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FCC Enforcement Monitor May 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:

- *FCC Shifts Battle Against Pirates to Landowners of Pirate Radio Sites*
- *Nevada Company Faces $100,000 Fine for Engaging in Prohibited Communications During FCC Auction*
- *FCC Proceeds With $17,500 Fine Against Arkansas Broadcaster for Violations Discovered During License Renewal Review*

FCC's Pirate Radio Enforcement Targets Landowners

The Enforcement Bureau recently issued Notices of Illegal Pirate Radio Broadcasting to four property owners in Pennsylvania, Maryland, and Oregon after investigations of unauthorized radio broadcasts found radio signals emanating from their properties. The Communications Act prohibits the transmission of radio signals without prior FCC authorization, as they can, among other things, pose risks to public safety by interfering with licensed operations such as air traffic control.

The FCC has stepped up its efforts to combat illegal broadcast operations, colloquially known as "pirate radio," in the wake of Congress's passage of the PIRATE Act in early 2020. Under Section 511 of the PIRATE Act and Section 1.80 of the FCC's Rules, the Commission may now impose fines of up to $2 million against individuals or entities that knowingly permit pirate radio operations on their property. Additionally, the PIRATE Act permits the FCC, without first having to issue a Notice of Unlicensed Operation, to propose a penalty against any person that "willfully and knowingly does or causes or suffers to be done any pirate radio broadcasting." The FCC will issue a Notice of Illegal Pirate Radio Broadcasting where it has reason to believe a property owner or manager is permitting illegal broadcasts from its premises. This Notice provides the landowner a chance to remedy the situation before enforcement action is taken.

In response to complaints of illegal FM broadcast operations at four locations in Pennsylvania, Maryland, and Oregon, the Enforcement Bureau issued Notices of Illegal Pirate Radio Broadcasting to the respective landowners. The Notices indicated that FCC investigators had confirmed radio signals were emanating from those properties without an FCC license authorizing such transmissions. The landowners were also warned that they face a fine of up to $2 million if the FCC determines they continued to permit illegal broadcasts from their property.

While the FCC's rules create exceptions from licensing requirements for certain extremely low-powered wireless devices, the Commission's agents determined that the transmissions originating from the properties far exceeded those levels. The property owners have ten business days from the date of their respective Notices to (1) respond with evidence demonstrating that pirate radio broadcasts are no longer occurring on their property, and (2) identify the individual(s) involved in the illegal broadcasts. If the parties fail to respond to the Notice altogether, the FCC may still determine that the parties had sufficient knowledge of the illegal broadcasts to warrant enforcement action, including substantial fines.

FCC Proposes to Fine Wireless Company $100,000 for Violating Rules Against Communicating Bidding Strategies During FCC Auction

The FCC released a Notice of Apparent Liability for Forfeiture ("NAL") proposing to fine a wireless broadband provider (the "Company") $100,000 for engaging in prohibited communications of bidding and bidding strategies during the FCC's Rural Digital Opportunity Fund Phase I Auction (Auction 904) and failing to timely report the prohibited communications.

Section 1.21002(b) of the FCC's Rules forbids FCC auction applicants from conveying certain information to other auction applicants during the "quiet period." This "quiet period" begins on the deadline for filing a short-form application to participate in the auction and ends on the deadline for winning bidders to submit long-form applications. The rule applies to any communication by an applicant regarding its own, or any other applicant's, bids or bidding strategies.

Section 1.21002(e) requires an applicant to disclose to the FCC if it makes or receives a communication that appears to violate Section 1.21002(b). Applicants must disclose potential violations in writing to the Commission immediately, and in any event, no later than five business days after the communication occurred.

The Company was a bidder in the Commission's Rural Digital Opportunity Fund Auction (Auction 904). Winning bidders receive financial support disbursed in monthly installments to assist in providing voice and broadband service to underserved and rural areas of the country. Prior to the Auction, the FCC released a Public Notice detailing the filing requirements and explaining the auction rules, including the ban on certain communications during the Auction. The Auction 904 quiet period began on July 15, 2020 at 6:00 p.m. when the short-form application filing window closed and did not end until January 29, 2021, when the long-form applications for winning bidders were due. In its short-form application, the Company stated that it did not have joint bidding agreements with any other Auction 904 applicant. In October 2020, the FCC released a Public Notice listing the bidders that had qualified to participate, and again reminded applicants of the rule against prohibited communications and the duty to report such communications.

During the Auction, the Company hired an investment agent to help it raise capital. While the Rules do not prohibit auction applicants from discussing bids or bidding strategies with investment agents, applicants are required to take "appropriate steps" to keep agents from becoming "conduits" for prohibited communications. In the Public Notice, the FCC noted that such "appropriate steps" might include implementing non-disclosure agreements.

Though the Company asked its agent through email to be cautious when communicating with other Auction 904 applicants, this informal warning came after the Company had already shared auction-related information with the agent. Despite the warning, during the quiet period the agent reached out to another Auction 904 applicant to seek funding for the Company's broadband expansion. Several communications occurred between the agent and the other auction applicant throughout December 2020 and January 2021 while the quiet period was in effect.

The FCC indicated that the Company did not take the "appropriate steps" to prevent improper communications, and that a non-disclosure agreement between the Company and its agent could have prevented the prohibited communications. The FCC therefore concluded that the Company appeared to have violated Section 1.21002(b) of the Commission's Rules, and in failing to report the prohibited communications to the FCC within five business days, also violated Section 1.21002(e) of the Rules.

In determining the amount of a proposed fine, the FCC may adjust its base fine upward or downward based upon the nature, circumstances, extent, and gravity of the violation, in addition to the violator's degree of culpability, ability to pay, and any history of prior offenses. Due to the importance of the prohibited communications rules, the FCC has previously issued fines of $100,000 for violating this rule. The Commission has reduced the fine to $75,000 when the target of the fine self-reported the violation. In this case, the FCC explained that the facts and circumstances did not merit a reduction because the prohibited communications continued for nearly two months and the Company failed to report them. The Company 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 Arkansas Radio Station $17,500 During License Renewal Review

Following an NAL issued in December 2021 (discussed **here**), the Media Bureau released a Forfeiture Order ("Order") fining an Arkansas radio station $17,500 for (1) discontinuing operation of its AM radio station and FM translator without first requesting authority from the FCC to do so, (2) Public Inspection File rule violations, and (3) failing to update certifications made in its license renewal application.

The December NAL gave the broadcaster 30 days to pay the proposed $17,500 fine or file a written response seeking reduction or cancellation of the fine. As of the date the Order was released, the broadcaster had neither paid the fine nor filed a response to the NAL.

The NAL explained that in January 2020, the broadcaster filed a license renewal application for its full power AM station and FM translator. In the application, it certified the stations were operating and had not been silent during the license term for more than 30 days. However, on March 6, 2020, the broadcaster's AM station, and therefore the associated FM translator, went silent due to "catastrophic failure" of the AM transmitter.

The FCC's rules require stations to notify the FCC within 10 days of discontinuing operations, and to obtain FCC authorization if the station will be silent for more than 30 days. Here, both stations went silent on March 6, 2020, with the AM station resuming operations on July 29, 2020 and the FM translator resuming operations on September 25, 2020. As a result, the broadcaster should have notified the FCC the stations had gone silent no later than March 17, 2020, and sought authority to remain silent by April 5, 2020, but did not. Instead, the FCC was notified of the silences through an informal objection to the AM station's pending license renewal application. The broadcaster filed requests for authority to be silent two days after the informal objection was filed.

Because both stations were silent for more than 30 days before the broadcaster sought authority to remain silent, the FCC found that the broadcaster had willfully and repeatedly violated Sections 73.1740(a)(4) and 74.1263(c) of its Rules. Additionally, Section 73.3526(e)(11)(i) of the FCC's Rules requires every station to place in its Public Inspection File "a list of programs that have provided the station's most significant treatment of community issues during the preceding three-month period." However, the FCC's review of the AM station's Public File revealed that several quarterly Programs/Issues Lists were filed late or were missing entirely.

Under Section 1.65 of the FCC's Rules, applicants are responsible for the continuing accuracy and completeness of information furnished in pending applications. In this instance, the broadcaster certified in its license renewal application that the stations were "currently on the air broadcasting," that there had been no rule violations by the licensee, and that the stations had not been silent for more than 30 days. The FCC explained that the first certification became inaccurate when the stations initially went off the air and the second certification became inaccurate when the broadcaster failed to notify the Commission the stations were off the air for 10 days. The third certification became inaccurate on the 31st day the stations were silent.

Concluding that the broadcaster had willfully and repeatedly violated Sections 73.1740(a)(4), 74.1263(c), 73.3526, and 1.65 of its Rules, the FCC issued the Order fining the broadcaster $17,500.