FCC Enforcement Monitor

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Headlines:

- *FCC Proposes $12,000 in Fines for Contest Violations*
- *$20,000 Fine for Unlicensed Operation and Interference*
- *Violations of Sponsorship Identification and Indecency Rules Lead to $15,000 Consent Decree*

Changing Rules and Delay in Conducting Contest Lead to $12,000 in Fines

Late last month, the FCC's Enforcement Bureau issued two essentially identical Notices of Apparent Liability for Forfeiture ("NALs") against two radio station licensees for failure to conduct a contest as advertised. Although the stations have different licensees, one licensee provided programming to the second licensee's station through a time brokerage agreement. The brokering station's response to a letter of inquiry ("LOI") addressed both licensees' actions with regard to the contest. In the subsequent NALs, the FCC's Enforcement Bureau proposed a $4,000 fine against the brokered licensee and an $8,000 fine against the brokering licensee.

In July of 2009, the FCC received a complaint that several radio stations held a weekly contest called "Par 3 Shoot Out" but did not conduct the contest substantially as announced or advertised. Specifically, the complaint maintained that at least one participant did not receive a promised prize of a golf hat and was not entered into a drawing to win a car or other prizes (as was promised in the contest's rules). About four months later, the FCC issued an LOI to the licensee conducting the contest about the claims made in the complaint. In its response to the LOI, the licensee conducting the contest indicated that the contest consisted of two phases. The first was an 18-week, online golf competition where the highest-scoring contestant each week would win a hat from a golf club. Each weekly winner and one write-in contestant would be able to participate in the second phase of the contest, a real golf competition consisting of taking one shot at a three par hole. As was publicized online, the prize for the winner of the second phase was a $350 golf store gift certificate, and if anyone hit a hole-in-one, they would win a Lexus car.

According to the brokering licensee, the first phase of the contest took place between June and November 2008. The contest took place entirely online, and although the second phase was scheduled to begin in November 2008, it was postponed due to inclement weather and ultimately did not occur at all because the

employee who was tasked with running the live golf competition was fired, and the remaining staff never resumed the contest. The brokering licensee further indicated that it forgot about the contest until it received the FCC's LOI, and, after receiving the LOI, the second phase of the contest occurred and was completed by January 2010. The brokering licensee indicated that it had provided additional prizes of a $25 golf store gift card and a catered lunch to each finalist in the second phase given the delay in conducting the contest.

Section 73.1216 of the FCC's Rules requires that a station-sponsored contest be conducted "substantially as announced or advertised" and must fully and accurately disclose the "material terms," including eligibility restrictions, methods of selecting winners, and the extent, nature and value of prizes involved in a contest.

The Enforcement Bureau determined that the contest was not conducted as announced or advertised because the rules were changed during the course of the contest and the contest was not conducted within the promised time frame. The Bureau further found that the licensees failed to fully disclose the material terms of the contest as required by the Commission's rules. According to the Bureau, the on-air announcements broadcast by the stations failed to mention all of the prizes the licensee planned to award and failed to describe any of the procedures regarding how prizes would be awarded or how the winners would be picked. The brokering licensee argued in its response to the LOI that the full rules were included online, which was a better way to make sure that potential contest participants were not confused. However, the Bureau found that while licensees can supplement broadcast announcements with online rules, online announcements are not a substitute for on-air announcements.

The base fine for failure to conduct a contest as announced is $4,000. The Bureau determined that, contrary to the argument presented in response to the LOI, "neither negligence nor inadvertence" due to the overseeing employee's departure "can absolve licensees of liability." The Bureau also said that providing additional prizes to make up for the delay does not overcome the violation of Section 73.1216. Finally, the FCC found that the licensees had failed to disclose the material terms of the contest because the advertisements that were broadcast over the air did not mention certain prizes.

The FCC proposed to impose the base fine amount of $4,000 against the time-brokered station after determining that the licensee had violated Section 73.1216. For the brokering licensee, the FCC proposed an increased fine of $8,000 because of the licensee's "pattern of violative conduct, and because it conducted the Contest over four stations, not one, thus posing harm to a larger audience."

Nine Years of Unauthorized Operation and Interference to Wireless Operator Lead to Large Fine

The FCC recently issued a Forfeiture Order to the former licensee of a Private Land Mobile Radio Service ("PLMRS") station. The Forfeiture Order follows an NAL that the FCC released in July of 2012 proposing a fine of $20,000 for the former licensee of the facility for operating without a license for nine years and causing interference to another wireless service provider.

The former licensee initially received the license for the PLMRS station in April 1997 for a five-year term. Three months before the expiration of the license, the FCC sent the licensee a reminder to renew the license, but the licensee never filed a renewal application. Therefore, the license expired in April of 2002. Nevertheless, the licensee continued operating the station, and on July 31, 2011, filed a request for Special Temporary Authority ("STA") with the Wireless Telecommunications Bureau of the FCC. The licensee stated in the application that it had recently discovered that its license had expired and that it

needed an STA to continue operating the station. The Wireless Bureau granted the STA three days later for a period of six months, until the end of January 2012.

As a result of the STA application, the Wireless Bureau notified the Enforcement Bureau of the unauthorized operation of the PLMRS station. The Enforcement Bureau sent an LOI to the licensee on April 26, 2012. In its response to the LOI, the licensee said that it had received a phone call on July 19, 2011 (twelve days before it filed its STA application), notifying the licensee that its radio communications were "coming through" on another station's frequencies and that its license had expired. It was after receiving this phone call that the licensee filed its STA application.

Section 1.903(a) of the FCC's Rules provides that any apparatus that transmits energy or communications or signals by radio may be used only in accordance with an FCC-granted authorization, and Section 1.949(a) requires the filing of renewal applications "no later than the expiration date of the authorization for which renewal is sought, and no sooner than 90 days prior to expiration." The base fine amount is $10,000 for operation of a station without FCC authority and $3,000 for failure to file required forms or information. Although the base fine for this licensee's violations would have been $13,000, the FCC determined in the underlying NAL that "a significant upward adjustment" of the base amount was necessary because the licensee operated without authorization for almost twice the length of the initial license term and that "lack of knowledge or erroneous belief does not warrant a downward adjustment of the forfeiture."

On August 27, 2012, the licensee replied to the NAL in an effort to reduce or cancel the proposed $20,000 fine. The licensee acknowledged its violations of the FCC's rule, but argued that "its violations were minor because the unauthorized operation did not involve a large manufacturing facility over a wide area with numerous devices" and that it acted promptly to come into compliance with the FCC's rules after receiving the phone call about causing interference. The licensee also argued that the $20,000 proposed fine would have a substantial negative financial impact on the licensee's business. However, the FCC declined to reduce the fine, indicating that the lengthy period of unauthorized operation and the creation of interference did "not constitute a minor violation." The FCC also analyzed the licensee's financial condition and determined that a $20,000 was not unduly burdensome.

California Radio Station Licensee Agrees to Pay $15,000 Under Terms of Consent Decree for Sponsorship I.D. and Indecency Violations

The FCC issued an order adopting a Consent Decree that terminated its investigation into a California licensee's violations of the sponsorship identification and indecency rules. Under the terms of the Consent Decree, the licensee agreed to make a $15,000 voluntary contribution to the United States Treasury and, if it does not sell the relevant station, to enact a compliance plan to avoid future violations of the sponsorship identification and indecency rules.

The FCC's sponsorship identification rule requires broadcasters to air announcements that identify when they are being paid to broadcast material and who is paying them, and are based on the idea that listeners and viewers have the right to know who is trying to persuade them. The indecency rule, Section 73.3999 of the FCC's Rules, forbids the broadcast of obscene material at any time and restricts the broadcast of indecent material between 6:00 a.m. and 10:00 p.m., primarily to protect children from being exposed to inappropriate content.

In this case, the FCC received a complaint alleging that on April 4, 2009, the licensee's AM station broadcast a call-in program without disclosing that the host had paid the station to appear and that the host used inappropriate language that violated the indecency laws. On April 29, 2013, the licensee filed an

assignment application to assign the station's license to a non-profit broadcaster. The FCC issued an LOI to the licensee on July 22, 2013 about the allegation raised in the 2009 complaint. The licensee responded to the LOI by providing a full recording of the April 4, 2009 broadcast, noting that he program was canceled in March 2012, and arguing that the broadcast had not violated the indecency and sponsorship identification laws.

The FCC disagreed, and the parties entered into a Consent Decree in which the licensee agreed to make a voluntary contribution of $15,000 to the United States Treasury. The FCC has not yet approved the application to assign the license of the station. If the FCC does grant the application, the Consent Decree requires that the licensee notify the Chief of the Investigations and Hearings Division of the Enforcement Bureau within 90 calendar days of the public notice of the grant as to whether or not the sale is actually consummated.

If the licensee does not consummate the sale, the Consent Decree requires that the licensee develop and implement a compliance plan and file periodic compliance reports with the FCC for a period of 3 years. The compliance plan would include creating operating procedures to help ensure compliance with the sponsorship identification and indecency rules, drafting and distributing a compliance manual to employees, implementing a compliance training program (which must include a hotline for employees to call the compliance officer, adding contractual clauses requiring employees to comply with the indecency and sponsorship identification rules to agreements with covered employees, and committing to enforce high standards to ensure compliance with the aforementioned laws). In addition, the licensee would need to educate prospective sponsors about the rules, and file regular compliance reports with the FCC for the next three years.

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

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