

**DISSENTING STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

Re: *M.C. Dean, Inc., File No.: EB-SED-15-00018428, NAL/Acct. No.: 201532100008, FRN: 0011134921, Notice of Apparent Liability for Forfeiture*

A little over a year ago, I became aware of the contention that the use of deauthentication technology to manage Wi-Fi systems violates section 333 of the Communications Act.<sup>1</sup> I respectfully requested that the Commission undertake a rulemaking or other proceeding to consider this issue more thoroughly, instead of pursuing an enforcement action. This seemed like a reasonable request when there was already a petition – and corresponding comments – on file. Alas, my request was rejected and the petition eventually withdrawn (conveniently after some of the petitioners entered into a consent decree with the Enforcement Bureau),<sup>2</sup> leaving the substantive concerns unaddressed. So that brings us to another suspect enforcement item without the underlying work being done.

As a strong supporter of what Wi-Fi can bring to consumers and the marketplace, I am extremely sympathetic to concerns regarding certain operators needlessly interfering with access points. I, however, cannot agree with the expansive reading of the statute contained in this item, especially without the Commission conducting a more thorough review of the issues raised in the earlier proceeding and repeated in the context of this enforcement matter.

Section 333 prohibits willful or malicious interference “to any radio communication of any station licensed or authorized by or under this Act.”<sup>3</sup> There is no clear intent that Congress meant to ensnare Part 15 devices when it used the word “station.” The legislative history highlights several services and contains language that indicate that Congress meant to protect stations that are licensed or licensed by rule, as opposed to unlicensed spectrum or devices, which are never mentioned, even though Part 15 was in existence decades before section 333 was adopted.<sup>4</sup>

There are legitimate concerns that equating Part 15 devices to “stations” appears inconsistent with prior Commission actions and could have serious regulatory repercussions for unlicensed users. For instance, if such devices are “stations,” would they be subject to other licensing provisions of the Act,<sup>5</sup> such as foreign ownership restrictions and transfer of control provisions,<sup>6</sup> among others? The

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<sup>1</sup> 47 U.S.C. § 333.

<sup>2</sup> *Petition of American Hotel & Lodging Association, Marriott International, Inc., and Ryman Hospitality Properties for a Declaratory Ruling to Interpret 47 U.S.C. § 333 or, in the Alternative, for Rulemaking*, RM-11737, Order, 10 FCC Rcd 1251 (WTB 2015).

<sup>3</sup> 47 U.S.C. § 333.

<sup>4</sup> Congress noted that there was an increase in interference instances to certain radio services that warranted a statutory solution, because the authority that was being used under “the more limited licensed operator provision of the Act” only allowed for remedy after lengthy and complex administrative proceedings. The services highlighted were amateur, maritime, citizens band radio, public safety, private land mobile and cable television. The legislative history states that the provision “prohibits intentional jamming, deliberate transmissions on top of the transmission of authorized operators already using specific frequencies in order to obstruct their communication, repeated interruptions, and the use and transmission of whistles, tapes, records, or other types of noisemaking devices to interfere with the communications or radio signals of other stations.” H.R. Rep. 101-316, at 8 (Oct. 27, 1989); *see also* S. Rep. 101-215, at 7 (Nov. 19, 1989).

<sup>5</sup> 47 U.S.C. § 307.

<sup>6</sup> *Id.* § 310.

Commission has never applied these sections to Wi-Fi operators. In fact, devices and stations traditionally have been treated differently under both the statute and Commission rules.<sup>7</sup>

Some have also raised whether the use of deauthentication frames constitutes interference under section 333. For example, the Commission’s definition of interference is “[t]he effect of unwanted energy due to one or a combination of emissions, radiations, or inductions upon reception in a radiocommunication system, manifested by any performance degradation, misinterpretation, or loss of information which could be extracted in the absence of such unwanted energy.”<sup>8</sup> It appears that this provision applies to mechanisms that intentionally cause electromagnetic interference, such as jammers, and not to deauthentication frames, which do not increase the level of energy overpowering communications signals in an area.

There is also a debate regarding potential inconsistencies between section 333 and the Part 15 rules. Under section 15.5(b) of the Commission’s rules, unlicensed devices can cause interference to and must accept interference from other Part 15 devices.<sup>9</sup> On the other hand, if section 333 applies to a Part 15 device, such a device would be prohibited from “willfully and maliciously interfer[ing] with or caus[ing] interference to” other unlicensed devices. This language appears to directly contravene the language of section 15.5(b). If applied, the statutory language of section 333, as written, could undermine the regulatory structure of unlicensed operations and potentially subject all Wi-Fi users to potential enforcement action whenever they “willfully” operate Wi-Fi equipment.<sup>10</sup>

Despite these valid concerns, we are, once again, trying to set important and complex regulatory policy by enforcement adjudication. This is backward and not the best course of action. Besides this Notice of Apparent Liability, the Commission has never considered whether using deauthentication software violates the statute or Commission policy. The Enforcement Bureau – not the Commission – has issued two consent decrees<sup>11</sup> and four enforcement advisories, three of which are actually about

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<sup>7</sup> For example, the Commission’s rules pertaining to unlicensed use clearly differentiates between “an authorized radio station” and intentional, unintentional or incidental radiators, which are devices. 47 C.F.R. § 15.5(b). Additionally, Section 302 of the Communications Act, 47 U.S.C. § 302(a), allows the Commission to “make reasonable regulations . . . governing the interference potential of devices which in their operation are capable of emitting radio frequency energy. . . .” At no point is there any reference to these devices being stations. Section 706(c) of the Communications Act, 47 U.S.C. § 606, delineating the powers of the President in a war or emergency also differentiates between stations and devices. Section 2.939(b) of the Commission’s rules also differentiates between station and devices when it states that “[r]evocation of an equipment authorization shall be made in the same manner as revocation of radio station licenses.” 47 C.F.R. § 2.939(b).

<sup>8</sup> 47 C.F.R. § 2.1.

<sup>9</sup> Section 15.5(b) states that the “operation of an intentional, unintentional, or incidental radiator is subject to the conditions that no harmful interference is caused and that interference must be accepted that may be caused by the operations of an authorized radio station, by another intentional or unintentional radiator, by industrial, scientific and medical (ISM) equipment, or by an incidental radiator.” 47 C.F.R. § 15.5(b).

<sup>10</sup> 47 U.S.C. § 312(f)(1) (“The term ‘willful’, when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States.”).

<sup>11</sup> *Marriott International, Inc., Marriott Hotel Services, Inc.*, File No.: EB-IHD-13-00011303, Acct. No.: 201532080001, FRN: 0006183511, Order, 29 FCC Rcd 11760 (EB 2014); *Smart City Holdings, LLC, and its Wholly-Owned Subsidiaries, Smart City Networks, LP, and Smart City Solutions LLC*, File No.: EB-SED-15-00018248, Acct. No.: 201532100006, FRN: 0024681223, Order, 30 FCC Rcd 8382 (EB 2015).

jammers.<sup>12</sup> Enforcement advisories and consent decrees do not serve as Commission precedent. Moreover, the last advisory, which the Enforcement Bureau must have found necessary due the unclear regulatory state, was released *after* the suspected behavior in this case.<sup>13</sup> Even if one accepts the belief that such advisories are worth something, how is that sufficient notice or fair?

The simple, which happens to correspond to the appropriate, solution to this controversy, is to either seek Congressional clarification or conduct a broad rulemaking on the potential reach of section 333 to Part 15 devices. That way all views can be explored by the Commission and objectors would have a remedy process via the court system.

As a side note, this item, yet again, fails to state with particularity how the Commission calculated the upward adjustment. I continue to be unable to support upward adjustments that are meant to penalize entities for potential violations *outside* of the statute of limitations period.

For the reasons stated above, I dissent.

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<sup>12</sup> *FCC Enforcement Advisory; Warning: Jammer Use is Prohibited*, Enforcement Advisory No. 2014-05, Public Notice, 29 FCC Rcd 14737 (EB 2014); *FCC Enforcement Advisory; Cell Jammers, GPS Jammers, and Other Jamming Devices; Consumer Alert: Using or Importing Jammers is Illegal*, Enforcement Advisory No. 2012-02, Public Notice, 27 FCC Rcd 2309 (EB 2012); *FCC Enforcement Advisory; Cell Jammers, GPS Jammers, and Other Jamming Devices; Consumers Beware: It is Unlawful to Use "Cell Jammers" and Other Equipment that Blocks, Jams, or Interferes with Authorized Radio Communications in the U.S.*, Enforcement Advisory No. 2011-04, Public Notice, 26 FCC Rcd 13299 (EB 2011).

<sup>13</sup> *FCC Enforcement Advisory; Warning: Wi-Fi Blocking is Prohibited*, Enforcement Advisory No. 2015-01, Public Notice, 30 FCC Rcd 387 (EB 2015).