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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:

- *Sponsorship ID Violations Lead to Consent Decree With $60,000 Payment*
- *Unauthorized Station Transfers and Silent Stations Result in $25,000 Civil Penalty and Compliance Plan*
- *Retailer Fined More Than $685,000 for Marketing Unauthorized Wireless Microphones*

LPTV Station Fails to Identify Programming as Sponsored, Enters Into $60,000 Consent Decree

The licensee of an Arkansas low power TV station entered into a consent decree with the FCC's Media Bureau, agreeing to pay a $60,000 penalty for violating sponsorship identification laws.

Broadcast stations are required under federal law (47 U.S.C. § 317(a)(1) and 47 C.F.R. § 73.1212) to identify the sponsor of any program the station has been paid to air. This requirement applies to advertising, music and any other broadcast content. The FCC has said that the sponsorship identification laws are "grounded in the principle that listeners and viewers are entitled to know who seeks to persuade them . . . ." Those who lived through the 1950s and 1960s or who followed the payola/plugola scandals of those decades may recall that the principal issue wasn't the pay-to-play scheme itself, but rather disc jockeys' failure to disclose to listeners that something of value had been given in exchange for playing a record.

In this case, in an effort to increase station revenue, an LPTV station urged political candidates to buy advertising packages. However, the packages being sold by the station included appearances for the candidate on the station's daily news and public affairs program. Multiple candidates bought these packages and were subsequently interviewed live on the air. The station failed to disclose to its viewers that the interviewees were not chosen for their newsworthiness, but instead were interviewed merely because the station had been paid. While stations may conduct paid interviews, under the sponsorship identification laws, viewers/listeners must be told on-air that the station was paid to air the content, and the station must identify the sponsor.

Along with political candidates, the station accepted payments to interview spokespeople for several commercial entities on the program. In both cases, that station failed to disclose that the content was sponsored and by whom. The Media Bureau noted that these undisclosed appearances on a news and public affairs program misled the public into thinking that the interviewees were selected based on their newsworthiness and the station's editorial judgment.

To resolve the FCC's investigation, the station entered into a Consent Decree. Along with paying a $60,000 monetary penalty, the station must implement a compliance plan overseen by a compliance officer that includes written procedures, a compliance manual, and a training program for employees designed to prevent future violations of the sponsorship identification laws. The license must also file compliance reports with the FCC annually for the next five years, and must notify the FCC within 15 days of discovering any future violation of the sponsorship identification rules.

Family of Deceased Radio Owner Fails to File Necessary Transfer Applications, Agrees to Consent Decree With $25,000 Penalty

The family of a deceased radio owner failed to file the necessary FCC applications to transfer the owner's stations after his death and also failed to timely request authority for two stations to be silent. These violations resulted in a Consent Decree with the FCC's Media Bureau requiring payment of a $25,000 penalty.

On January 13, 2021, the controlling shareholder of a number of radio licensees passed away. Under Section 310(d) of the Communications Act and Sections 73.3540 and 7.3541 of the FCC's transfer of control rules, involuntary transfer of control applications should have been filed within 30 days of the controlling shareholder's passing. Those applications must apprise the FCC of the facts surrounding the involuntary transfer, and seek Commission consent to the transfer of control of the licenses from, for example, the decedent to the decedent's estate/executor. Once the FCC approves the involuntary transfer, there will typically be a second set of applications to transfer the licenses out of the estate to the party inheriting the stations (or sometimes to a party buying the stations directly from the estate).

Here, the stations were also later placed into trusts created two months after the controlling shareholder's death, but applications seeking FCC approval were not filed until several months after that. During that time, the former controlling shareholder's son became the sole trustee of the trusts and assumed de facto control of the licensees and their radio licenses without having obtained the additional FCC approvals to do so.

Unrelated to these transfer issues, the license renewal applications for an AM station and FM translator formerly controlled by the deceased owner disclosed that the stations were off the air without FCC authorization. In the case of the AM station, special temporary authority ("STA") to remain silent was not requested until two months after a previous STA to be silent had expired. With regard to the FM translator, it was silent for seven months before the licensee requested special temporary authority for it to be silent.

Under Section 73.1740(a)(4) (full power stations) and Section 74.1263(c) (FM translators) of the FCC's Rules, licensees must notify the FCC within 10 days of a station going silent if it does not return to the air within that time. If that silence is expected to last more than 30 days, the licensee must obtain FCC authorization to be silent for longer than 30 days. Even where a station has received permission to remain silent for the maximum duration of an STA (six months), the licensee must seek renewal of that authorization every six months thereafter if the station continues to be silent. Absent a special finding by the FCC preventing it, the license of a station that has been silent for more than 12 consecutive months (even with the required STAs in place) automatically expires under Section 312(g) of the Communications Act.

To conclude the FCC's investigation of the alleged violations, the licensees agreed to enter into a Consent Decree. Under the terms of the Decree, the licensees must pay a civil penalty of $25,000 and appoint a compliance officer to implement and administer a compliance plan. The compliance plan must include a compliance manual and training program to prevent future violations. The licensees must also submit a compliance report within 90 days, and then submit annual compliance reports for the next three years.

FCC Fines New York Retailer $685,338 for Marketing Noncompliant or Unauthorized Wireless Microphones

The FCC recently fined a wireless microphone retailer $685,338 after years of warning the company to obtain proper FCC authorizations for the wireless microphones it was selling. As we **discussed in 2020**, the FCC previously proposed the fine, asserting that the retailer had advertised 32 models of wireless microphones that did not comply with the Communications Act or the FCC's equipment marketing rules.

Section 302(b) of the Communications Act prohibits, among other things, the sale or offering for sale of devices that fail to comply with the FCC's radiofrequency ("RF") equipment authorization regulations. Similarly, Section 2.803(b) of the FCC's Rules prohibits, with limited exceptions, the marketing of an RF device unless the device has first been properly authorized, identified, and labeled in accordance with the FCC's Rules. Section 74.851(f) of the FCC's Rules requires devices emitting radiofrequency energy (such as wireless microphones) to be authorized in accordance with the FCC's certification procedures to prevent interference before they can be marketed in the United States. As detailed in Pillsbury's **Primer on FCC Radio Frequency Device Equipment Authorization Rules**, equipment authorization procedures differ depending on the type of equipment involved.

The Commission initially cited the company in 2011 (the "2011 Marketing Citation") for marketing wireless microphones that did not comply with the FCC's equipment marketing rules. Despite this citation, the retailer continued to market noncompliant microphones. In response to a 2016 complaint alleging the company was still marketing noncompliant microphones, the FCC issued a Letter of Inquiry ("LOI") in 2017. This prompted a years-long investigation, during which the retailer never provided complete answers regarding the authorization status of its microphones. In many cases, the FCC ID numbers provided by the retailer did not match the microphone's advertised descriptions and/or claimed operating frequencies.

The FCC then issued another LOI in 2019 asking for (i) the actual frequencies, (ii) the FCC IDs, and (iii) the authorized frequencies for 82 wireless microphone models that were available for sale on the retailer's website. The retailer only provided answers for some of the wireless microphones. The FCC determined that 32 of the 82 microphone models advertised for sale were not properly authorized and issued a Notice of Apparent Liability for Forfeiture in April 2020 (the "2020 NAL") proposing a $685,338 fine.

In the 2020 NAL, the FCC found that the retailer apparently willfully and repeatedly violated Section 302 of the Communications Act and Sections 2.803 and 74.851 of the Commission's Rules when it marketed 32 models of wireless microphones that were noncompliant or unauthorized. The FCC also proposed a significant upward adjustment of the total "base fine" for such violations due to the retailer's long record of repeated and continuous marketing violations and the egregious nature of the violations, specifically noting that the retailer marketed two microphones that apparently operated in the aviation band and thus had the potential to cause harmful interference to a critical public safety radio service.

The retailer responded to the 2020 NAL on July 10, 2020. First, it asserted that the 2020 NAL should be cancelled because it did not prove a violation occurred, and it claimed that screenshots of its website showing prices and a shopping cart do not prove that a specific microphone was available for purchase. The retailer also argued that to prove a violation, the FCC must show that the retailer had "the intention or ability to sell or lease" the microphones. The FCC reasoned that a website containing images, descriptions, prices, the word "shop" and a shopping cart, and an "add to cart" function clearly indicated the products were advertised for sale. The FCC further noted that the actual sale of an unauthorized device is not necessary to prove a marketing violation, and a website with thorough descriptions and pictures of the microphones is a clear indication that the retailer was marketing the microphones to the public.

Second, the retailer claimed the 2011 Marketing Citation provided insufficient and stale notice to support the 2020 NAL. In many cases, entities that violate a rule and do not hold an FCC authorization or license are entitled to a non-monetary citation before an NAL can be issued, but the FCC pointed out that there is no expiration date for a citation, and the 2017 LOI followed by the 2020 NAL kept the retailer on notice that the FCC was continuing to investigate. The FCC also rejected the claim that the rules cited in the Marketing Citation did not match the rules cited in the 2020 NAL, noting that the difference in the rule numbers was due to that rule section being reordered in 2013.

Third, the retailer argued that the proposed fine should be lowered because some microphones were authorized or should be grouped together and considered one model. The FCC rejected this argument, noting the company did not provide any technical documentation to prove the devices were identical and should be grouped together. The FCC also rejected the argument that some of the microphones had not been sold for more than a year prior to the 2020 NAL, explaining that a model does not have to be sold to be marketed. The FCC also rejected the argument that some of the models were actually authorized, instead showing that the frequencies authorized under the FCC ID for a particular model did not match the frequencies provided by the retailer in its 2020 NAL response.

Finally, the retailer claimed that the upward adjustments were excessive and unwarranted. The retailer argued that the fines for the microphones capable of operating in the aviation band should be eliminated or reduced because it was not proven that the models in fact operated in the aviation band. However, the FCC pointed out that the retailer never actually stated that the two models were not capable of operating in the aviation band and had not provided information to show the devices could not operate in that band. The retailer also claimed that there was no evidence of a continuing violation to support the upward adjustment. The FCC reaffirmed its conclusion that the facts supported an upward adjustment, noting that the 2011 Marketing Citation and the 2020 NAL both showed noncompliant wireless microphones being marketed on the retailer's websites. In addition, the FCC rejected the retailer's argument that it did not understand the FCC's inquiries because it is not involved in the communications business. The FCC explained that the retailer received multiple citations and communications from the FCC and any continued ignorance of the law did not excuse or mitigate the violations. The Commission also noted that the retailer's website continues to show many of the models at issue – a clear indication the company had no intent of complying with the FCC's Rules.