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To: All Broadcast Clients

July 17, 2008

LICENSEE BROADCASTS A VOICEMAIL MESSAGE WITHOUT INFORMING CALLER OF INTENT TO BROADCAST; FCC ISSUES \$12,000 FORFEITURE

The FCC's Enforcement Bureau (the "Bureau") has issued a Notice of Apparent Liability for Forfeiture ("NAL") against Capstar TX Limited Partnership ("Capstar") for broadcasting a voicemail message left by a listener on the private cell phone of an on-air personality. The Bureau found Capstar apparently liable for a forfeiture of \$12,000 for violating the FCC's "telephone rule".

The "telephone rule" requires that a broadcaster *inform* a party to a telephone conversation of its intent to broadcast the conversation, either *before* broadcasting the conversation live or *before* recording the conversation for future broadcast.

In his complaint, the caller alleged that he left a voicemail message on an on-air personality's private cell phone, and that the station later broadcast the message on at least two occasions. The caller was not notified before he left the voicemail message that the message might be broadcast by the station. The complainant provided an audio recording of one of the broadcasts of the voicemail message, which included an admission by the DJ that the voicemail message was also broadcast during the prior day. The program in which the voicemail message was broadcast was also carried live by commonly owned affiliate stations.

Capstar did not dispute the veracity of the allegations, responding that it no longer held the license for the station that originated the broadcast, and that it had no knowledge of the matters raised in the complaint. The Bureau found that Capstar's response was insufficient

to counter the allegations made by the complainant.

In prior cases, the FCC has held that for purposes of the telephone rule, the term "conversation" includes outgoing answering machine messages and conversations recorded by answering machines. This decision extends the scope of the telephone rule to include voicemail messages left for station employees.

The Bureau assessed the forfeiture notwithstanding the fact that Capstar no longer owns the station on the ground that licensees are liable for violations of FCC rules that take place under their stewardship.

The base forfeiture for the unauthorized broadcast of a telephone conversation is \$4,000. In this case, however, the Bureau increased the forfeiture to \$12,000 because the conversation was broadcast multiple times on multiple stations, and because Capstar's parent has a history of violations relating to the "telephone rule." The Bureau also commented that in order to ensure that the forfeiture was "not simply an affordable cost of doing business" it considered as well the licensee's "exceptional size and ability to pay" when determining the amount of the forfeiture.

Broadcasters must exercise care when broadcasting telephone conversations. A broadcaster must inform a caller of its intent to broadcast a conversation prior to the live broadcast of a call, or prior to recording a call for future broadcast, unless the caller is aware or may be presumed to be aware that the call



is being broadcast or likely will be broadcast. Awareness is presumed to exist only if the other party is associated with the station, such as an employee or part-time reporter, or if the caller places the call and the call is obviously in connection with a program in which telephone conversations are customarily broadcast. If broadcasters want the option of broadcasting voicemail messages, they must include in their outgoing message a notice of intent to broadcast, giving the caller the

opportunity to hang up before leaving a voicemail.

If you have any questions concerning the FCC's rule on the broadcast of telephone conversations, please contact an attorney in our office.

Leventhal Senter & Lerman PLLC

This memorandum is intended only as a general discussion of these issues and should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired. To discuss any of the issues presented here, please contact any attorney in our office.