



WASHINGTON, DC

March 6, 2009

**Station Fined \$6,000 for Violation of the Telephone Rule by  
Failing to Notify Recipient *Before* Call Was Captured By Digital Delay Device**

The FCC's Enforcement Bureau recently assessed a \$6,000 forfeiture against Station WTWR-FM, Luna Pier, Michigan, for violating the Telephone Rule (Section 73.1206 of the FCC's Rules) by recording for broadcast a live telephone conversation without giving prior notice to the recipient of the call of its intention to do so. The Telephone Rule requires that *before broadcasting or recording* a telephone conversation for later broadcast, a licensee must inform any party to the call of its intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast. The Commission presumes such awareness *only* where the other party to the call is associated with the station, such as an employee or part-time reporter, or where the other party originates the call and it is obvious that the call was made in connection with a program in which the station customarily broadcasts telephone conversations.

The incident at issue occurred shortly after the Pittsburgh Steelers' quarterback Ben Roethlisberger was injured in a motorcycle accident while not wearing a helmet. The Station's on-air talent called a restaurant, joking about the "Big Ben" hamburger the restaurant offered on its menu. The Station recorded the conversation using a digital delay system which "dumps" the content of the conversation if the recipient of the call objects to broadcast of the conversation, and broadcasts the call on a 10-second delay if consent is obtained. The Station voluntarily elected to seek such consent even though the Telephone Rule, as a technical matter, requires only that a station notify the other party to the call of an intent to record or broadcast the conversation. Although Station personnel went so far as to obtain consent from a restaurant employee to air the conversation before that portion of the call was broadcast, the Station began to capture the call using the digital delay system prior to obtaining any consent.

The Station argued that it received permission before broadcasting any part of the telephone conversation between its employee and the recipient of the call, and therefore did not violate the Telephone Rule. The Bureau held that the Station needed to provide notice of intent to broadcast or record *not just before* broadcasting the conversation, *but also before* it began recording the call during which the conversation occurred, and that failure to do so was a violation of the Telephone Rule. The base forfeiture for a violation of the Telephone Rule is \$4,000. Since the Station's licensee had previously violated the Telephone Rule, the forfeiture was increased to \$6,000.



Despite stations' efforts over the years to make the Telephone Rule less restrictive, the Commission has consistently required that, when a station originates a call, notice that a call is being broadcast or recorded for later broadcast *must* be given before either broadcasting the call live or recording the call for later broadcast. It is not sufficient to give notice after recording but prior to broadcast – the party must be informed before a conversation is recorded. Due to the privacy concerns that underpin the Telephone Rule, the FCC enforces this rule vigorously.

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If you have any questions about the Telephone Rule, please contact an attorney in this office.

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.

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