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## FCC Enforcement Monitor

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### *Headlines:*

- *Bad Legal Advice Leads to Admonishment for Public File Violations*
  - *\$10,000 Fine for Tower Violation*
  - *Missing Emergency Alert System Equipment Results in \$6,000 Fine*
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### **Licensee's Poor Financial Condition and Reliance on Bad Legal Advice Fend Off Fines**

Earlier this month, the FCC's Enforcement Bureau issued an order against the former licensee of a Texas radio station admonishing the licensee but declining to impose \$40,000 in previously proposed fines relating to public inspection file violations.

In December of 2010, agents from the Enforcement Bureau's local office reviewed the station's public inspection file and determined that, among other things, the file did not contain any quarterly issues-programs lists. In response, the FCC issued a Notice of Apparent Liability for Forfeiture ("NAL"), and ultimately a Forfeiture Order, imposing a fine of \$25,000, which the licensee subsequently paid.

After the original NAL was issued, the station hired an independent consultant to assist it in ensuring that the station's public inspection file was complete. In August of 2011, the licensee submitted a statement to the FCC in which it certified that all of the required documents had been placed in the station's public inspection file. However, field agents visited the station again in October of 2011, and found that the public inspection file still did not contain any issues-programs lists. In response, the FCC issued two more NALs in June of 2012 (the "2012 NALs") for the still-incomplete public inspection file and for the false certification submitted in response to the original NAL. The 2012 NALs proposed a \$25,000 fine for providing false information to the FCC and a \$15,000 fine for the still-missing issues-programs lists.

In this month's order, the FCC analyzed the now-former licensee's claim that it had engaged an independent consultant to assist it in responding to the original NAL and that it had subsequently placed documentation regarding issues-programs in its public inspection file. The FCC noted that the outside consultant's advice that placing copies of the station's daily program logs in the file would be adequate to meet the requirement was erroneous. However, since the licensee had sought to fix the problem by hiring a consultant and had relied on the consultant's advice, the FCC concluded that the licensee had not

negligently provided incorrect information to the Enforcement Bureau, and therefore the FCC did not impose the originally-proposed \$25,000 fine for false certification.

In contrast, the FCC concluded that the former licensee had indeed willfully violated Section 73.3526 of the FCC's Rules by not including issues-program lists in its public inspection file. The former licensee had, however, submitted documentation of its inability to pay and asked that it not be required to pay the proposed \$15,000 fine. The FCC agreed that the former licensee had demonstrated its inability to pay, and therefore declined to impose the \$15,000 fine.

In doing so, the FCC also noted that while “[r]eliance on inaccurate legal advice will not absolve a licensee of responsibility for a violation, [it] can serve as evidence that the licensee made an effort to assess its obligations, that its assessment was reasonable, if erroneous, and was made in good faith.” In light of all the facts, the FCC elected to formally admonish the former licensee, and warned that, should the former licensee later acquire broadcast licenses, it could face substantial monetary penalties, regardless of its ability to pay, for future rule violations.

### **Unpainted Antenna Structure Leads to \$10,000 Fine**

A regional director of the FCC's Enforcement Bureau issued an NAL against the owner of a tower in New York for failing to clean or repaint the tower and proposed a fine of \$10,000.

The tower was 97.5 meters tall, and under the terms of its Antenna Structure Registration (“ASR”), was required to meet painting and lighting specifications that required the tower to be painted and display red obstruction lighting at night. However, in mid-July of 2013, when an agent from the FCC's Philadelphia Office inspected the tower, the agent noticed that the paint on the antenna structure was faded and flaking and that the “structure had a dual lighting system consisting of a white medium intensity strobe light at the top level for daytime visibility and red obstruction lights at the mid-level and top level for nighttime visibility.” On the day of the agent's inspection, the white medium intensity obstruction lighting was not functioning.

The agent spoke to an employee of the company maintaining the tower and was told that the white obstruction lighting had been installed and used in lieu of the required painting for about ten years. Later in July of 2013, the FCC issued a Notice of Violation to the owner of the antenna structure. In response, the owner asserted that the white obstruction lighting outage was fixed three days after the agent's inspection, a remote monitoring system was installed, and an application was filed with the FAA requesting permission to use the daytime lighting in lieu of painting the tower. In May of this year, the owner notified the FCC that the FAA had approved a dual lighting system for the tower.

Section 303(q) of the Communications Act of 1934 (the “Act”) requires “that antenna structure owners must maintain the painting and lighting of antenna structures as required by the Commission.” In addition, Section 17.50 of the FCC's Rules requires that “Antenna structures requiring painting under this part shall be cleaned or repainted as often as necessary to maintain good visibility.” Since the tower had not been painted for at least 10 years, the FCC concluded that the tower owner had willfully and repeatedly violated Section 303(q) of the Act and Section 17.50 of the FCC's Rules.

The base fine for failing to comply with antenna structure marking and/or lighting requirements is \$10,000. Based on the circumstances of the violation, the FCC concluded that the base fine was appropriate, and assessed a fine of \$10,000.

## Pennsylvania Radio Station Lacking Emergency Alert System Equipment Receives Fine

The FCC recently issued a Forfeiture Order against a Pennsylvania licensee whose radio station did not have Emergency Alert System (“EAS”) equipment installed at its main studio. In November of 2009, a local agent from the FCC’s Enforcement Bureau inspected the station’s main studio and determined that the station did not have any EAS equipment. The station’s engineer confirmed that the EAS equipment was missing. However, the licensee owned two other co-located stations that had functional EAS equipment at the studio site. Although the station engineer said that an EAS test for the station in question could be conducted by using the equipment from the other two stations, the station had never conducted an EAS test.

In January of 2011, the FCC issued an NAL proposing a \$10,000 fine for violating Section 11.35 of the FCC’s Rules. The EAS violations lasted from 2006 until February 2010. The licensee replied to the NAL in March of 2011, arguing that the NAL should be canceled because: (1) the NAL had not been issued within the statute of limitations, (2) the facts in the NAL were insufficient to support finding a violation of Section 11.35, and (3) the FCC had not taken into account the licensee’s history of compliance with the FCC’s rules and the steps the licensee had taken before the 2009 inspection to obtain EAS equipment.

The Forfeiture Order addressed the licensee’s objections to the NAL in turn. First, the FCC rejected the statute of limitations argument. Section 503(b)(6) of the Act permits the FCC to issue an NAL if “(1) the violation charged did not occur more than one year prior to the date of issuance of the [NAL] or (2) the violation charged did not occur prior to the date of commencement of the current license term.” In this case, the EAS violation did not occur prior to the date of commencement of the current license term because the license term began in August of 2006, and the violation occurred in November of 2009. The FCC also rejected the licensee’s argument that the facts did not support finding a violation of Section 11.35 of the FCC’s Rules, as the station was not connected to the EAS equipment for the co-located and co-owned stations and an EAS test had never been conducted on the station. Although the Enforcement Bureau did not cancel the proposed fine, after acknowledging that the licensee had a history of compliance with the FCC’s rules and had contracted to obtain EAS equipment before the 2009 inspection, the Forfeiture Order lowered the proposed fine from \$10,000 to \$6,000.

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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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