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## FCC Enforcement Monitor

by Scott R. Flick and Lauren Birzon

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### *Headlines:*

- *FCC Fines Noncommercial Educational Station \$12,500 for Ads*
  - *Public Inspection File Violations Lead to Three Short Term License Renewals*
  - *Main Studio Violations and Unauthorized Operations Garner \$21,500 Fine*
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### **Noncommercial Educational Station Airs Expensive Ads**

A recent fine against a noncommercial educational station serves as a warning to noncommercial licensees to be mindful of on-air acknowledgements and advertisements. In concluding a proceeding that began in 2006, the FCC issued a \$12,500 fine against a California noncommercial FM licensee for airing commercial advertisements in violation of the FCC's rules and underwriting laws.

In August 2006, agents from the Enforcement Bureau inspected the station and recorded a segment of the station's programming. During the inspection, the agent determined that the recorded programming included commercial advertisements on behalf of for-profit entities. In January 2007, the Bureau issued an initial Letter of Inquiry ("LOI") regarding the station's commercial advertisements and additional technical violations. At the same time, the Bureau referred the matter to the Investigations and Hearings Division for additional investigation. The Division issued additional LOIs in 2008 and 2009, to which the licensee responded three times. In its responses, the licensee admitted to airing four commercial announcements over 2,000 times in total throughout an eight-month period in 2006. It also acknowledged that it had executed contracts with for-profit entities to broadcast the announcements in exchange for monetary payment.

According to Section 399(b) of the Communications Act and the FCC's Rules, noncommercial educational stations are not permitted to broadcast advertisements, which are defined as program material that is intended to promote a service, facility, or product of a for-profit entity in exchange for remuneration. Noncommercial stations may air acknowledgments for entities that contribute funds to the station, but the acknowledgments must be made for identification purposes only. Specifically, such acknowledgments should not promote a contributor's products or services and may not contain comparative or qualitative statements, price information, calls to action, or inducements to buy or sell. In addition to these rules, the

FCC requires that licensees exercise "good faith" judgment in airing material that serves only to identify a station contributor, rather than to promote that contributor.

In this case, the FCC determined that the materials aired were prohibited advertisements because they favorably distinguished the contributors from their competitors, described the contributors with comparative or qualitative references, and included statements intended to entice customers to visit the contributors' businesses. As a result, the FCC proposed a \$12,500 fine in June 2010.

In response, the licensee argued that the FCC should reduce or cancel the fine because (1) the announcements complied with the FCC's Rules and "good faith" precedent, (2) the announcements did not contain a "call to action," and (3) the FCC had not previously prohibited the language used in the announcements. The licensee also claimed that the investigation of the station was improper because the FCC had previously indicated it would not monitor stations for underwriting violations, but would respond solely to complaints.

The FCC refused to cancel or reduce the fine, finding that both the fine and the investigation were warranted given the licensee's violations. In its Order, the FCC defended its determination that the materials aired by the station were promotional advertisements because they contained comparative phrasing, qualitative statements, and aimed to encourage the audience to purchase the goods or services of the for-profit entities. In addition, the FCC rejected the notion that the investigation was in any way improper, noting that the FCC has broad authority to investigate the entities it regulates, including through field inspections.

Here, as in other underwriting cases, the FCC's decision to issue a fine came down to a necessarily subjective interpretation of language—is a given statement promotional in nature or does it merely identify a source of funding? The FCC has acknowledged that it is sometimes difficult to distinguish between the two, hence the requirement that licensees exercise "good faith" judgment in airing underwriting announcements. Noncommercial educational stations must therefore carefully review the content of their on-air announcements to ensure the language is not unduly promotional in order to avoid a fate similar to the licensee in this case.

### FCC Ups the Ante (Again) for Public Inspection File Violations

Recently, Pillsbury has written about a trend toward \$10,000 fines for all public inspection file violations. This month, the FCC not only issued \$10,000 forfeitures against stations with public inspection file violations, but also halved the eight-year license terms sought in the stations' license renewal applications.

When the licensee of a noncommercial FM station in Maryland and the licensee of a commercial AM and FM station in Virginia filed license renewal applications for their stations, they disclosed that each station's public inspection file was missing all 32 of the quarterly issues/programs lists required to be in the public file under Sections 73.3526 and 73.3527 of the Commission's Rules. In separate Notices of Apparent Liability for Forfeiture, the FCC fined the Virginia licensee \$20,000 (\$10,000 for each of its stations) and the noncommercial licensee \$10,000 for the violations.

In considering the stations' license renewal applications, the FCC granted each a shortened four year license term, requiring each station to repeat the license renewal process in four years rather than in the normal eight year time frame. It found that the licensees' failure to include any issues/programs lists in the stations' public files over their eight year license term fell "far short of the standard of compliance...that would warrant routine license renewal."

Both decisions noted that the quarterly issues/programs lists are evidence that the licensee is serving the needs and interests of its communities, and that meeting the public file requirements is essential to fulfilling a licensee's public service obligations. "The Commission's public information file rule...safeguards the public's ability to assess the station's service and to meaningfully participate in the station's renewal process, and ensure the station's accessibility to and nexus with its community, to serve and respond to community programming needs." According to the FCC, the limited renewal term would provide the Commission with an opportunity to review the stations' compliance in the coming years and take corrective action as necessary.

The FCC also indicated that its decision to grant the license renewal applications at all, without designating them for an evidentiary hearing, relied heavily on the licensees' pledges in their license renewal applications to implement procedures to ensure that the issues/programs lists are timely placed in the stations' public files going forward.

### Unauthorized Operation and Failure to Maintain Main Studio Lead to Fines

A \$21,500 Notice of Apparent Liability for Forfeiture was recently issued against the licensee of two radio stations in South Dakota for multiple violations of the FCC's main studio rule, failing to make the stations available for inspection, and operating one of the stations in violation of its authorization.

In May 2011, an agent from the FCC's Enforcement Bureau attempted to inspect the main studio of the licensee's stations with little success. When the agent visited the main studio, the doors were locked and no staff was present. When the agent called the phone numbers associated with the licensee, no one answered and there was no voicemail. Oddly enough, a former employee of the licensee stopped by the main studio while the agent was present and informed the agent that no staff had been present at the main studio for over a year.

Over the next several days, the agent attempted to inspect the station two more times and again found the main studio locked and unoccupied. On the day of the agent's last attempt to inspect the main studio, an attorney of the licensee called the agent and informed him that the licensee had filed a request for Special Temporary Authority ("STA") to take the stations off the air and that the stations had been taken off the air during the period in which the agent had attempted to inspect the stations.

During this same period, the agent also inspected the transmitter facility of one of the stations. The agent found that the station was operating with a circularly polarized FM antenna, and had a horizontally polarized FM antenna laying on the ground. The station's authorization specified use of horizontal polarization only.

The FCC has strict requirements regarding a station's main studio. Section 73.1125(a) of the FCC's Rules requires that stations maintain a main studio with "meaningful management and staff presence." At a minimum, stations must have at least one full-time manager and one staff-level person employed at the main studio. The licensee did not have such staff present during any of the agent's attempted inspections. Even though the station had filed for an STA, *the FCC cautioned that an STA does not eliminate a station's main studio obligations*. In addition, Section 73.1125(e) requires that stations maintain a local or toll free telephone number in the station's community of license, which the licensee failed to do.

The base fine for main studio rule violations is \$7,000. Under Section 73.1225(a) of the FCC's Rules, licensees are also required to make stations available for public inspection by the FCC during regular business hours. The base forfeiture for that violation is also \$7,000.

Finally, Section 73.1350(a) of the FCC's Rules provides that licensees must operate stations in compliance with their authorizations, with the base fine for a violation of this rule being \$5,000. The agent's inspection determined that the station was using an unauthorized antenna, and prior inspections of the transmitter facility revealed that this unauthorized operation had been in place for several years, with the station having been issued a Forfeiture Order in 2003 for unauthorized operations. In assessing the fine, the FCC determined an upward adjustment from the base fine of \$5,000 to \$7,500 was warranted because the violation occurred over the course of several years. That fine, combined with the two \$7,000 fines related to the main studio inspection, resulted in a total fine of \$21,500 for this licensee.

If you have any questions about the content of this publication, please contact the authors below, or the Pillsbury attorney with whom you regularly work.

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