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FCC Enforcement Monitor August 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:

- *Big-4 Network, Among Others, Settles With FCC Over Emergency Alert Tone Violations*
- *Despite Self-Disclosure, Sponsorship ID Violations Land $233,000 Proposed Fine*
- *Topeka TV Licensee Enters Into Consent Decree Over Late-Filed KidVid Reports*

False Alarm: FCC Enters Into Multiple Consent Decrees Over Emergency Alert Tone Violations

In a single day last week, the FCC announced four separate Consent Decrees in response to unauthorized uses of the Emergency Alert System ("EAS") tone across various media outlets. The parent companies of a Big-4 broadcast network and two cable channels, as well as the licensee of two southern California FM stations, each agreed to significant payments to settle investigations into violations of the FCC's EAS rules. According to the Consent Decrees, unauthorized emergency tones have reached hundreds of millions of Americans in the past two years alone.

The Emergency Alert System is a nationwide warning system operated by the FCC and the Federal Emergency Management Agency that allows authorized public agencies to alert the public about urgent situations, including natural disasters and other incidents that require immediate attention. Once the system is activated, television and radio broadcasters, cable television operators, and other EAS "participants" begin transmitting emergency messages with distinct attention tones. These tones consist of coded signals that are embedded with information about the emergency and are capable of activating emergency equipment. Wireless Emergency Alerts ("WEA"), which deliver messages to the public via mobile phones and other wireless devices, also use attention signals.

Emergency tones may not be transmitted except in cases of: (1) actual emergencies; (2) official tests of the emergency system; and (3) authorized public service announcements. In an accompanying Enforcement Advisory published on the same day as the Consent Decrees, the FCC's Enforcement Bureau noted that wrongful use of the tones can result in false activations of the EAS, as well as "alert fatigue," in which "the public becomes desensitized to the alerts, leading people to ignore potentially life-saving warnings and information."

For the Big-4 network, it all started with a joke. Around the time of last year's nationwide EAS test, a late-night network talk show parodied the test in a sketch that incorporated emergency tones. According to the Consent Decree, the network's programming reaches almost all US television households through hundreds of local television affiliates, as well as through the network's owned and operated stations. Shortly after the episode aired, the company removed the offending portions of

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the program from its website and other streaming sites and did not rebroadcast the episode. Despite these remedial actions, the damage was already done; in response to the Enforcement Bureau's investigation, the network's parent company agreed to pay a $395,000 "civil penalty."

The parent companies of two major cable channels entered into similar agreements. In one instance from this past year, an episode of a popular show set in a zombie-infested post-apocalyptic world used simulated EAS tones on multiple occasions over the course of an hour. That episode was transmitted on eight separate occasions over a two-month period. According to the Consent Decree, within weeks of the episode's debut, the Enforcement Bureau reached out to the network regarding the unauthorized uses of the tone and, after a brief investigation, the network's parent company agreed to pay $104,000 to resolve the matter.

The FCC also came to a pricey agreement with the owner of an animal-themed cable channel. The Enforcement Bureau began its investigation after receiving a complaint about an episode of a reality TV series about Texas game wardens. Segments of the episode included real-life footage of emergency responses to Hurricane Harvey, which battered southeastern Texas in 2017. The footage included actual WEA tones that were transmitted during the storm. As a result, the company agreed to pay $68,000 to resolve that investigation.

Finally, the Enforcement Bureau also went after the licensee of a prominent Los Angeles hip hop FM radio station and a nearby station on which the programming was simulcast. The licensee agreed to pay $67,000 after the stations played a simulation of an emergency tone 139 times in the fall of 2017. The tone was one of several sound effects used in a promotional bed to introduce the station's weather reports.

None of these uses of an emergency tone were in response to an emergency or authorized by any governmental entity. In addition to the payments, as a part of the respective Consent Decrees, each party agreed to admit liability and to implement a three-year compliance plan.

Despite Self-Disclosure, Radio Group's Sponsorship ID Woes Continue With $233,000 Proposed Fine

In a contentious Notice of Apparent Liability ("NAL"), the FCC voted to propose a $233,000 fine for a large radio group for repeated violations of the FCC's sponsorship identification rule and for violating a 2016 Consent Decree between the company and the Enforcement Bureau by failing to promptly notify the FCC of the violations.

The FCC's sponsorship ID rule requires broadcast stations to identify sponsored content and to identify the sponsor on air whenever any "money, service, or other valuable consideration" is paid or promised to the station for the broadcast. According to the FCC, failing to identify sponsors misleads the public into believing that material was aired independently by the broadcaster rather than because a party paid for its airing.

The NAL's roots go back several years. In 2011, the licensee of a New Hampshire FM station aired a series of ads promoting a proposed local utility project without announcing the name of the company that purchased the ads. In total, the Enforcement Bureau determined that the station had violated the sponsorship ID rule in 178 broadcasts over a six-month period. Toward the end of that period, the station was acquired by a group owner of radio stations. The Enforcement Bureau determined at the time that the new owner was liable for all of the violations despite the recent ownership change.

To resolve the matter, the new owner entered into a Consent Decree with the Enforcement Bureau in January 2016. Under the terms of that Decree, the company agreed to, among other things, pay a $504,000 civil penalty and to report to the FCC any future noncompliance with the sponsorship ID rules within 15 calendar days of discovery of a violation. The agreement was set to expire in January 2019.

In January 2018, however, the company disclosed that a sports ad had aired on six of its Michigan radio stations over a dozen times in May 2017 without sufficient sponsorship identification. According to the NAL, the company said that it took immediate steps to prevent further incidents but failed to report the incidents within the 15-day timeframe mandated by the 2016 Consent Decree. In a May 2018 filing, the company disclosed an additional noncompliant ad that had aired several times two weeks prior on one of its Georgia stations.

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According to the NAL, the company violated the sponsorship ID rules a total of 26 times over the past two years and proposed an $8,000 fine for each violation. Though the base amount for a sponsorship ID violation is $4,000, the FCC doubled that amount for each violation, asserting that it was justified by the company's history of violations, particularly considering that the company was still operating under the earlier Consent Decree for similar violations. The FCC then tacked on an additional $25,000 proposed fine for the company's breach of the 2016 Consent Decree by failing to timely report the 2017 noncompliant ads.

While the NAL was approved by a majority of the commissioners, the FCC's newest member, Commissioner Starks, dissented with a blistering statement, alleging that the $25,000 fine in response to the breach of the 2016 Consent Decree is so low as to "undermine the deterrent effect" of future enforcement actions. According to Commissioner Starks, the FCC's supposed lackluster response to the breach "will signal to industry that [the FCC does] not take compliance seriously."

Meanwhile, the company has thirty days from the release of the NAL to either pay the full $233,000, or to file a written statement seeking reduction or cancellation of the proposed fine.

Think of the Children: FCC Settles With Topeka TV Station Over Late-Filed KidVid Reports

The FCC's Media Bureau recently entered into a Consent Decree with the licensee of a Topeka, Kansas television station for the late filing of over three years of Children's Television Programming Reports and failing to report those late filings in its 2014 license renewal application.

Under the FCC's children's educational programming (or "KidVid") rules, TV stations must provide programming that "serve[s] the educational and informational needs of children." Pursuant to KidVid compliance guidelines that were in place at the time of the alleged violations, stations were expected to air an average of at least three hours per week of regularly scheduled children's programming at least 30 minutes in length, and file a Children's Television Programming Report on FCC Form 398 demonstrating their compliance with the guidelines each quarter.

Once filed with the FCC, the reports are uploaded to the station's Public Inspection File, and at the end of each license term, the station must certify in its license renewal application whether it filed the reports in a timely manner.

According to an April 2016 NAL, the Topeka station failed to timely file over a dozen Children's Television Programming Reports between 2011 and 2015. When the station filed its 2014 license renewal application, it also failed to disclose these prior late filings. Unfortunately for the station, such failures are now easy for the FCC to spot, as a simple search of the timestamps on a station's online Public Inspection File documents makes these errors glaringly apparent. To account for the repeated filing violations, as well as the station's failure to report them, the NAL proposed a fine of $15,000.

In its response to the NAL, the station requested that the Media Bureau defer collection of the fine until after the FCC's 2016 television spectrum auction (presumably expecting a successful auction bid, which did not occur). In a June 2016 Forfeiture Order, the Media Bureau rejected the station's deferment request and found the station liable for the full $15,000 fine.

The station responded to the Forfeiture Order with a Petition for Reconsideration, arguing that it could not pay the fine due to financial hardship. This, too, was rejected by the Media Bureau due to the station's failure to "provide convincing evidence as to variances in the returns and the financial statements to warrant a cancellation or reduction of the [fine]."

To put an end to the proceeding, the Media Bureau and the station negotiated a Consent Decree under which the station agreed to pay a $3,000 fine as well as implement and adhere to a one-year compliance plan to prevent future violations of the KidVid rules. Notably absent from the Consent Decree was an admission of guilt by the station, a common feature of such settlements.

As **discussed** in Pillsbury's CommLawCenter blog, the FCC last month approved several changes to its KidVid rules, including more flexible program scheduling options and, possibly to the chagrin of the Topeka station, replacing the quarterly reports with an annual report. While most of the changes will go into effect on September 16, the change from quarterly to annual reports requires approval from the Office of Management and Budget, and therefore will not go into effect until that occurs.

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