ADVISORY

FCC Enforcement Monitor June 2024

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HEADLINES

Pillsbury's communications lawyers have published the 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:

- *Louisiana TV Station Admonished for Lack of Non-Discrimination Clause in Advertising Contracts*
- *$25,000 Fine for a Variety of Rule Violations by Florida Low Power FM Station Affirmed*
- *FCC Proposes $367,436 Fine for Marketing Violations Involving WiFi Devices*

FCC Media Bureau Admonishes TV Station for Lack of Non-Discrimination Clause in Advertising Contracts

The FCC's Media Bureau admonished a Louisiana TV station for failing to include a non-discrimination clause in its advertising sales contracts. While it stopped short of issuing a fine, the Bureau warned that future violations could result in harsher sanctions.

Since 2008, the FCC has required commercial radio and television stations to include explicit non-discrimination clauses in their ad sales contracts. To ensure compliance, the FCC revised its broadcast license renewal application form in 2011 to require commercial broadcasters to certify that their ad sales contracts contain a non-discrimination clause making clear to advertisers that the station will not accept advertising placed with an intent to discriminate on the basis of race or ethnicity. If a licensee is unable to certify compliance, the FCC requires an attachment to the license renewal application explaining the circumstances and why such non-compliance should not be considered an obstacle to the station's license renewal.

The TV station responded "No" to the non-discrimination certification in its license renewal application, noting that its advertising agreements did not contain a non-discrimination clause. The station indicated, however, that it does not permit discrimination in its ad sales and that it would add a non-discrimination clause to its ad sales contracts going forward.

In light of the absence of any evidence that the station had actually engaged in discriminatory ad sales, the Media Bureau admonished the station, granted its license renewal application, and warned that any future violations could trigger fines or more severe sanctions.

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While enforcement actions involving the FCC's advertising non-discrimination requirements are uncommon, that is because most stations are able to make the necessary certification in their license renewal application. Radio and television broadcasters should examine their advertising contracts to ensure they contain the necessary language and that their stations have in fact been meeting their obligation to prevent discrimination by race or ethnicity in advertising sales.

FCC Enforcement Bureau Denies Petition to Reconsider $25,000 LPFM Fine

The FCC Enforcement Bureau denied a Petition for Reconsideration filed by the licensee of a Florida low power FM radio station, finding unpersuasive the licensee's argument that a $25,000 fine should be cancelled due to the licensee's inability to pay.

A 2022 Forfeiture Order concluded that the licensee failed to: (1) operate the station according to the parameters of its license and the FCC's rules; (2) make the station available for inspection by FCC field agents; and (3) properly maintain Emergency Alert System (EAS) equipment.

In response to a 2020 Notice of Apparent Liability for Forfeiture (NAL), the licensee submitted a written response in which it did not dispute the alleged rule violations but nonetheless sought reduction or cancellation of the proposed fine. Regarding the allegations of unauthorized operation and failure to permit inspection, the licensee argued that the wrong base fine was used in setting the proposed fine, and promised that it would make operational changes to better enable future station inspections. The licensee also provided EAS logs after the NAL was issued which it said should resolve that claimed violation and any related EAS fine. The licensee also pointed to its record of prior compliance with the FCC's rules as a reason to reduce or cancel the proposed fine.

However, FCC agents subsequently attempted to inspect the station and its EAS equipment to confirm the station's compliance, but were once again denied access by the licensee's president.

The FCC's rules permit the Enforcement Bureau to grant a petition for reconsideration that relies on new facts or arguments under three narrow circumstances: (1) the new facts or arguments relate to events that have arisen since the petitioner last had the opportunity to present facts or arguments; (2) the facts or arguments underlying the petition became known to the petitioner since the last opportunity to present facts or arguments; or (3) the public interest, in the Enforcement Bureau's determination, requires consideration of the new facts or arguments.

In this case, the licensee asserted that it did not claim a difficulty to pay in its NAL response because its financial position "is not the same as it was when [the Bureau] issued the [NAL]." The licensee pointed to the installation of a new governing board nearly a year after it responded to the NAL and additional insight into its finances as new facts warranting reconsideration.

For its part, the FCC noted that the petitioner at all times, regardless of whether a new board was put in place, had information about its own financial status and could have raised that issue in its NAL response or at any time before issuance of the Forfeiture Order. It further found that the licensee had failed to substantiate its claim of inability to pay with the proper documentation, including federal tax returns for the past three years, financial statements for the past three years prepared under generally accepted accounting principles, or other reliable and objective accounting documentation. The licensee submitted only a declaration from the station's president, a list of non-cash assets, and eleven months of bank statements. The Enforcement Bureau found this documentation to be insufficient and therefore denied the Petition for Reconsideration, leaving the $25,000 fine in place. The licensee has thirty days to pay the fine.

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FCC Warns It May Change How It Calculates Fines to Increase Them in Proposing $367,436 Fine Against Wireless Networking Device Company for Equipment Marketing Violations

The FCC issued an NAL with a proposed $367,436 fine to a multinational computer and wireless networking device company, alleging violations of the FCC's equipment marketing rules. In doing so, the FCC noted that it may alter its methodology for calculating fines for equipment marketing violations, potentially resulting in significantly higher fines in the future.

In this case, the FCC alleged violations of Section 302(b) of the Communications Act of 1934, as amended, and Sections 2.803(b), 2.1043(a), and 15.407(a)(5) of the FCC's Rules, which collectively prohibit manufacturing, importation, marketing, and selling of devices in the U.S. without authority from the FCC. Section 302(b) provides that "[n]o person shall manufacture, import, sell, offer for sale, or ship devices or home electronic equipment and systems, or use devices, which fail to comply with regulations promulgated pursuant to this section." Section 2.803(b)(1) of the Rules states that no person can market a radiofrequency (RF) device requiring FCC certification unless the device has successfully passed the certification process and is properly identified and labeled. "Marketing" includes selling, leasing, offering for sale or lease, advertising for sale or lease, importing, shipping, or distributing the device for sale or lease.

Equipment certification is a process whereby FCC-recognized third-party Telecommunication Certification Bodies evaluate applications from manufacturers or importers to ensure an RF device meets the FCC's technical requirements. Section 15.407(a)(5) of the FCC's Rules states that indoor access points in the 5.925-7.125 GHz band must not exceed specified power limits. In addition, once a device is certified, Section 2.1043(a) of the FCC's Rules prohibits changes to its maximum power level without obtaining a new certification.

A complaint submitted to the FCC asserted that a WiFi router marketed by the company operated at nearly eight times its authorized power, and a competitor filed a lawsuit against the company alleging that its devices were operating beyond their authorized power limits. The FCC subsequently issued two Letters of Inquiry to the company requesting information on the router, as well as all other wireless routers and WiFi boosters the company sold in the United States.

After reviewing the company's responses, the FCC released an NAL proposing a fine of $367,436, asserting that two of the company's devices (a WiFi adapter and a WiFi Router) that were marketed by the company beginning in 2016 and 2021, respectively, were modified after initial testing and authorization to exceed their authorized power limits.

Starting from a base fine of $14,000 ($7,000 for each non-compliant device model marketed), the FCC reached a much larger ultimate fine based on its conclusion that the marketing of the non-compliant devices was apparently intentional, repeated, and continuous, that the company had a history of similar prior violations, and that the company experienced a substantial economic gain from the unlawful conduct. In response to these aggravating factors, the FCC applied significant upward adjustments for both marketing violations, reaching a total proposed fine of $367,436, the statutory maximum.

Clearly indicating its belief that even this augmented fine fell short of adequately penalizing the violations, the FCC stated a concern that its current method for calculating fines in equipment marketing enforcement cases may not yield fines commensurate with the seriousness of the violations. The Commission was especially concerned that in many cases, the gross revenues or profits from violations far exceeded the maximum possible fine, thereby incentivizing companies to view such fines as simply a cost of doing business. Accordingly, the FCC gave notice that in future cases it may change its methodology for calculating such fines from its current "per model marketed" approach to some other methodology, such as a "per unit marketed" approach, that could generate greatly increased fines.

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