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Licensees Fined Despite FCC Assurances

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“[A]n oral contract is not worth the paper it’s written on,” according to legendary movie mogul Sam Goldwyn. The same is unfortunately true of informal FCC advice.

In late August, while most of Washington was at the beach, the FCC issued fines to three microwave operators for transmitting without a license. The facts were similar in all three cases. Each defendant is a company on the U.S. side of the Mexican border. In 2001, each applied for an FCC license to communicate with a Mexican station. When a grant was not forthcoming, each asked for a special temporary authority (STA) – essentially, a short-term license.

The FCC’s International Bureau told each of the companies that the requested STA would not be granted, because Mexico was not granting authority in the opposite direction, *but that no U.S. enforcement would result from unlicensed operation*. Taking the Bureau at its word, the companies put their stations on the air. Three years later, a different arm of the FCC – the Enforcement Bureau – notified each one that it was in violation of the law and would be fined \$10,000. Each responded with a sworn affidavit attesting to the International Bureau staff’s assurances that operators in that situation would not be prosecuted.

Last month the Enforcement Bureau rejected the defense and imposed the \$10,000 fine on each company. *The Bureau does not dispute that other FCC staff told the companies they were safe from enforcement*. Instead, the Enforcement Bureau criticizes the companies for relying on informal oral opinions from FCC personnel. (The Bureau goes on to argue that the companies must have known the staff gave bad advice in 2001, because each reapplied for a license in 2004. But the Bureau also concedes that U.S.-Mexico licensing relations were not normalized until earlier in 2004, so applying before then would likely have been futile.)

It has always been a principle of administrative law that an agency like the FCC is not officially bound by informal advice of its staff, and so is free to disavow anything the staff tells the public. On the other hand, good faith oral dealings between the staff and the industries they work with are an essential lubricant that keeps the regulatory process working smoothly. These cases are a harsh reminder that, as a practical matter, informal oral opinions of a staff member are only as good as the tenure and memory of the staff person involved – and the willingness of the agency to stand by what that staffer says.

