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# FCC Enforcement Monitor March 2022

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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:*

- *LPTV Owner Pays $250,000 for Abusing FCC's Licensing Processes*
- *FCC Proposes $32,000 Fine for Radio EEO Violations*
- *Florida Radio Station Receives $20,000 Proposed Fine for Contest Rule Violations*

### Abuse of FCC Licensing Processes Leads to $250,000 Penalty

The FCC entered into a Consent Decree earlier this month with an LPTV broadcaster (the "Company") that held 80 LPTV licenses and more than 120 unbuilt LPTV construction permits, resolving an investigation into whether the Company abused the Commission's licensing processes. The FCC was investigating whether the Company had filed a series of minor modification applications to construct and license temporary facilities with the intent of relocating stations substantial distances from their originally authorized sites to evade FCC restrictions on filing major modification applications.

In response to a Media Bureau inquiry concerning the Company's construction and licensing practices and the operational status of its stations, the Company claimed that each licensed station was constructed in compliance with the parameters set forth in the underlying construction permit. It conceded, however, that it had installed temporary transmission equipment that was later removed, and that the stations were never built to provide permanent television service. The FCC recognized that in some instances, the temporary equipment was installed because pandemic-related supply chain issues made it difficult for the Company to obtain equipment. However, the FCC found that at least 30 stations were constructed with temporary equipment as a way to effectuate a series of repeated, short moves with the ultimate goal of moving the stations a large distance – sometimes over 100 miles from the location listed in the initial construction permit.

Under Section 74.787(b) of the FCC's Rules, any change in an LPTV's antenna location greater than 30 miles, or a move where the proposed protected contour does not overlap some portion of the protected contour of the existing station, is considered a major change requiring the permittee/licensee to file a major modification application. Major modification applications in the LPTV service are currently frozen and may only be filed upon the opening of a filing window. The FCC has held that the filing of any facility application implies that the applicant is "ready, willing, and able" to construct and operate the facility as proposed. When determining whether a permittee has engaged in an abuse of process based on serial minor modification applications, the FCC looks at several factors, including (1) the nature of the broadcast facilities (*i.e.*, temporary construction); (2) the duration of operations; (3) the purpose of the relocations; and (4) any pattern of relocations.

The FCC explained that the Company undertook the series of short moves by: (1) filing an application for minor modification to relocate the station within 30 miles of its licensed site; (2) building temporary facilities upon grant of the minor modification application with no intent to provide permanent service at the new location; (3) filing a license to cover the temporary location and then applying for special temporary authority to go silent once the license was granted; and (4) removing the equipment from the site and filing for a new minor modification to move the station up to 30 miles again. The Company would repeat this process until the station was moved from a rural unserved or underserved area with low population density to a densely populated urban or suburban area.

While the FCC accepted that some stations were built with temporary facilities due to difficulty obtaining equipment, it found that at least 30 stations were constructed with temporary facilities and operated only a short time. The FCC believed the Company lacked intent to use those facilities to provide a permanent television program service to viewers, and that their plan was instead to undertake a pattern of relocating the stations as a way of circumventing the major change rule and the freeze on major modification applications.

In agreeing to the Consent Decree, the Company admitted that its actions violated the FCC's rules and agreed to pay a $250,000 penalty along with implementing a comprehensive compliance program. It also agreed to surrender authorizations for nearly a hundred LPTV stations. Due to delays resulting from the investigation as well as supply chain delays, the FCC agreed to toll the construction permit expiration dates for certain of the Company's other stations for four months, but required that the Company commence operation of all licensed and silent facilities within one year of going silent.

### Radio Stations Receive Proposed Fine of $32,000 for EEO Violations

The FCC proposed a $32,000 fine against the licensee of a number of Georgia radio stations for failing to timely upload an Annual EEO Public File Report to the stations' Public Inspection Files, failing to timely upload the Report to the stations' websites and, based on those failures, failing to analyze its EEO program.

Section 73.2080(c)(6) of the FCC's Rules requires every non-exempt broadcast station to prepare and place an Annual EEO Public File Report in its Public Inspection File and on its website, if it has one. The Annual EEO Public File Report contains information regarding a station employment unit's full-time vacancies during the preceding year, the recruitment sources used to fill those vacancies, the referral source for each of the resulting hires, the total number of interviewees grouped by referral source, and a description of the station's recruitment initiatives not connected to specific vacancies. Separately, Section 73.2080(c)(3) of the FCC's Rules requires a licensee to analyze its EEO recruitment program on an ongoing basis to ensure it is achieving broad outreach to potential applicants.

In a recent license renewal application, the broadcaster disclosed that it had not uploaded its 2018 Annual EEO Public File Report to the stations' Public Inspection Files by the applicable deadline. The Enforcement Bureau issued a Letter of Inquiry in July 2020 and the broadcaster responded, acknowledging that the report was uploaded over nine months late and citing an "administrative change" and loss of a former employee as the reason. Finding that such circumstances do not excuse or nullify a rule violation, the FCC concluded that the licensee violated Section 73.2080(c)(6) of the FCC's Rules in two different ways: (1) by failing to timely upload the report to the Public Inspection Files of the stations, and (2) by failing to timely upload it to the stations' websites. The Commission found that failure to timely upload the report denied the public of the ability to participate in monitoring and providing input on the stations' EEO programs, thereby preventing the stations from analyzing their recruitment program and thus also violating Section 73.2080(c)(3) of the FCC's Rules.

Section 503(b)(2)(A) of the Communications Act allows the FCC to assess a fine of up to $55,052 per day of a continuing violation, up to a maximum of $550,531 for a single act. When determining the amount of a fine, the FCC considers the "nature, circumstances, extent, and gravity of the violation" as well as the violator's history of any prior offenses and its ability to pay. The FCC's base fine for a Public Inspection File violation is $10,000. Here, the FCC noted the broadcaster's large number of stations across the country, the large number of people it employs, how routinely it fills job openings, and its prior history of both EEO and non-EEO rule violations. In light of these factors, the FCC proposed a $26,000 fine for the failure to prepare and upload the report.

Because there is not an established base fine for failing to analyze a station's EEO program, the FCC looked to prior Notices of Apparently Liability (NAL) issued to the broadcaster in 2008 and 2017 for various EEO rule violations. In both NALs, the FCC proposed a $2,000 fine. Considering the prior history of EEO offenses, the FCC felt an upward adjustment was warranted and issued a $6,000 fine for the failure to analyze the stations' EEO program. In total, the FCC proposed a $32,000 fine. The broadcaster has 30 days from release of the NAL to pay the fine or file a written statement seeking reduction or cancellation of it.

### FCC Fines Florida Radio Station for Contest Rule Violations

The FCC proposed a fine of $20,000 against the licensee of a Florida radio station for apparent violations of the Commission's contest rules. Specifically, the FCC found that the licensee apparently failed to fully disclose material contest terms, to conduct the contest as advertised, and to maintain the contest's rules on the station's website for at least 30 days after the end of the contest.

Section 73.1216 of the FCC's Rules requires a licensee to "fully and accurately disclose the material terms" of a contest it broadcasts or promotes and to conduct the contest "substantially as announced and advertised." Material terms may be disclosed by either airing those terms or making them available in writing on a publicly accessible website. If the latter, the contest rules must stay on the website for at least 30 days after the contest ends. Material terms include, among other things, eligibility restrictions and the means of selecting winners. Contest rules that are ambiguous or open to interpretation are susceptible to an FCC finding that the station failed to disclose the material terms.

The Enforcement Bureau received a complaint from a person alleging they had been incorrectly excluded from a contest and that the radio station had violated its contest rules. The complainant had won a different station-run contest on March 1, 2019 and attempted to enter the contest at issue in the complaint on May 30, 2019. A station employee applied a "90-day lockout" on prior winners and excluded the complainant. The written contest rules, however, specified that only persons who had won a contest in the prior 30 days were to be excluded.

In response to an FCC Letter of Inquiry, the station admitted that, as a result of human error, it did not conduct the contest "in strict compliance with the written rules" when its employee applied the incorrect eligibility exclusion to the complainant. The station also admitted that it took the rules off the website the day the contest ended, rather than leaving the rules up for 30 days as required. However, the station contended that the complaint was not material because the contest rules not only excluded persons who had won a prize in the 30 days prior to the January 7, 2019 start of the contest, but also excluded anyone who won a prize while the contest was ongoing.

The FCC disagreed, finding that the station's application of its contest rules was not supported by the plain language of its rules or its standard screening protocol. The FCC noted that even if the contest rules could be interpreted as the station claimed they should be, FCC precedent makes clear that ambiguous rules are to be "construed against the interests of the promoter of the contest." Further, the FCC clarified that regardless of the complainant's eligibility to participate in the contest, the complaint was not "immaterial" because a person does not need to be a qualified contestant to have standing to bring a contest rules complaint at the FCC regarding the manner in which a contest was conducted.

The FCC's base fine for each "violation of requirements pertaining to broadcasting of lotteries or contests" is $4,000. In this case, the FCC noted that it may adjust the proposed fine upward for "violations that are egregious, intentional, or repeated, or that cause substantial harm or generate substantial economic gain for the violator." Considering the totality of the circumstances, the FCC determined an upward adjustment was warranted, explaining that the licensee's owner had a history of contest rule violations, and that the station also failed to maintain the rules on its website for the required 30 days after the end of the contest. As a result, the FCC proposed a total fine of $20,000. The station has 30 days from release of the NAL to pay the fine or file a written statement seeking reduction or cancellation of it.