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## FCC Enforcement Monitor

By Scott R. Flick and Jessica Nyman

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### *Headlines:*

- *FCC Issues \$3.36 Million Fine to Company and Its CEO for Selling Toll Free Numbers*
  - *Antenna Fencing and Public Inspection File Violations Result in \$17,000 Fine*
  - *FCC Reiterates That “Willful Violation” Does Not Require “Intent to Violate the Law”*
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### **Hold the Phone: FCC Finds Company and CEO Jointly and Severally Liable for Brokering Toll Free Numbers**

The FCC handed down a \$3,360,000 fine to a custom connectivity solutions company (the “Company”) and its CEO for violations of the FCC’s rules regarding toll free number administration. Section 251(e)(1) of the Communications Act mandates that telephone numbers, including toll free numbers, be made “available on an equitable basis.” As a general rule, toll free numbers, including “vanity” numbers (e.g., 1-800-BUY-THIS), cannot be transferred, and must be returned to the numbering pool so that they can be made available to others interested in applying for them when the current holder no longer needs them. Section 52.107 of the FCC’s Rules specifically prohibits brokering, which is “the selling of a toll free number by a private entity for a fee.”

In 2007, the Enforcement Bureau issued a citation to the Company and CEO for warehousing, hoarding, and brokering toll free numbers. The Bureau warned that if the Company or CEO subsequently violated the Act or Rules in any manner described in the 2007 citation, the FCC would impose monetary forfeitures. A few years later, the Bureau received a complaint alleging that in June and July of 2011, the Company and CEO brokered 15 toll free numbers to a pharmaceutical company for fees ranging from \$10,000 to \$17,000 per number. In 2013, the FCC found the Company and CEO jointly and severally liable for those violations and issued a \$240,000 fine.

Despite the 2007 citation and 2013 fine, the Bureau found evidence that the CEO continued to broker toll free numbers. In early 2013, the Bureau received tips that the CEO sold several toll free numbers to a law firm for substantial fees. An investigation revealed that the CEO, who was the law firm’s main point of

contact with the Company, had sold 32 toll free numbers to the firm for fees ranging from \$375 to \$10,000 per number. On other occasions, the CEO solicited the firm to buy 178 toll free numbers for fees ranging from \$575 to \$60,000 per number. This, along with his correspondence with the firm—including requests that payments be made to his or his wife's personal bank accounts—were cited in support of a 2014 Notice of Apparent Liability (“NAL”) finding that the CEO, in his personal capacity and on behalf of the Company, had “yet again, apparently violated the prohibition against brokering.”

As neither the Company nor the CEO timely filed a response to the 2014 NAL, the FCC affirmed the proposed fines: \$16,000 for each of the 32 toll free numbers that were sold, combined with a penalty of \$16,000 for each of the 178 toll free numbers that the Company and CEO offered to sell, resulting in a total fine of \$3.36 million.

### **FCC Rejects AM Licensee’s “Not My Tower, Not My Problem” Defense**

The FCC imposed a penalty of \$17,000 against a Michigan radio licensee for failing to make available its issues/program lists in the station's public file and for failing to enclose the station's antenna structure within an effective locked fence.

Section 73.3526 of the FCC's Rules requires broadcast stations to maintain a public inspection file containing certain documents. Section 73.3526(c)(1) specifies that the file be available for public inspection at all times during regular business hours. Subsection (e) of that rule requires AM and FM broadcast stations to place in the file on a quarterly basis a list of programs that have provided the station's most significant treatment of community issues during the preceding three-month period, and to retain the lists in the public inspection file until final action has been taken on the station's next license renewal application. Section 73.49 of the Rules requires antenna towers having radio frequency potential at the base to be enclosed within effective locked fences or other enclosures.

In February 2010, the Enforcement Bureau's Detroit Office inspected the licensee's main studio and found that the station's public inspection file did not contain any quarterly issues/program lists for the current license term—meaning the station's file was missing 24 quarters of issues/program lists. A month later, the agent returned to inspect the station's two-tower array and found that the fence enclosing the antenna structure was severely damaged, and the severity of the fence's deterioration and the plant growth surrounding the fence indicated that the damage had existed for a considerable period of time. The agent also observed that there was no perimeter property fence.

In response to a 2012 NAL for these violations proposing a \$17,000 fine, the licensee requested reduction or cancellation of the proposed fine, arguing that it did not own the towers used by its station. The licensee also argued that the fine should be reduced or cancelled because, even though it did not own the towers, it made good faith efforts to repair the fence and to have its issues/program lists reassembled and placed in the public inspection file immediately after receiving the NAL. The FCC rejected the licensee's request, explaining that the responsibility to enclose the antenna structure within an effective locked fence lies with the licensee and that fine reductions for fixing violations are available only for corrective actions begun prior to receiving an NAL from the FCC.

### **Unintentional Operation on Wrong Frequency Brings \$10,000 Fine**

Earlier this month, the FCC imposed a \$10,000 fine against an Oregon land mobile licensee for operating his station on an unauthorized frequency at an unauthorized location. Section 301 of the Communications Act provides that no person may use or operate any apparatus for the transmission of energy or communications or signals by radio within the United States, except under and in accordance with the Act

and with a license issued by the FCC. Section 1.903(a) of the FCC's Rules requires that stations in the Wireless Radio Services be operated in accordance with the applicable rules and with a valid authorization granted by the FCC.

Responding to a complaint of harmful co-channel interference, an agent from the Enforcement Bureau's Portland Office monitored transmissions on 854.4125 MHz. The agent traced the source of the interfering transmissions to a transmitter located in Hillsboro, Oregon, and confirmed that no licenses to operate on that frequency at that location had been issued by the FCC. The property owner of the site informed the agent that the operator of the radio equipment was a tenant in the building.

On January 18, 2013, the agent inspected the equipment and saw that it had frequency 845.4125 MHz clearly marked on the unit. The agent also measured the transmitter output on frequency 845.4125 MHz and verified the harmful interference. A review of FCC records confirmed that the license issued to the operator did not authorize operation on that frequency, nor at that location. The Enforcement Bureau subsequently issued a \$10,000 NAL to the licensee for willful and repeated violation of the Communications Act and the FCC's Rules.

In response to the NAL, the licensee admitted that his station was operating on the unauthorized frequency, but argued that the violation was not "willful" because he did not intentionally tune the station to that frequency. He also argued that his operation at the unauthorized location was permitted by Section 90.621(b)(6) of the Rules, which "allows the station location to be modified as long as the resultant 22 dbu contour is within the 22 dbu contour of the other licensed stations covered under the license."

The FCC rejected both defenses. First, the FCC explained that under the Act, "willful" is defined as the "conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. Therefore, the licensee's acknowledged operation of the station on the unauthorized frequency was "willful" (and in any event, was "repeated"). The FCC also clarified that Section 90.621(b)(6) applies only to authorized short-spaced stations and incumbent licensees. It therefore did not apply to the licensee, who was not operating the station on an authorized frequency and whose station was not authorized to operate as a short-spaced facility. Accordingly, the FCC declined to cancel or reduce the \$10,000 fine.

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If you have any questions about the content of this Advisory, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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