/ Section 97.125 provides, "No licensed radio operator shall wilfully or maliciously interfere with or cause interference to any radio communication or signal."

2/ Section 97.119 provides, "No licensed radio operator or other person shall transmit communications containing obscene, indecent, or profane words, language or meaning."