Communications

November 2014

FCC Enforcement Monitor

By Scott R. Flick and Carly A. Deckelboim

Headlines:

- *$7,000 Fine for Late Renewal Application and Unauthorized Operation*
- *Missing Wood Planks Around Tower Lead to $5,600 Fine*
- *$39,000 Fine Upheld for Hearing Aid Compatibility Violations*

Reduced Fine Imposed for Unauthorized Operation and Tardy Renewal Application

Earlier this month, the Audio Division of the FCC's Media Bureau (the "Bureau") issued a Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture ("NAL") against a Nevada licensee for failing to timely file its license renewal application and for continuing to operate its FM station after its license had expired. The Bureau imposed a fine for the violations and considered the licensee's renewal application at the same time.

Section 301 of the Communications Act provides that "[n]o person shall use or operate any apparatus for the transmission of energy of communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of the Act." Section 73.3539(a) of the FCC's Rules requires that broadcast licensees file applications to renew their licenses "not later than the first day of the fourth full calendar month prior to the expiration date of the license sought to be renewed."

In this case, the licensee's license expired on October 1, 2013, which meant that the licensee was required to file its license renewal application by June 1, 2013. However, the licensee did not file its renewal application until October 18, 2013, almost three weeks after its license expired, even though the Bureau had attempted to contact the licensee in June of 2013 about the impending expiration. In addition to its license renewal application, the licensee also requested Special Temporary Authority on October 18, 2013 to continue operating while its license renewal application was processed.

The base fine for failing to file a required form is $3,000, and the base fine for operating a broadcast service without an instrument of authorization is $10,000. Based on the facts of this case, the Bureau proposed the full base amount of $3,000 for failure to file a required form since the licensee filed its renewal application more than four months late. However, with regard to the fine for unauthorized operation, the Bureau noted that the licensee had previously been licensed to operate its station and that such unlicensed operation was less serious than “pirate” operations, which typically receive the full $10,000 fine. The Bureau therefore reduced the fine for unlicensed operation to $4,000, for a total proposed fine of $7,000.

The Bureau concluded that the licensee’s late renewal application and unauthorized operation of the station did not constitute “serious violations” requiring an evidentiary hearing. As a result, the Bureau said it would grant the license renewal application in a separate action.

Reduction in Fine Permitted for History of Compliance but Not for Damage Caused by Weather Conditions

The Regional Director of the Western Region of the FCC’s Enforcement Bureau issued a Forfeiture Order against an Alaska Licensee for willfully and repeatedly violating the FCC’s tower fencing rules.

The Enforcement Bureau had issued an NAL in July of 2012 proposing the base fine of $7,000 for violating Section 73.49 of the FCC’s Rules, which requires that “[a]ntenna towers having radio frequency at the base ... must be enclosed within effective locked fences or other enclosures.” On March 8 and March 15, 2012, agents from the Anchorage Office had observed that wood planks were missing from the fencing enclosing the licensee’s tower, which allowed access to the base of the tower. The licensee responded to the NAL and admitted that the wood planks had fallen but argued that the tower was not accessible because significant snow prevented access to the tower’s base. The licensee also argued that the damaged fencing was caused by an “Act of God,” and that the violation of the FCC’s Rules was therefore not willful. Finally, the licensee argued that in proposing the fine in the NAL, the FCC had not complied with the Small Business Regulatory Enforcement Fairness Act (“SBREFA”) and that the fine should be reduced because the licensee had a history of compliance with the FCC’s Rules.

The Enforcement Bureau rejected all but one of the licensee’s arguments in the Forfeiture Order. First, it concluded that the tower was accessible despite the snow accumulation because the agents were able to access the tower on both days that they visited the site. Second, it rejected the licensee’s argument that the violation was not willful due to an “Act of God” because “the mere fact that an antenna structure’s fence may have been damaged by weather does not necessarily mean that a resulting violation was not willful, and we have repeatedly assessed forfeitures for violations potentially caused by weather damage.” In any event, the Enforcement Bureau determined that the licensee’s failure to repair or replace the damaged fencing made the violation willful.

Finally, the Bureau rejected the licensee’s argument that the FCC had not complied with its obligation under SBREFA to adopt a specific policy or program concerning the reduction or waiver of forfeitures for small entities and noted that the FCC had previously determined that its policies for assessing penalties in the Forfeiture Policy Statement complied with SBREFA. However, the Enforcement Bureau did accept the licensee’s argument that the fine should be reduced based on the station’s history of compliance with the FCC’s Rules. The licensee had not previously received a citation from the FCC for a violation, so the Enforcement Bureau reduced the fine from $7,000 to $5,600.

Good-Faith Effort to Comply with Hearing Aid Compatibility Rules Not Enough for Reduction of Fine

Earlier this month, the FCC issued a Memorandum Opinion and Order denying an Application for Review involving violations of the FCC’s hearing aid compatibility rules. In denying the Application for Review, the FCC upheld a $39,000 fine against the violator.

The Enforcement Bureau had issued an NAL against the company in December of 2010 for failing to comply with the hearing aid compatibility requirements by not “offer[ing] to consumers for nine months the required number or percentage of digital wireless handsets that met or exceeded the radio frequency interference standards for hearing aid compatibility set forth in section 20.19(b)(1) of the Rules.” The hearing aid compatibility rules were designed “to enhance the ability of consumers with hearing loss to access digital wireless telecommunications.” The base fine amount for such violations is $15,000 per missing handset model. The company fell short by two compliant models during the nine-month period in question, which normally would have resulted in a base fine of $30,000. However, the Bureau exercised its discretion to increase the fine due to the nine-month duration of the violation, proposing a fine of $39,000.

In June of this year, the Enforcement Bureau issued a Forfeiture Order affirming the findings of the NAL. In the Forfeiture Order, the Enforcement Bureau rejected the licensee’s argument that it had reasonably believed it was in compliance with the rules because “a violator’s erroneous beliefs are not a mitigating factor warranting cancellation of a forfeiture.” The company had also argued that it relied on third party Internet sources, which the Enforcement Bureau held “do not reflect sufficient diligence to excuse the violation.” The Enforcement Bureau also rejected the company’s argument that it was not purposely trying to violate the laws, noting that “willful noncompliance is not predicated on a finding of knowledge or intent to violate the law.” Finally, the Enforcement Bureau declined to reduce the fine based on the company’s history of compliance, finding that the nine-month duration of the current violation meant that the company could not “be said to have a history of overall compliance with the” FCC’s Rules. Although the company argued that payment of the proposed fine would impose a financial hardship, it did not submit any financial documentation to support that claim. The Forfeiture Order therefore affirmed the $39,000 fine proposed in the NAL.

The company filed its Application for Review in July of this year and argued that the Enforcement Bureau erred by discounting the diligent, good-faith efforts of a small service provider to faithfully comply with the hearing aid compatibility rules. The FCC, “upon review of the Application for Review and the entire record,” did not find a reason to modify the Enforcement Bureau’s decision and upheld the $39,000 fine.

If you have any questions about the content of this Advisory, please contact the Pillsbury attorney with whom you regularly work, or the authors of this Advisory.

Scott R. Flick (bio)
Washington DC
+1.202.663.8167
scott.flick@pillsburylaw.com

Carly A. Deckelboim (bio)
Washington, DC
+1.202.663.8006
carly.deckelboim@pillsburylaw.com

About Pillsbury Winthrop Shaw Pittman LLP
Pillsbury is a full-service law firm with an industry focus on energy & natural resources, financial services including financial institutions, real estate & construction, and technology. Based in the world's major financial, technology and energy centers, Pillsbury counsels clients on global business, regulatory and litigation matters. We work in multidisciplinary teams that allow us to understand our clients’ objectives, anticipate trends, and bring a 360-degree perspective to complex business and legal issues—helping clients to take greater advantage of new opportunities, meet and exceed their objectives, and better mitigate risk. This collaborative work style helps produce the results our clients seek.