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FCC Enforcement Monitor June 2019

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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:

- *Investigation Into Undisclosed Radio Station Owner With a History of Felonies Leads to Hearing Designation Order*
- *FCC Settles With Alaskan Broadcaster After Disastrous Station Inspection*
- *FCC Reinstates Licenses for Tennessee and Alabama Radio Stations, Then Immediately Threatens to Revoke Them*

Troubled Past: Alleged Misrepresentations Lead FCC to Designate Applications for Hearing

In a recent Hearing Designation Order ("HDO"), the FCC's Media Bureau raised serious concerns over the control of several midwestern AM stations.

The ordeal began when a father sought to help his adult son get a start in the radio business. According to the HDO, the father established a trust in 2006 for the purpose of acquiring radio station assets, and appointed his son as the sole beneficiary and a family friend/local attorney as the sole trustee. This trust was formed orally and not put in writing until 2012. For the next several years, the father provided the trust with millions of dollars to acquire AM stations in Missouri and Illinois. Unbeknownst to the FCC, however, was the father's felonious past, having been convicted for obstruction of justice and bank fraud. The FCC's assignment and transfer application forms specifically ask whether any parties to the application have been convicted of felonies. The FCC's view is that such behavior casts doubt on whether that person's involvement with a station would be in the public interest.

Shortly after the trust's creation, the son supposedly formed a separate company which, according to the trust, managed all of the stations' operations, including employment and finances. According to the trust, this agreement, like the 2006 trust agreement, was an oral agreement, and never reduced to writing.

Suspicions regarding control over the trust arose in 2012, when a local resident and listener filed a Petition to Deny the stations' license renewal applications. He had sought a job with the stations and was directed to speak to the father. This raised red flags for the listener, who subsequently began perusing the stations' Public Inspection Files. In them, he found indications that the father was running the stations' day-to-day operations, such as communications from the trust's counsel to the father regarding basic station operations and business matters.

To complicate matters further, the son (and sole beneficiary of the trust) passed away in 2015, leaving the trust's assets, including the station licenses, to his father. According to the trust, however, the father declined them and a year later assigned the beneficial interests in the trust to his girlfriend. In the meantime, the trust entered into a programming and marketing agreement with another broadcaster.

Once the girlfriend was made the beneficiary, she and the family friend/trustee entered into an agreement to assign the trust's assets, including the station licenses, to a new trust, and filed assignment of license applications to seek FCC approval for that assignment. The petitioner filed another Petition to Deny the assignment applications, claiming that the assignments were a "subterfuge" to enable the father to continue to control the stations.

In its review of the multiple pending applications, the FCC determined that substantial and material questions were raised regarding whether: (1) an undisclosed transfer of control to the father took place either before or after the son's death; (2) the father is an undisclosed real party-in-interest to the applications; (3) the original trust was used to shield the father or other trust beneficiaries from the FCC's ownership attribution requirements; and (4) the trust engaged in misrepresentations and/or a lack of candor in its applications and other communications with the FCC.

Further complicating the investigation, the FCC noted that the trust had failed to provide significant documentary evidence for many of its claims, with the trust blaming this in part on the destruction of "a great majority of [the stations'] business records" that took place shortly after the son's death.

To resolve these questions and to determine whether the applications should be granted, the applications have been designated for a hearing before an Administrative Law Judge. It is not uncommon for such hearing proceedings to take years to be resolved.

Seward's Folly: Alaskan FM Station Settles With FCC Over 6-Year-Old Violations

The FCC recently entered into a Consent Decree involving numerous rule violations by an FM station licensed to Seward, Alaska, including infractions relating to the now-repealed Main Studio rule, and basic station monitoring and Emergency Alert System requirements. According to the FCC, the licensee also failed to respond to multiple Notices of Violation ("NOVs") previously issued to the station.

Six years ago (one Notice of Apparent Liability ("NAL"), multiple NOVs, and a Warning Letter ago), a regional Enforcement Bureau agent inspected the Seward station's main studio and transmission site. Upon arrival, the agent discovered that the studio was understaffed and in violation of the now-repealed Main Studio rule. Instead of finding a full-time manager and full-time staff person, as was previously required under Section 73.1125(a) of the FCC's Rules, the agent was greeted by a single volunteer.

To make matters worse, the volunteer was unable to identify the station's chief operator or anyone acting in that capacity. Section 73.1870 of the FCC's Rules requires FM licensees to designate a chief operator, or a temporary one if the chief operator is unavailable. The FCC requires this designation to be in writing and kept with the station's files. This written designation, along with various other required logs, were nowhere to be found during the inspection. The station also failed to post its license at the studio (another FCC rule that has since been repealed).

The agent noticed that the station had not been monitoring its own operations. A broadcast station must constantly monitor its compliance with the FCC's technical rules and the parameters of its license. When such monitoring is not performed via live supervision, the station must either be monitored by an automatic system, a remote control facility, or a hybrid of the two. The agent determined that the station was only accessible for live monitoring six days of the week and during limited hours, and had no automated or remote control monitoring in place for the remaining time.

Further, in what could be seen as a warning to broadcasters ahead of **August's nationwide Emergency Alert System test**, the inspection revealed multiple EAS violations. Broadcasters are required to, among other things, monitor other stations and Federal sources and rebroadcast emergency alert messages received. Not only did the Alaska station not have the necessary monitoring and transmission equipment installed, it was not monitoring a sufficient number of stations, nor was it even set to broadcast the correct messages.

The Enforcement Bureau subsequently issued NOVs and a Warning Letter to the station demanding information about the violations and any remedial actions the station was taking, but received no response. In a 2017 NAL, the FCC proposed a fine of $66,000 for the various operational violations and the station's failure to respond to its previous notices.

It was only after it received the NAL that the station reached out to the FCC. In its response to the NAL, the licensee did not contest any of the charges, but stated that it had addressed the violations after the agent's visit. The station also sought to have the proposed fine reduced or cancelled due to its inability to pay. According to information the station submitted to the FCC, the station had no income, liquid assets, real estate, or investments, and was primarily supported by financial and equipment donations. In the Consent Decree, the FCC noted that the station is the only full-service radio station licensed to serve the area.

As a result, the FCC and the station agreed to resolve the investigation by having the licensee enter into a Consent Decree. According to the terms of the Consent Decree, the station must: (1) admit liability for the myriad violations raised in the NAL and subsequent warnings; (2) pay a $2,000 penalty; and (3) implement a multiyear compliance plan.

Hi License, Bye License: FCC Reverses License Cancellations, For Now

In a case of regulatory whiplash, earlier this month the FCC's Media Bureau reinstated two stations' licenses that were earlier cancelled due to nonpayment of delinquent regulatory fees, only to then initiate proceedings to potentially revoke the licenses for failure to pay those same debts.

The Communications Act of 1934, as amended, requires the FCC to "assess and collect regulatory fees" to recover the costs of certain regulatory activities. The FCC assesses a 25% penalty for late or unpaid fees. In addition, the "Red Light" rules governing the FCC prohibit it from processing applications when the applicant is delinquent on debts owed to the FCC.

In 2017, the FCC dismissed license renewal applications filed by the licensee of a Tennessee AM station and the licensee of an Alabama AM station. At the same time, the FCC cancelled the stations' licenses and deleted their call signs from the FCC database. In response, each of the licensees filed a Petition for Reconsideration seeking reconsideration of the FCC's actions. In separate letters published this month, the Media Bureau granted in part both petitions.

Each licensee had a different explanation for its failure to pay. The Alabama licensee blamed its lack of payment on a multi-decade dispute with the Internal Revenue Service over a large refund it claims it is owed, that upon payment, would immediately be used to cover the licensee's FCC debts. The FCC dismissed this argument by stating that the licensee failed to (1) demonstrate a material error in the license's cancellation, or (2) raise any changed circumstances or new facts in time to challenge the cancellation. The FCC also noted that the licensee had earlier entered into a repayment plan for its debt, but had stopped payment after only eight installments.

The delinquent Tennessee licensee had also entered into a repayment plan, but said it was forced to stop payment due to "economic conditions." The licensee further claimed that it never received a notification from the FCC regarding its delinquency, possibly due to the death of its attorney around the time the FCC sent the notification. According to the licensee, it should not have had its license cancelled because it had entered into a new payment plan, and as a minority-owned broadcaster, the cancellation was not in the public interest. In response, the FCC stated that the licensee had defaulted on its most recent payment plan. The FCC also dismissed the licensee's public interest argument, concluding that such an argument was not timely and should have been made in a previous request for a waiver, reduction, or deferral of regulatory fees.

Despite rejecting both applicants' arguments and reiterating its authority to dismiss the renewal applications, the FCC determined that its license cancellations were premature. Under Section 307(c)(3) of the Communications Act, filing a license renewal application prolongs the station's license, including through "any hearing and final decision on such an application and the disposition of any petition for rehearing." As a result, the licenses should have remained in effect until the FCC reached a final decision on each of the Petitions for Reconsideration. The FCC therefore provisionally reinstated each licensee's renewal application to "pending status."

On the same day that the FCC reinstated the licenses, however, it issued an Order to Pay or to Show Cause to each of the licensees, ordering them to either pay their delinquent regulatory fees, or show that the fees are inapplicable or should be waived or deferred. The orders note that failure to pay or to show cause may result in license revocation.