

Trio of NALs for Antenna Structure Violations Highlight Application of Aggravating Factors - Being Bigger May Be a Liability

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The release of three notices of liability in the past two weeks regarding alleged violations of the Federal Communications Commission's (FCC's) antenna structure violations by the FCC's Enforcement Bureau (Bureau) reveals the extent to which size may trump uncooperative and extended non-compliant behavior when it comes to proposed forfeitures. For violations falling under same category - failure to comply with lighting and/or marking of antenna structures - the smaller entity that cooperated with the Bureau received a proposed penalty of \$10,000, whereas the one which ignored Bureau notices received a proposed forfeiture of \$14,000. But the third, AT&T, because of its size (and the inclusion of an alleged second, but lesser, violation) received a notice proposing a \$25,000 forfeiture.

Ohana Media Group, LLC (Ohana): In June 2013, a Bureau agent observed that an Ohana did not have the correct daylight hours lighting in operation on two successive days and advised Ohana of the outage. Upon being contacted by the Bureau, Ohana initiated a Notice to Airmen (NOTAM) with the Federal Aviation Administration (FAA), required when there is a known tower lighting outage of more than 30 minutes duration. When the Bureau's Anchorage Office issued a Notice of Violation (NOV) a month later, Ohana had already repaired the lighting and installed two redundant monitoring systems. The NAL issued to Ohana proposed the base forfeiture amount with no adjustment for lighting violations (\$10,000) after alleging violations of the rule requiring proper tower marking and lighting and the rule requiring notification of the nearest FAA office or Flight Service Station whenever a top steady burning light is out or any flashing obstruction light is observed or known to be not working for more than 30 minutes. Ohana's cooperation apparently avoided the application of any aggravating factors.

Kemp Broadcasting, Inc. (Kemp): In April 2013, Bureau agents observed that Kemp's 401-meter antenna did not have the proper daytime lighting at either the top or at three lower levels. An employee was notified in person by the agents, who returned after dark to find one of the red flashing lights required on this tower at night was out. To make a long story short, some of the lights continued to be out for several months following the agents' initial observations. Even after receiving a mid-May NOV and further contacts from the Bureau, Kemp apparently did not initiate a NOTAM with the FAA after several months. Finally, the Bureau itself notified the FAA in mid-September. Despite all of that, and the allegations in the NAL issued to Kemp that three FCC rules were violated - failure to exhibit required lighting, failure to notify the FAA of outages, and failure to maintain a

properly functioning monitoring system – the Bureau started with a base forfeiture amount of \$10,000 and made a modest upward adjustment of \$4000 for Kemp’s repeated failure to notify the FAA of the outages.

AT&T Services, Inc. (AT&T): Following an April 2103 complaint from the Los Angeles Police Department regarding an unlit antenna structure, an agent of the Bureau confirmed the structure was of a sufficient height absent a special aeronautical study (*i.e.*, over 200 feet) to require lighting and marking, as well as antenna registration. Although AT&T six days later removed a whip antenna to bring the height below 200 feet, the Bureau issued an NOV in early May. AT&T acknowledged the whip antenna had been installed five months prior to the Bureau inspection, and that the FAA had not been properly notified of the structure. The Bureau noted that the base forfeiture of \$10,000 would be proposed as in the two previous cases, as well as a separate base forfeiture amount of \$3000 for failing to register the antenna structure with the FCC. The Commission noted only one aggravating factor that it was applying: ability to pay. Because AT&T is a multi-billion enterprise, and to ensure the forfeiture amount is an adequate deterrent, the Bureau increased the forfeiture proposed to \$25,000. Notably, the Bureau observed in a footnote that Verizon Wireless in a 2010 order received a forfeiture of only the base amount, \$13,000, for the same offenses. This differential between the two cases signals the increased attention that the FCC is willing to put on the size of companies when assessing a penalty for violation of the rules. Further, the comparison with the Ohana and Kemp cases leaves the unmistakable impression, absent possible additional detail not set forth in the NALs, that being a large company may expose one to greater liability than being an uncooperative, non-compliant one, which is not what one would necessarily expect in a rational enforcement regime.