ADVISORY

FCC Enforcement Monitor November 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:

- *Broadcaster Receives $518,283 Fine for Local TV Ownership Rule Violation*
- *Ohio LED Sign Manufacturer Enters $47,600 Consent Decree for Marketing Unauthorized Devices*
- *FCC Reduces Fine to $3,400 for Washington LPTV Licensee's Unauthorized Operation and Untimely License Applications*

TV Broadcaster Receives Statutory Maximum Fine for Violating FCC Multiple Ownership Rule

A large multi-market television company (the "Company") was fined $518,283 for violating the FCC's rule prohibiting one entity from owning two top-four rated TV stations in the same Nielsen Designated Market Area ("DMA"). This Forfeiture Order follows a July 2021 Notice of Apparent Liability ("NAL"), which we wrote about **here**.

In July 2020, the Company acquired the non-license assets and network affiliation of a top-four rated station in the Anchorage, Alaska DMA and placed the network's programming on a non-top-four rated station that was already owned by the Company. At the time of the transaction, the Company owned one top-four station in the market and one that it claimed organically improved its ratings to join the top four and therefore was not in violation of 47 C.F.R. 73.3555, which includes the Local Television Ownership Rule (the "Rule"). The Rule prohibits an entity from owning two full-power television stations in the same DMA if both commonly owned stations are ranked among the top-four rated stations in the market. However, the Rule permits a top-four duopoly if one of the stations was outside the top four and organically improved its ratings to join the top four. Note 11 (the "Note"), which was added to the Rule in 2016, bars the common ownership of two top-four stations with overlapping contours in the same DMA through the acquisition of a network affiliation and says:

> *An entity will not be permitted to directly or indirectly own, operate, or control two television stations in the same DMA through the execution of any agreement (or series of agreements) involving stations in the same DMA, or any individual or entity with a cognizable interest in such stations, in which a station (the "new affiliate") acquires the network affiliation of another station (the "previous affiliate"), if the change in network affiliations would result in the licensee of the new affiliate, or any individual or entity with a cognizable interest in the new affiliate, directly or indirectly owning, operating, or controlling two of the top-four rated television stations in the DMA at the time of the agreement.*

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The FCC found that the transaction—acquiring the network affiliation and placing that programming on a lower-rated station—was the functional equivalent of a license transfer or assignment and effectively turned the station into a top-four station in violation of the Rule. The Forfeiture Order noted that the Company had not sought a waiver of the Rule or contacted FCC staff about the permissibility of the transaction.

In response to the NAL, the Company argued that (1) because one of its stations had improved its ratings and already achieved top-four status prior to the transaction, the "plain language" of the Note was not implicated by the transaction; (2) the Company lacked notice that the Note prohibits purchases of network affiliations, rather than just affiliation swaps; and (3) the FCC's interpretation of the Note constitutes impermissible regulation of the Company's content choices for its station. The FCC rejected these arguments. It found that the relevant ratings showed the station as the fifth-ranked (not top four, as the Company contended) station in the market before the network's programming caused it to enter the top four. It also found that the Company could not rely on an exemption to the Rule that allows a network to offer an affiliation to a duopoly owner (one top-four station and one non-top-four station) if the network is unhappy with its current affiliate and the proposed affiliate has "demonstrated superior station operation." In this case, the Company indicated it declined an offer from the network to acquire the affiliation and instead bought the affiliation from the current affiliate. The FCC also pointed to its **Second Report and Order** that provided more detail on affiliation acquisitions as notice of permissible transactions and stood by its finding that the Rule and accompanying Note 11 do not regulate a Company's content choices, but merely market concentration.

The FCC concluded that the appropriate fine would be $8,000 for each day the violation persisted, which would result in a total fine of $1,720,000. However, the statutory cap on fines for a single violation is $518,283. As a result, the Commission reduced the proposed fine to that amount and indicated it did not see a justification for any further reduction when considering the nature and duration of the violation and the Company's ability to pay.

LED Sign Manufacturer Settles Equipment Marketing Investigation for $47,600

The FCC entered into a Consent Decree with an Ohio-based sign manufacturer, resolving an investigation into whether the manufacturer unlawfully marketed light-emitting diode ("LED") signs in the United States. The entity manufactures, advertises, and sells fully assembled LED signs. The investigation found, and the manufacturer admitted, that it marketed several unauthorized LED signs without the required FCC equipment authorization, labeling, and user manual disclosures and failed to retain required test records in violation of the Communications Act and the FCC's Rules.

Section 302(b) of the Communications Act of 1934 (the "Act") authorizes the FCC to establish reasonable rules to minimize harmful interference by equipment that emits radio frequency ("RF") energy, with the goal of ensuring that electronic devices meet certain requirements to minimize interference before the devices reach the market. The FCC achieves this goal in two ways. First, the FCC sets forth technical requirements for transmitters and other equipment to minimize the likelihood they will cause interference to authorized radio services. Second, it has created an equipment authorization program to ensure that equipment entering the United States market complies with all equipment marketing rules.

The FCC's rules require that RF devices be tested for compliance with interference restrictions and satisfy technical and other requirements prior to marketing in the United States. "Marketing" includes the "sale or lease, or offering for sale or lease, including advertising for sale or lease, or importation, shipment or distribution for the purpose of selling or leasing or offering for sale or lease." Specifically, Section 2.803(b) of the FCC's Rules prohibits (with limited exceptions which do not apply here) the marketing of an RF device unless the device has first been properly authorized, identified, and labeled in accordance with the FCC's Rules.

As detailed in Pillsbury's **Primer on FCC Radio Frequency Device Equipment Authorization Rules**, equipment authorization procedures differ depending on whether the device is an "unintentional radiator" (a device whose RF emissions are incidental to its operation, such as a digital power supply) or an "intentional radiator" (a device that intentionally emits RF energy outside of the device, typically for communication with another device). While unintentional radiators may be authorized through either the Supplier's Declaration of Conformity ("SDoC") or Certification procedures, most are generally authorized by SDoC. Section 2.906 of the Rules sets forth the relatively simple SDoC procedures that apply to unintentional radiators.

In 2020, the FCC's Enforcement Bureau, Spectrum Enforcement Division ("Division"), received a complaint regarding the manufacturer. The Division issued a Letter of Inquiry ("LOI") and several follow-up inquiries to the manufacturer regarding its LED signs and its compliance with the FCC's equipment marketing Rules. The manufacturer timely responded to the LOI and follow-up correspondence, and the subsequent investigation revealed that it had marketed LED signs without the required equipment authorization, labeling, and user manual disclosures, and had failed to retain the required test records.

Since receiving the initial LOI in December 2020, the manufacturer began working to bring its unauthorized signs into compliance by obtaining SDoC authorizations for them and by marketing its compliant equipment with the correct labels and user manual disclosures. It achieved compliance with the applicable Equipment Marketing Rules by November 2021.

While the Division concluded that the manufacturer marketed unauthorized RF equipment in violation of Section 302(b) of the Act and Sections 2.803(b), 2.938, 2.1077, 15.19, 15.21, 15.101, and 15.105 of the FCC's Rules, the manufacturer and the FCC engaged in settlement negotiations which ultimately led to a Consent Decree terminating the investigation. The Consent Decree requires the manufacturer to, among other things, designate a compliance officer, implement a multi-part compliance plan, file annual compliance reports for the next three years, and pay a $47,600 civil penalty to the government.

Washington State LPTV Stations Receive a Reduced Fine of $3,400 – Nearly a 75% Reduction

As we discussed **last month**, the Media Bureau issued an NAL to a Washington state broadcaster for failing to timely file license to cover applications and allegedly engaging in unauthorized operation of two low power television stations as a result. The licensee had 30 days to either pay the full amount of the proposed fine or file a written statement seeking reduction or cancellation of the proposed fine.

Approximately three weeks after the NAL was issued, the licensee submitted its written response in which it requested a reduction or cancellation of the fine, citing its inability to pay. While the licensee did not dispute that it had violated the rules, its written response included copies of the last three years of its federal income tax returns to support its claim that it was unable to pay the proposed $13,000 fine.

Section 503(b)(2)(E) of the Act requires the FCC to account for the nature, circumstances, extent, and gravity of a violation when issuing fines. The FCC also considers the degree of culpability, any history of prior offenses, and the ability of the violator to pay the fine. In the NAL, the FCC referenced its Forfeiture Policy Statement, which sets a base fine of $3,000 for failing to file a required form and a base fine of $10,000 for construction and operation without an instrument of authorization.

In the NAL, the FCC already reduced the proposed fine to $6,500 per station, noting that LPTV stations provide a secondary service. However, the FCC declined to further reduce the fines to $3,500 each, as it had done for similar violations, citing the lengthy, four-year period of time the stations had apparently engaged in unauthorized operations.

The FCC will not consider reducing or canceling a fine for a claimed "inability to pay" unless the respondent submits: (1) its three most recent annual federal tax returns; (2) financial statements; or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. While the FCC believes a licensee's gross revenues are generally the best indicator of its ability to pay a fine, it has recognized that other financial indicators, such as net losses, may sometimes be relevant. However, if gross revenues are sufficiently large, then the fact that a business is operating at a loss is usually not considered adequate by the FCC to demonstrate that the business cannot afford to pay a fine. When considering claims of financial hardship, the FCC generally believes an average of five percent of a licensee's gross annual income is a reasonable fine and has not exceeded eight percent. At times, a fine of five percent of gross revenues has been found to be excessive when a licensee has operated at a significant loss.

In this case, the tax returns indicated that the proposed $13,000 fine exceeded eight percent of the licensee's gross annual revenue based on a three-year average. Because the licensee has not operated at a significant loss, the FCC indicated that it would not cancel the fine completely, but that it did believe a reduction was appropriate and reasonable based upon the licensee's financial information. As such, the FCC issued a Forfeiture Order reducing the fine to $3,400.