

## Annals of Regulatory Experience Series Memorandum

Re: The FCC and "Stale Items."

Recently, the FCC under Congressional pressure began publishing a list of matters "on circulation." The FCC's under a statutory requirement to act with "proper dispatch" (47 USC §154(j)). Consistent with the Sunshine-in-Government Act, it's also supposed to be doing the public's business in public, as Senator Obama has noted. Yet there appears to be a substantial backlog of undecided matters, doesn't there -- and, the vast majority of FCC actions are still taken in secret.

The FCC is also very slow. The list of FCC "circulation items" alone goes back as far as 2005. The week before last, the FCC proposed to fine 52 ABC Television Network stations for an episode of "NYPD Blue" which was aired February 25, 2003! In other words, it took the agency nearly five years to get what appears to be a routine "indecent" complaint out the door! That same week, the FCC finally dismissed a series of tariff complaints which had been pending since 1994! Critics of the FCC's content policing might applaud that gross delay. Others probably can defend the huge delays in handling common carrier matters.

Here, too, is a Federal agency which has never completed action on any "forbearance" petition within the statutorily prescribed 12 months. They've always granted themselves an extension -- and, even then, don't appear ever to have granted any petition in its entirety. Just imagine if the rest of the Federal Government -- or, any state government, for that matter -- operated in such a leisurely fashion. This is behavior which makes the D.C. Government look efficient, isn't it?<sup>1</sup>

Well, in late 1989 newly confirmed FCC Chairman Alfred C. Sikes told the FCC staff, assembled in the Fine Arts Theater -- then on the ground floor of the agency's Washington headquarters -- that he fully intended to "make the trains run on time." Thus, one of the first FCC monthly meetings was devoted to "stale items." Dozens of petitions, rule makings, stalled complaints, etc., which had been pending before the FCC and its bureaus for years were assembled. Four of five FCC Commissioners had just been confirmed. All were appalled at the mass of unexplained, unattended regulatory matters. It showed what can occur at any Federal agency with no real "case management" system -- and, where neither employees nor supervisors were regularly held to account.

The FCC in one fell swoop terminated hundreds of stale proceedings. A

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<sup>1</sup> Until the mid-1980s, the FCC actually was quite speedy. The agency met as often as two, even three times a week. The seven FCC Commissioners worked through the pending matters quickly. Because the decisions were being handed down rapidly, moreover, the opinions tended to be much shorter, more succinct. The telephone book-sized decisions of recent years were unheard of.

series of computerized management and reporting requirements were also instituted. Tracking the "speed of service" -- how quickly various matters were completed -- was begun. In early 1990, moreover, the prickly topic of "indecentcy" and "obscenity" complaints was addressed.

Two previous FCC Chairmen had been of the view that the FCC's "indecentcy" and "obscenity" enforcement policies and practices were "unconstitutional." They also objected to new legislation on the topic. The four new FCC Commissioners, however, took the position that as long as laws were on the books, they'd be enforced. They also determined that there'd actually be consideration of complaints, too.

Thus, in March 1990 the FCC had "Indecency Day." More than 160 complaints which had been languishing in various offices and bureaus were brought forward. The FCC determined most were non-actionable -- whether for want of sufficient allegations, or whatever. About 20, however, were found to be worthy of further steps. The FCC directed they be sent to licensees for comment. And, the FCC also found that about five of the long-pending complaints were more than warranted. Letters proposing sanctions were approved.

Some of these complaints, incidentally, involved Howard Stern. The FCC directed that the actual transcripts of Stern's remarks be attached to the press releases issued that day. That was sufficient to deter news reports assailing the FCC for censoriousness. Writing for the Wall Street Journal, Bob Davis noted that Stern's remarks -- and, the details of the FCC's release -- were such that they couldn't appear in most newspapers.<sup>2</sup>

In conclusion, the Sikes FCC employed "Stale Items Day" and "Indecency Day" as a useful means of clearing away hundreds of long-pending matters. The FCC Chairmen who followed, however, evidently were more tolerant.<sup>3</sup> The FCC's "case management system" fell into disuse, delays and backlogs began to reappear. At present, there apparently is no centralized listing of pending matters. In addition to being the most-reversed Federal agency, the FCC evidently is slowest to act. One expects, however, that if the next FCC Chairman's a reasonably proficient manager, at least the delays and backlogs will be addressed.

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<sup>2</sup> Following "Indecency Day," the FCC received several thousand letters actually thanking the agency for finally "doing something."

<sup>3</sup> FCC Chairman Reed Hundt was successful in meeting most of the deadlines specified in the 1996 Telecommunications Act, however -- a major accomplishment.