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FCC Enforcement Monitor July 2018

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HEADLINES

Pillsbury's communications lawyers have published FCC Enforcement Monitor monthly since 1999 to inform our clients of notable FCC enforcement actions against FCC license holders and others. This month's issue includes:

- *Alaskan Licensee Faces Fines Over FM Station Silences*
- *Enforcement Bureau Issues Consent Decrees for LED Billboard Violations*
- *Tower Owner Hit for Unlit Structure*

Cold Justice: Media Bureau Responds to Alaska Licensee's Applications With Multiple Fines

The FCC's Media Bureau issued two Notices of Apparent Liability ("NAL") to an Alaskan licensee for repeated unauthorized silences and reduced power operations on its FM station and FM translator stations. At the same time, the Media Bureau found an assignment application for one of the translators to be defective, and renewed the FM station's license for only an abbreviated two-year term.

The FCC sets minimum operating schedule requirements for broadcast stations, and requires a station to transmit according to the "modes and power" specified by its license. A station that expects to remain off-air for more than 30 days must request permission from the FCC. However, Section 312(g) of the Communications Act of 1934 ("Act"), provides that a station's license automatically expires if the station "fails to transmit broadcast signals for any consecutive 12-month period."

In this case, the licensee originally applied for renewal of an FM license and three FM translator licenses in 2013. The licensee also filed an assignment application to sell one of the translators up for renewal.

Several months later, another Alaskan broadcaster filed informal objections against all of the applications, alleging, among other things, that: (1) the applicant was delinquent on a debt from a previous enforcement action; (2) the applicant had failed to pay application fees for the translator license renewal applications; (3) all of the stations had been operating at low power or were off-air for extended periods of time (some for as long as 12 consecutive months); and (4) the assignment application was defective. The objecting broadcaster also claimed the applicant lacked the character qualifications to hold a license.

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The Media Bureau quickly dismissed various other claims made by the objecting broadcaster, including that (1) the licensee had not complied with the Emergency Alert System rules; (2) the licensee had violated the main studio rule; (3) the licensee had engaged in an unauthorized transfer of control; and (4) the proposed assignee did not actually exist.

In sorting out the remaining objections, the Media Bureau first determined that the applicant was not delinquent in its payments to the FCC. Though the licensee had an unpaid Notice of Apparent Liability for Forfeiture from 2009, a licensee is not indebted to the FCC until (1) the fine has been partially paid, or (2) a court has ordered payment. According to the FCC, the forfeiture never became payable because the license at the heart of the enforcement action had been cancelled shortly after issuance of the NAL and the Media Bureau therefore never issued a Forfeiture Order.

The Media Bureau did, however, find that the licensee had failed to pay license renewal application fees for the translator stations. Though the applicant claimed that the translators in question were noncommercial educational broadcast stations and thus exempt from the fee, the Media Bureau determined that the stations being retransmitted by the translators were commercial stations at the time of filing, and thus required a fee. The Media Bureau also dismissed the assignment application, finding it procedurally defective because a single individual signed for both the assignor and assignee, in contravention of the FCC's Rules. Finally, the Media Bureau rejected the character claims, determining that the objecting licensee had failed to make a *prima facie* case for its claims of false certifications and false statements to the FCC.

Regarding the issue of whether the stations were silent or operated at variance from their licenses, the Media Bureau found that all of the stations were repeatedly silent without authorization for extended periods of time. Although several of these silent periods lasted 364 days, none of the stations remained silent for the continuous 12-month period required for automatic expiration. The Media Bureau did, however, find that the FM station had operated at reduced power for much of the most recent license period and beyond without authorization to do so.

Section 309(k) of the Act provides several criteria the FCC must consider when reviewing license renewal applications. The FCC will grant such an application if: (1) "the station has served the public interest, convenience, and necessity;" (2) the licensee has not committed any serious violations of the Act or the FCC's Rules; and (3) the licensee has not committed any other violations of the Act or the FCC's Rules that, taken together, would indicate a pattern of abuse.

Though the Media Bureau granted all of the translator license renewal applications, it proposed a $10,000 fine for discontinuing operations on the translator stations on five different occasions, a $20,000 fine for the FM station's operation at reduced power without authorization, and mandated that the licensee pay the translator stations' missing application fees along with a 25% late payment penalty.

The Media Bureau proceeded to note that the licensee's failure to seek or maintain authorization for many of the FM station's silent and reduced power periods constituted a "pattern of abuse" of the FCC's Rules and that the FM station's operational record failed to serve the "public interest, convenience, and necessity" during the most recent license term. As a result, the Media Bureau granted a short-term renewal of the FM station's license, providing only a two-year renewal rather than the standard eight year license term.

LED Astray: FCC Settles Multiple Investigations into Noncompliant Digital Billboards

The FCC entered into four separate consent decrees with LED sign manufacturers and marketers in the course of a single week after investigating whether the companies violated its equipment authorization rules.

Section 302(b) of the Communications Act restricts the manufacture, import, sale, or shipment of devices capable of **causing harmful interference to radio communications**. To this end, the FCC regulates devices that emit radio frequency energy ("RF device"), including those that unintentionally generate signals that can interfere with other spectrum users. RF devices must adhere to strict technical standards and various labeling and marketing requirements.

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Under Section 2.803 of the FCC's Rules, an RF device must demonstrate compliance with the FCC's technical standards by undergoing an equipment authorization procedure, and Section 2.955 requires the device's responsible party (usually the manufacturer or marketer) to retain testing and inspection records. Part 15 of the FCC's Rules sets technical standards and requires the responsible party to properly label and identify each device and include user instructions.

Each of the investigations was strikingly similar. Responding to complaints from the public, the FCC issued a Letter of Inquiry ("LOI") to each company in July 2017, seeking information relating to the marketing of LED signs and billboards in the United States. LED signs are deemed "unintentional radiators" because powering their semiconductor material can cause harmful interfere with radio communications like **cellular networks**.

After receiving the LOI, each company began the process of bringing its signs into compliance. By September 2017, all but one of the sign companies achieved full compliance, with a China-based company ultimately coming into full compliance in June 2018.

Three out of the four sign companies admitted failing to: (1) obtain equipment authorization prior to marketing its signs; (2) retain test records; and (3) properly label the equipment and provide user instructions. The fourth company only admitted to violating the equipment labeling and user instruction rules.

According to the terms of the consent decrees, in addition to admitting liability, each party agreed to (1) institute a compliance plan that includes a compliance officer and regular reporting, and (2) pay a civil penalty to the U.S. Treasury. The penalties ranged from $14,000 to $43,000 per party.

The Dark Tower: FCC Investigates Tower Owner for Lighting Outage

The Enforcement Bureau issued a Notice of Violation ("NOV") against the owner of a Mississippi tower after the structure was observed unlit on consecutive nights.

The FCC's Part 17 Rules require a tower owner to comply with various paint and lighting specifications of the Federal Aviation Administration ("FAA"). Tower owners must inform the FAA of any "improper functioning" not corrected within 30 minutes. Tower marking and lighting is a vital component of air traffic safety, and noncompliant structures pose serious hazards to air navigation.

The Mississippi tower at issue is nearly 250 feet tall and is required to have alternating orange and white painted bands, red obstruction lights, and a flashing red beacon at the top. In March 2018, an Enforcement Bureau agent observed the tower on a "dark, cloudy" night and found the tower's top beacon and side lights were completely extinguished. When the agent found the tower unlit the following night, the agent contacted the FAA and determined that the lighting issue had not previously been reported.

In response, the FCC subsequently issued the NOV requiring the tower owner to respond within twenty days. Specifically, the owner must explain to the FCC's satisfaction, under penalty of perjury: (1) the facts and circumstances surrounding the violations; (2) a description of the owner's corrective actions; and (3) a timeline for completion of these actions. The FCC will then consider that information as it contemplates what enforcement action it may take against the owner. The FCC did not indicate in the NOV whether the tower lighting has been fixed yet. If not, that will likely increase the severity of any sanctions issued by the FCC for the lighting failure.

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