ADVISORY

FCC Enforcement Monitor August 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:

- *Florida Radio Station Faces $14,000 Proposed Fine for Contest Rule Violations*
- *$6,500 Fines Targeted at Mississippi and Tennessee FM Translators for Late-Filed License Renewal Applications and Unauthorized Operation*
- *FCC Continues Focus on Collecting Unpaid Regulatory Fees from Broadcasters*

FCC Fines Florida Radio Station for Contest Rule Violations

The FCC proposed to fine a radio broadcaster $14,000 for violating the Commission's Contest Rule while conducting a multi-station contest. Specifically, the FCC issued a *Notice of Apparent Liability for Forfeiture* (NAL) asserting that the broadcaster failed to select and/or notify contest winners in a timely fashion, as required by the licensee's announced contest terms.

Section 73.1216 of the FCC's Rules requires a licensee to "fully and accurately disclose the material terms" of a contest it broadcasts or promotes and to conduct the contest "substantially as announced and advertised." Material terms include, among other things, eligibility restrictions, the time and means of selecting winners, and the extent, nature, and value of prizes. Prizes must be awarded promptly, and the FCC has consistently found violations where stations failed to award prizes in accordance with the announced contest terms.

In April 2021, the FCC received a complaint alleging that one of the licensee's radio stations had not conducted a contest in a manner "substantially as announced and advertised." The Enforcement Bureau issued a Letter of Inquiry (LOI) to the licensee in August 2021. In its November 2021 response, the licensee explained that during the first half of 2021, it had conducted a nationwide contest on 194 of its stations. During the contest, each participating station announced a contest "keyword" once an hour, for eleven hours each day, for 27 days. Listeners could qualify to win by submitting this keyword via text message or the internet before the end of the hour in which the word was announced. One national winner would then be picked each hour from across all stations, creating 297 winners (11 per day x 27 days). The prize was a $1,000 check and winners were to be notified within 72 hours, according to contest terms.

Upon review, the licensee discovered that as a result of human error, the contest had not been conducted according to the announced contest terms. In its LOI response, the licensee disclosed that (1) the part-time employee tasked with randomly selecting a national winner from among those qualified sometimes failed to do so; (2) the part-time employee's manager did not provide supervision to confirm winners were selected; and (3) some winners were never notified they had been selected. Ultimately, 50 winners out of 297 were not timely selected and/or notified. After receiving the LOI but before submitting its response to the FCC, the licensee selected and notified 50 "replacement" winners.

The licensee argued that its actions did not amount to a violation of the rules because (1) an insubstantial number of winners that were not timely selected/notified compared to the total number of winners; (2) the contest terms only required the licensee to select "a total of up to, but not more than," 297 verified winners; (3) it was not done intentionally, but was merely the "poor performance of two employees" that caused the selection/notification failures; and (4) the licensee went to "great lengths" to mitigate the selection/notification failures, eventually awarding prizes to all "winners" who completed the required paperwork.

The FCC did not find these arguments persuasive. First, it noted that the total number of selection/notification failures was indeed substantial, amounting to over 16% of possible prizes, with the delay in awarding those prizes being approximately six months. Second, the FCC explained that although the licensee's contest terms *did* allow for the licensee to select "up to" 297 winners, the rules did not allow for the licensee to select fewer winners due to employee negligence. Third, the FCC clarified that human error and employees' poor performance did not excuse a licensee from liability. Fourth, the FCC noted that the licensee only sought to correct its mistakes after receiving the LOI, and "such post-LOI remedial efforts do not mitigate its liability." Thus, the FCC concluded that the licensee had willfully violated Section 73.1216 in failing to select and notify winners "in a timely manner" and to conduct the contest "fairly and substantially as represented to the public."

The FCC's base fine for Contest Rule violations is $4,000. The NAL noted that the FCC may increase the proposed fine for violations that are "egregious, intentional, repeated/continuous, substantially harmful, or the source of substantial economic gain for the violator…." The FCC decided to assess a single violation related to the licensee's failure to conduct the contest in accordance with the advertised contest terms. However, considering the totality of the circumstances, the FCC determined an upward adjustment was warranted, explaining that the licensee had failed to select/notify over 16% of the winners in a timely manner as required by the contest terms. The FCC therefore proposed an upward adjustment of $8,000, and because the licensee had previously violated FCC rules, it proposed an additional upward adjustment of $2,000. Finding no basis for any countervailing downward adjustments, the FCC proposed a total fine of $14,000. The licensee has 30 days from release of the NAL to pay the fine or file a written statement seeking its reduction or cancellation.

Late-Filed License Renewal Applications and Resulting Unauthorized Operation Cause Trouble for Mississippi and Tennessee FM Translator Stations

Two FM translator stations licensed to Tennessee and Mississippi received NALs for failing to timely seek renewal of their licenses and for not seeking special temporary authority (STA) to operate after their licenses expired. In response, the FCC's Media Bureau issued NALs to both stations, proposing a $6,500 fine for each.

The Tennessee FM translator station had operated without a license since August 1, 2020, when its license expired, and did not file a license renewal application until February 16, 2024, over three years later. The station also failed to apply for the necessary STA to continue operating after its license expired. The licensee explained that "it mistakenly believed that the renewal application for the Station was filed with the timely filed renewal applications for its other two stations."

In a similar case, the licensee of a Mississippi FM translator station did not file an application to renew its station's license before the license expired on June 1, 2020. The licensee continued to operate for almost four years without authorization, failing to file a license renewal application until April 4, 2024. Despite the significant delay in filing its license renewal application, the licensee did not provide any explanation for its lateness and did not apply for STA to continue to operate after its license expired.

Under the FCC's *Forfeiture Policy Statement*, the base fine for failing to file a required form is $3,000, and $10,000 for operating without authorization. However, the FCC considers the degree of culpability, any history of prior offenses, and the ability of the violator to pay the fine in deciding whether to adjust the base fine upward or downward.

In both cases, the FCC concluded that the FM translator station had engaged in unauthorized operation. After reviewing all the factors and referring to the *Forfeiture Policy Statement*, the FCC proposed a fine of $3,000 against each station for failing to timely file a license renewal application, and $10,000 for each station's extended period of unauthorized operation, which would have resulted in a total fine of $13,000 for each station. However, because FM translators provide a secondary service, the FCC reduced each fine by half, to $6,500. Each station must either appeal with a written statement seeking reduction or cancellation of the proposed fine, or pay it within 30 days of receiving the NAL.

Two Radio Stations Owe Nearly $19,000 in Unpaid Regulatory Fees

Two Mississippi radio stations must pay the FCC nearly $19,000 in unpaid, overdue annual regulatory fees (or otherwise demonstrate why the fees are inapplicable or should be waived or deferred) or risk losing their FCC licenses. The fees were assessed for fiscal years 2013, 2015, 2016, 2017, 2018, 2019, 2020, 2022, and 2023. Unless otherwise exempt, broadcast stations must pay regulatory fees each year by a date set by the FCC. That date has to fall before October 1, when the federal government's next fiscal year begins. With October 1 on the horizon, broadcasters should be watching the FCC's website for an announcement of the final regulatory fee amounts and the fee payment deadline for FY 2024. The FCC will also release a Public Notice detailing procedures for paying the fees.

Under the Communications Act of 1934, as amended, the FCC has authority to assess annual regulatory fees to fund the agency's operating costs for the coming fiscal year. Late payment of these fees incurs a 25% penalty plus interest. If licensees fail to pay regulatory fees and any penalties or interest, the FCC may revoke their affected licenses.

Prior to issuing an *Order to Pay or to Show Cause* to the stations' licensee, the FCC sent demand letters seeking payment. When payment was not received, the Commission transferred the debt to the U.S. Department of Treasury for collection. Subsequently, the FCC requested the return of the matter from the Treasury Department in order to pursue its own collection efforts.

In proceedings for unpaid regulatory fees, the licensee is not entitled to an adjudicatory hearing unless it can present a substantial and material question of fact as to whether the fees are owed. Even then, the hearing will be conducted only through written evidence and the licensee must pay the cost of the hearing if it ultimately does not prevail.

The *Order to Pay or to Show Cause* requires that within 60 days the licensee either pay the full outstanding debt or demonstrate why it is inapplicable or should be waived or deferred. While the FCC will consider waiving, reducing, or deferring a fee debt for good cause consistent with the public interest, it rarely does so. To receive relief, the licensee must present proof of extraordinary circumstances or financial hardship that outweighs the public interest in recovering the cost of the FCC's regulatory services.

Given the high cost of not timely paying regulatory fees, licensees should make sure that their 2024 regulatory fees are paid in full by the deadline, and may want to doublecheck to ensure there are no amounts still outstanding from prior years.

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