

FCC Enforcement Monitor

June 2022

By Scott R. Flick and Elizabeth E. Craig

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 Proposes \$34,000 Fine for Interrupting Emergency Communications During Wildfire*
- *Late Programs/Issues Lists and Failure to Disclose Violation Causes \$15,000 Proposed Fine for North Dakota Noncommercial Licensee*
- *License Rescinded for Mississippi Station Not Built as Authorized*

Amateur Ham Radio Operator Receives \$34,000 Proposed Fine for Transmitting on Radio Frequency Used by Fire Suppression Aircraft

The FCC issued a Notice of Apparent Liability for Forfeiture (NAL) to an amateur radio operator for interfering with the U.S. Forest Service while it and the Idaho Department of Lands were directing aircraft fighting a 1,000-acre wildfire outside of Elk River in northern Idaho. The FCC found that the individual violated Sections 301 and 333 of the Communications Act (the "Act"), and Sections 1.903(a) and 97.101(d) of the Commission's Rules by operating on government frequencies without a license and causing intentional harmful interference to licensed radio operations.

On July 22, 2021, the FCC received a complaint from the U.S. Forest Service about an individual who had been transmitting on government frequencies, noting that the transmissions had caused interference to fire suppression aircraft operations. The complaint explained that on July 17th and 18th, firefighters working on the "Johnson Fire," a 1,000-acre wildfire on national forest lands in northern Idaho, received several communications from an individual calling himself "comm tech." He advised firefighters and aircraft of hazards at a radio repeater sight in Elk Butte and identified his location as the Elk River airstrip. On July 18th, the fire operations section chief drove to the airstrip and found an individual who admitted to transmitting on government frequencies as "comm tech."

On July 22, 2021, a U.S. Forest Service Law Enforcement and Investigations Branch agent interviewed the individual about the incident. The individual admitted to operating on the government frequency and that he was not authorized to do so. On October 15, 2021, the FCC sent a Letter of Inquiry (LOI) to the individual. In the individual's response, he again admitted to operating on the government frequency but argued that he was not trying to cause interference and instead was trying to provide information to the firefighters. He suggested a third party may have also been transmitting, and may have continued to do so after he spoke to the fire chief and ceased his own operations.

Section 333 of the Act states that “[n]o person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed or authorized by or under the Act or operated by the United States government.” The legislative history of Section 333 describes willful and malicious interference as “intentional jamming, deliberate transmission on top of the transmissions of authorized users already using specific frequencies in order to obstruct their communications, repeated interruptions, and the use and transmission of whistles, tapes, records, or other types of noisemaking devices to interfere with the communications or radio signals of other stations.” Section 97.101(d) of the Commission’s Rules states that “[n]o amateur operator shall willfully or maliciously interfere with or cause interference to any radio communications or signal.” The FCC found that the individual violated Sections 333 of the Act and 97.101(d) of the Rules when he caused harmful interference by making repeated interruptions to the Forest Service’s communications. The unauthorized transmissions impeded legitimate communications and resulted in personnel being diverted away from the fire and to his location at the airstrip.

Section 301 of the Act states that “[n]o person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . without a license granted by the Commission.” Section 1.903(a) of the FCC’s Rules requires that wireless licensees operate in accordance with the rules applicable to their particular service, and only with a valid Commission authorization. The FCC found that the individual violated those sections when he made eight separate radio transmissions on the government’s frequency, as he did not have a license to operate on that frequency. According to the FCC, his statements to the U.S. Forest Service and his written response confirmed his actions.

Section 1.80 of the FCC’s Rules establishes a base fine of \$10,000 for operating without a license, and \$7,000 for causing interference to authorized stations for each violation or each day of a continuing violation. Here, the Commission proposed a total fine of \$34,000 – a \$10,000 fine for each of the two days of unlicensed operations, and \$7,000 for each of the two days of harmful interference. The FCC concluded that there were no mitigating factors supporting any downward adjustment of the proposed fines, and issued the NAL for the full \$34,000.

FCC Proposes \$9,000 and \$6,000 Fines for Minnesota and North Dakota Television Stations’ Late-Filed Programs/Issues Lists

The FCC issued proposed fines of \$9,000 and \$6,000 in response to allegations that two noncommercial television stations owned by a North Dakota licensee failed to timely upload all of their Quarterly Programs/Issues Lists to the stations’ Public Inspection Files. An FCC staff review of the stations’ Public Inspection Files as part of the license renewal process revealed that during the license term, both stations uploaded numerous Quarterly Programs/Issues Lists late and failed to properly disclose these violations in the stations’ license renewal applications.

Section 73.3527(e)(8) of the FCC’s Rules requires every noncommercial broadcast 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.” The list must include a brief narrative of the issues addressed, as well as the date, time, duration, and title of each program addressing those issues. The list must be placed in the Public Inspection File within 10 days of the end of each calendar quarter.

With regard to the broadcaster’s Minnesota station, the FCC noted that four of the Lists created during the license term were uploaded more than one year late, three Lists were uploaded between one month and one year late, and three Lists were uploaded between one day and one month late. Its North Dakota station uploaded three Lists more than one year late, uploaded four Lists between one month and one year late, and uploaded three Lists between one day and one month late. The FCC also noted that the licensee did not disclose the violations in the license renewal application for either station. The FCC therefore concluded that the licensee willfully and repeatedly violated Section 73.3527(e)(8) of the FCC’s Rules and that the failure to report the violations constituted an apparent violation of Section 73.3514(a) of its Rules, which requires that applications filed with the Commission be accurate and complete.

Section 1.80(b)(10) of the FCC's Rules establishes a base fine of \$10,000 for Public Inspection File violations and a base fine of \$3,000 for failure to file a required form or information. However, the Commission may adjust the amount upwards or downwards based upon factors such as the "nature, circumstances, extent and gravity of the violation," in addition to the licensee's "degree of culpability" and "any history of prior offenses." Taking those factors into account, the FCC proposed a fine of \$6,000 for the Minnesota station and \$3,000 for the North Dakota station for the late-filed Quarterly Programs/Issues Lists. The FCC proposed a fine of \$3,000 for each station for failing to disclose those violations in its license renewal application, resulting in a total proposed fine of \$9,000 for the Minnesota station and \$6,000 for the North Dakota station. Noting that the violations did not constitute a "serious violation" or a pattern of abuse that would prevent renewal of the stations' licenses, the FCC indicated it would grant both license renewal applications by separate action if no other issues arose.

Mississippi FM Translator's License Rescinded for Failures to Build as Authorized and Satisfy License Condition

A Mississippi FM translator's license was rescinded because the station was not built as authorized and did not satisfy a condition in its license. The owner filed a license application for the station on July 20, 2021, asserting that it had completed construction at the location authorized in the construction permit, and referenced an antenna structure registration number and the coordinates of a tower. The FCC granted the license on September 1, 2021 and included in the license a standard condition requiring the station to operate continuously for the first year. This condition establishes a rebuttable presumption that station silence during the first year is evidence of unlicensable, temporary construction.

On November 23, 2021, the station requested Special Temporary Authority (STA) to remain silent, which triggered the presumption of temporary construction. The reason given for the station's silence was "technical" but the licensee did not provide any additional information or explanation that would rebut the presumption of temporary construction. In January 2022, the station responded to the FCC's request for more information, explaining that flooding from Hurricane Ida damaged the transmitter on August 30, 2021, but that the station returned to the air just a few days later but went silent again on November 23, 2021. The FCC found that explanation insufficient to determine whether the station's silence starting in November was due to the hurricane or other causes, and issued a Letter of Inquiry on February 17, 2022.

The licensee raised several procedural challenges in response to the LOI, arguing that the FCC singled it out for disparate treatment by issuing an LOI, that only courts of equity can use rebuttable presumptions, that the FCC had no authority to place such a presumption on the license, and that presumptions are outdated, speculative, draconian, and contrary to the concept of "innocent until proven guilty." In the process, however, the licensee acknowledged that it did not use the tower noted in the construction permit but instead built approximately 30 yards away on an amateur ham radio tower in an RV park.

The licensee attempted to demonstrate the construction was permanent by stating the ham tower was mounted to a shed affixed to the ground that received power through a permanent electric outlet shared with an RV. It claimed it paid the owner of an RV to use the location for three months but intended to find another location after hurricane season. It could not provide any photos, documents, or invoices associated with the construction. The licensee indicated that the owner of the RV had since moved away and that the engineer who built the facility did not accept any payment (presumably preventing the licensee from presenting the FCC with an invoice demonstrating the nature of the installation). The licensee provided two short videos showing car stereos receiving music from the station's frequency.

The licensee also admitted that the station did not actually return to the air in the fall of 2021 as it had previously stated, but rather stopped broadcasting on August 30, 2021 and did not return to the air after that (other than for a six-hour test on March 4, 2022). The licensee said it did not intend to deceive the FCC by providing incorrect information.

The FCC rejected each procedural challenge, explaining that there is nothing about the license condition that was disparate, discriminatory, or beyond the FCC's authority. The Commission explained that it has placed the same condition on all new radio broadcast licenses since June 2015 in response to abusive practices where temporary facilities for stations were built and moved in a series of small, temporary "hops" that would each qualify as "minor" to accomplish "major" long distance moves. We previously discussed those abusive practices [here](#).

In the end, the Commission concluded that the facilities as constructed were not licensable because the licensee provided false information in its license application by stating it had completed construction at the authorized location. As the licensee admitted, the facility at the RV park was not at the location authorized in the construction permit. Despite the unauthorized location being only 30 yards away from the authorized location, FCC rules require Commission approval before making such changes in an FM translator's location. As a result, the FCC rescinded the grant of the application.

Based on the unauthorized construction alone, the facilities were not licensable. Additionally, the FCC explained that the licensee failed to rebut the presumption that the facilities were temporary. According to the FCC, the additional information provided (RVs are inherently mobile, the RV owner had indeed moved, the lack of a lease with the RV owner, the lack of an agreement with the landowner of the RV park) confirmed that the facilities were temporary. Accordingly, the FCC rescinded the grant of the application, ordered the construction permit be forfeited, and dismissed the application for STA as moot.