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FCC Enforcement Monitor December 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:

- *Unauthorized Oregon Radio Station Transfers Yield $16,000 Penalty*
- *Consent Decree Over Upgrade of EAS Equipment Includes $1.1 Million Payment*
- *Chinese Video Doorbell Manufacturer Draws Proposed Fine of $734,872 for Equipment Authorization Rule Violations*

All in the Family: Unauthorized Oregon Station Transfers Between Mother, Daughter, and Sisters Result in Consent Decree and $16,000 Civil Penalty

The licensee of an Oregon AM station and its companion FM translator entered into a Consent Decree with the FCC's Media Bureau to resolve the Bureau's investigation into unauthorized transfers of control of the stations. The Consent Decree follows a September 2024 Notice of Apparent Liability for Forfeiture (NAL) and requires the licensee to pay a $16,000 civil penalty.

Under Section 310(d) of the Communications Act and Section 73.3540 of the FCC's Rules, voluntary transfers of control of a broadcast license require prior approval by the FCC. To determine whether control of a broadcast license has changed, the FCC considers "actual or legal control, direct or indirect control, negative or affirmative control, and *de facto* as well as *de jure* control." An analysis of *de facto* control, which is analyzed by the FCC under a totality of the circumstances test, looks at, among other things, the exercise of control over a station's programming, personnel, and finances. Surrendering control over programming, personnel, or finances transfers *de facto* control of a station. The *de facto* control analysis also considers whether the other person or entity in question has held itself out to the public, the station staff, or both as being in control of the station.

In 2014, the sole member of the licensee LLC entered into a purchase agreement to sell the station to her daughter. The agreement stipulated that the daughter would pay the purchase price through "sweat equity," defined by the parties as providing accounting and administrative services. Between September 2016 and February 2021, the daughter delivered enough "sweat equity" services to satisfy the purchase price, after which the licensee LLC filed Articles of Organization with Oregon listing the daughter as the sole member/manager of the licensee LLC.

In October 2021, the mother and daughter amended the purchase agreement to acknowledge that the daughter had fully performed under the agreement, but that "the purpose of the Purchase Agreement has been frustrated by the mutual mistake of the Parties, who acknowledge that the sale and transfer of the FCC licensee and the Station[s'] FCC license[s] should have been subject to the prior approval by the FCC in accordance with 47 U.S.C. § 310 and regulations promulgated thereunder." The amendment stated that transfer applications would be filed within ten business days of execution of the purchase agreement amendment, but the applications were not filed until February 2022.

Throughout 2022, the daughter and her sisters held themselves out to the public as co-owners of the station in social media posts, on the station's website, and in a news article. The news article said that the station was "passed down . . . to four sisters" and that the sisters "worked behind the scenes at [the station] for years before taking over" and quoted the daughter as stating "[w]e changed the format [of the station] to political news talk."

Based on these developments, the Media Bureau ceased processing the transfer applications and initiated an investigation into potential unauthorized transfers of control. Ultimately, the Media Bureau concluded in the NAL that that two unauthorized transfers of control had occurred; first from the mother to the daughter, and then to the sisters. The NAL relied in part on the article indicating that the daughters had exercised *de facto* control over the stations, including by changing station format.

To resolve the investigation rather than litigate further, the licensee and the Media Bureau entered into a Consent Decree terminating the investigation. Pursuant to the Consent Decree, the licensee admitted that it violated the Communications Act and the FCC's voluntary transfer of control rule and agreed to pay a $16,000 civil penalty. In turn, the Media Bureau committed to approving the pending transfer of control applications upon payment of the penalty and conditioned upon no further issues arising that would prevent a grant.

Cable Company to Pay $1.1 Million Over EAS Upgrade Mishaps

A cable company with a national footprint entered into a Consent Decree with the FCC's Enforcement Bureau to terminate an investigation into whether the company violated the FCC's Emergency Alert System (EAS) Rules. The company will make a $1.1 million payment and implement a multi-part compliance plan.

Under various sections of Part 11 of the FCC's Rules, EAS participants, such as cable systems and broadcasters, must ensure that EAS equipment is "installed so that the monitoring and transmitting functions are available during the times the stations and systems are in operation." EAS participants are permitted to operate without EAS equipment for 60 days absent FCC authority to repair or replace defective equipment. EAS participants, however, must submit an informal request to the FCC for additional time if replacement of the defective equipment is not completed within 60 days.

Following adoption of new EAS rules in September 2022, EAS participants were required to upgrade their equipment so it could, among other things, carry EAS messages delivered in Common Alerting Protocol format via the Internet through the Integrated Public Alert and Warning System, commonly known as IPAWS. Much of the company's EAS hardware and software systems required upgrades to comply with the new rules. The company began planning for those upgrades in Summer 2022 by meeting with its EAS equipment provider to determine a process for taking a limited number of EAS devices offline at a time, sending them in for upgrading, and returning them to service before repeating the process with another batch of devices. According to the Consent Decree, the company believed this deactivate-upgrade-reinstate process was subject to the 60-day grace period to repair or replace "defective" equipment and that notification/approval of the FCC was not required.

The Consent Decree describes the company's procedures for handling a defective EAS device as: "[L]oad the most recent backup configuration of the malfunctioning EAS Device onto a spare unit and to install that unit while the malfunctioning EAS device [is] being repaired or replaced. If a spare unit was not on hand at the specific location of the failed unit, a spare would be shipped from another location." Due to the volume of EAS devices that required upgrades to comply with the new rules, the company did not have enough spare devices to provide while the original units were with the device manufacturer for upgrades. Ultimately, the company was able to accomplish the upgrade procedure for all but two of its EAS devices before the compliance deadline, with one of those devices being upgraded within 12 hours of the deadline and the other device being partially upgraded.

On the day before the October 2023 nationwide EAS test, the company notified the FCC's Public Safety and Homeland Security Bureau that about three dozen of its EAS devices would be offline during the test as they underwent upgrades to meet the December 2023 compliance deadline. The company's notification resulted in several questions to the company about the company's EAS readiness which, because the company believed it would meet the compliance deadline and that it was covered under the 60-day repair grace period, it decided not to answer.

The Enforcement Bureau followed up with a Letter of Inquiry to which the company timely responded. The Bureau ultimately disagreed with the company's interpretation of the EAS Rules, asserting that the devices were not "defective" as they were still able to perform "the monitoring and transmitting functions" that are required "during the times the stations and systems are in operation." Negotiations between the company and the Bureau resulted in a Consent Decree, with the company agreeing to a $1.1 million payment and implementation of a compliance plan, including appointing a compliance officer, creating a compliance manual, training its employees, reporting any future violations to the FCC within fifteen days, and submitting two compliance reports to the FCC over the next year.

FCC Proposes $734,872 Fine Against Chinese Smart Home Device Manufacturer for Violating Equipment Authorization Rules

Last month the FCC issued an NAL proposing a $734,872 fine against a Chinese smart home device manufacturer for repeated violations of the FCC's equipment authorization rules.

Specifically, the NAL alleged violations of Sections 1.17(a)(2) and 2.911(d)(7) of the FCC's Rules, which respectively require that statements to the FCC be truthful and accurate and that applicants designate a domestic point-of-contact for service of process to ensure accountability, particularly for foreign manufacturers.

The manufacturer had previously received over twenty FCC equipment authorizations to sell radio frequency-emitting (RF) equipment in the United States. From 2023 to 2024, the manufacturer sought three additional equipment authorizations for variations of video doorbells/security cameras. After a *Consumer Reports* article discussed potential security vulnerabilities in the smart home devices, the FCC opened an investigation and issued a Letter of Inquiry (LOI) to the manufacturer via its U.S. agent for service of process listed on the three applications.

The applications designated a Colorado corporation and an individual at that corporation as the manufacturer's agent. The FCC was unable to verify the existence of the individual, finding no credit history, driver's license, Social Security Number, or any other records associated with that name. Furthermore, the FCC's LOI was returned by the Postal Service as undeliverable to the physical address and, when the FCC tried to reach the agent by phone, the call went unanswered with no option to leave a voicemail. The FCC emailed the contact email address listed on the applications and received only a three-word response, and no response to the LOI.

The FCC tried to arrange for personal service to the address the manufacturer listed in the applications but was unable to complete service as the address was at a mailbox store. The FCC did succeed in completing delivery to a person at a California address listed in the Colorado corporation's corporate registration documents. After the FCC received no response to the LOI for over a month, it served a subpoena on the mailbox store, requesting information about the owner of the address. The mailbox store responded, explaining that the owner of the address held a "virtual mailbox," meaning it could receive mail at a physical address and view its mail electronically. However, the store explained that the mailbox had been flagged for potential fraud given the volume and variety of mail it received, and the store closed the mailbox in 2019. As of the release of the NAL, the manufacturer has not responded to the LOI.

Section 302a(b) of the Communications Act prohibits, among other things, the manufacture, importation, sale or offering for sale, shipment, or use of, devices that fail to comply with the FCC's equipment authorization regulations. Applicants for an equipment authorization are required under Section 2.911(d)(7) of the FCC's Rules to appoint a U.S.-based agent for service of process at a physical address. As stated in the NAL, this requirement ensures accountability and a way to communicate with applicants, especially foreign-based applicants. The FCC emphasized that the manufacturer did not have a reasonable basis for believing the address it listed for its U.S. agent was correct, as the mailbox had been closed for years and the manufacturer made no effort to determine the accuracy of the information it submitted in its applications. Thus, the FCC found that the manufacturer violated Section 1.17(a)(2) of its Rules by providing incorrect material factual information with respect to the agent's contact information.

The FCC issued the LOI directing the manufacturer to respond within 30 days, and an LOI is an "order" under Section 503(b)(1)(B) of the Communications Act. Section 503(b) of the Act allows the FCC to fine an entity found to have willfully or repeatedly failed to comply with an FCC rule or order up to $24,496 for each day of a continuing violation, up to a statutory maximum of $183,718 for a single act or failure to act. The FCC found each application submitted with inaccurate information to be a separate and continuing violation. Concluding that the company benefited from these misrepresentations by profiting from the sale of products that would not have been authorized without a U.S. agent for service of process, the FCC proposed the statutory maximum of $183,718 for each of the three applications, for a total of $551,154.

Separately, Section 1.80(b) of the FCC's Rules sets a base fine of $4,000 for failure to respond to an FCC communication. Considering the severity and duration of the alleged violations, the FCC found that the maximum statutory fine was warranted, and proposed a fine of $4,000 per day multiplied by the 151 days that elapsed since the manufacturer was ordered to respond to the LOI (which had to be reduced to the statutory maximum of $183,718). The NAL proposed a total of three $183,718 fines for the three defective applications and one $183,718 fine for the failure to respond, for a total proposed fine of $734,872. The manufacturer has thirty days to either pay the proposed fine or to seek reduction or cancellation of it.