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FCC Enforcement Monitor October 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:

- *National Cable Sports Network Draws Proposed Fine of $146,976 for Transmitting False EAS Tones*
- *For-Profit Arrangement Lands Michigan Noncommercial Radio Station in Hot Regulatory Water*
- *California LPFM Station Agrees to $9,000 Consent Decree for Numerous Rule Violations*

FCC Proposes $146,976 Fine Against National Cable Sports Network for Transmitting False EAS Tones

The Federal Communications Commission issued a Notice of Apparent Liability for Forfeiture (NAL) to a cable sports network for violating the Commission's Emergency Alert System (EAS) rules. Specifically, the NAL alleged violations of Section 11.45 of the FCC's Rules, which prohibits the transmission of false or deceptive EAS tones.

The EAS is a nationwide public warning system designed to alert the public in case of emergencies, such as severe weather warnings or AMBER alerts. To maintain the effectiveness of such emergency alerts, EAS tones may only be aired for specific uses, such as actual emergencies, authorized tests, and qualified public service announcements (PSAs). Section 11.45 strictly prohibits airing an EAS tone, or simulations of it, except in connection with these permitted uses. The FCC takes false EAS tone violations particularly seriously, asserting that violations desensitize the public to legitimate EAS alerts.

In October 2023, the FCC received complaints alleging a cable network had transmitted EAS tones during a sports promotional video. In January 2024, the Commission's Enforcement Bureau sent a Letter of Inquiry requesting information about the incident. The network responded, providing video recordings of the sports-related promo video that had aired for three days and admitting that it contained an EAS tone. While the network argued the promo video contained fewer than two seconds of EAS tone, it did acknowledge that the tone was not aired in connection with an actual emergency, authorized test, qualified PSA, or other permitted use. The network also acknowledged that the promo video aired six times over three days on two different networks.

Based on the network's admissions and the FCC's review of the video, the FCC found six apparent violations of Section 11.45 of the Commission's Rules. The FCC noted that while the two-second duration was shorter than a full EAS tone, it was long enough for viewers to recognize the sound as an EAS tone.

Pursuant to Section 503(b)(2)(D) of the Communications Act and Section 1.80(b)(10) of the FCC's Rules, the FCC is authorized to issue fines of up to $24,496 per rule violation, but the total fine for a single act may not exceed $183,718. Section 1.80(b) establishes a base fine of $8,000 for this type of violation. However, the FCC may upwardly adjust a fine for violations that are egregious, intentional, repeated, cause substantial harm, or which generate substantial economic gain for the violator. Similarly, it may downwardly adjust a fine for violations that are minor, made in good faith, voluntarily disclosed, follow a prior history of compliance, or where an inability to pay exists.

While the FCC had previously issued the base fine of $8,000 for violations of the false EAS tone rule, in this instance the FCC highlighted several reasons why it believed an upward adjustment was warranted. The FCC considers several factors when determining the fine for transmitting a false EAS tone, such as the number of times the tone was transmitted, the length of time over which the violations occurred, the audience reach (nationwide in this case), and the extent of the public safety impact. The FCC emphasized the network's broad reach of over 55 million subscribers, that the promo involved self-promotion of the network, the network's ability to pay, and the fact that the network had previously been fined for violating this same EAS rule. Taking these factors into account, the FCC proposed a total fine of $146,976 – the statutory maximum for six violations of the rule. The FCC found no reason for a downward adjustment, noting that this was not a minor violation, there was no voluntary disclosure or good faith compliance efforts prior to the Letter of Inquiry being sent to the network, as well as the network's prior history of EAS tone violations.

The network has 30 days from release of the NAL to pay the fine or file a written statement seeking reduction or cancellation of it.

Noncommercial FM Station's Programming Agreement With For-Profit Entity Yields Consent Decree

The FCC entered into a Consent Decree terminating its investigation of a Michigan noncommercial educational (NCE) FM station over the station's violation of the FCC's rules for NCE broadcast services. Under Section 73.503 of the FCC's Rules, an NCE broadcast station can provide only a nonprofit and noncommercial broadcast service and is prohibited from airing any promotional announcements for a for-profit entity if the station's licensee, its principals, or its employees receive any type of consideration for doing so. In this context, consideration includes anything of value, including the "contribution of programming material and funds, goods and/or services used for programming, as well as in kind contributions (e.g., studio equipment) which frees station funds for programming purposes."

During review of an application to transfer control of the NCE station, FCC staff found that the licensee entered into a programming agreement with a for-profit entity under which the for-profit entity would provide programming at its sole expense to the station, and retain all station revenue, including contributions and underwriting support. The programming agreement also provided that the programmer would "subsidize the costs of keeping the station on the air during the term (of the Agreement)," with the programmer agreeing to reimburse the station's licensee for a portion of the station's direct operating expenses.

As a result, the Consent Decree stated that "in addition to the programming material and related goods and services, the Licensee also received pecuniary consideration from the Programmer in the form of reimbursement of the Licensee's direct operating expenses…"—an arrangement which violates the FCC's NCE broadcast rules.

Under the terms of the Consent Decree, the licensee must implement a Compliance Plan, including designating a Compliance Officer, holding annual consultations with counsel, creating and distributing a Compliance Manual, conducting Compliance Training for employees, and submitting Annual Compliance Reports to the FCC for three years.

California Low Power FM Station Enters $9,000 Consent Decree to Resolve Numerous Rule Violations

The licensee of a California low power FM (LPFM) station entered into a Consent Decree to terminate an investigation into multiple alleged rule violations. Two parties filed informal objections to the station's license renewal application alleging that (1) the station was causing interference by operating above its authorized power level; (2) the station had failed to air any Emergency Alert System tests in more than three years of operation; (3) the station failed to provide local public notice of the filing of its license renewal application; (4) entities connected with the licensee had simultaneously held interests in another radio station in violation of the FCC's cross-ownership rules; and (5) the applicant failed to maintain the accuracy of its applications pending before the FCC.

In response to these allegations, the FCC's Media Bureau suspended processing of the license renewal application and commenced an investigation. In that investigation, the LPFM licensee acknowledged that it had violated the FCC's rules regarding cross-ownership of interests in a second radio station, failed to obtain FCC approval for two sudden changes in a majority of the licensee's board of directors, did not provide local public notice of the filing of its license renewal application, and had failed to maintain the accuracy of information in a pending FCC application.

The Order adopting the Consent Decree, however, noted that the allegations that the station was causing interference and had failed to air EAS tests were not adequately supported by the objectors.

Under Section 73.860(d) of the FCC's Rules, a party holding an attributable interest in a radio station must divest that interest before an LPFM station in which it also holds an attributable interest commences operating. Here, two directors holding attributable interests in the LPFM station at issue also held attributable interests in an entity with other radio interests. Further, in violation of Section 73.865(d) of the FCC's Rules, the licensee failed to file *pro forma* transfer of control applications seeking approval for sudden changes to 66.6% of the licensee's voting interests when two directors were added to the board and later when the same two directors were replaced.

The Order adopting the Consent Decree also stated that the licensee failed to broadcast notices to the public announcing that it had filed a license renewal application and failed to amend a 2015 construction permit application when it replaced two members of the three-member board of directors.

Under the terms of the Consent Decree, the licensee must pay a civil penalty of $9,000 and create and implement a Compliance Plan. The Compliance Plan must include the appointment of a Compliance Officer, the drafting and distribution of a Compliance Manual, an employee Compliance Training Program, the reporting of any future violations within 15 days of discovery, and the filing of Annual Compliance Reports with the FCC for three years.

The Order indicates that upon payment of the $9,000 civil penalty, the FCC will grant the station's license renewal application as long as no additional violations come to light.