Communications

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FCC Enforcement Monitor

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Headlines:

- *Broadcaster Loses Appeal of $20,000 FCC Fine*
- *FCC Issues Citation for Violations of Radio Frequency Equipment Authorization and Labeling Rules*
- *FCC Proposes $392,930 Fine to Telecom Provider for Excessive USF Fees, Unauthorized Transfers, and Delinquent Regulatory Fees*

Ninth Circuit Upholds $20,000 Fine Against FM Broadcaster for Unauthorized Operation

The U.S. Court of Appeals for the Ninth Circuit upheld a $20,000 FCC fine against a New Mexico FM broadcaster for operating outside the parameters of the broadcaster's construction permit.

Section 301 of the Communications Act bans the unlicensed transmission of "energy or communications or signals by radio." Section 503 of the Act authorizes monetary fines where the FCC finds "willful[] or repeated[]" failure to comply "with the terms and conditions of any license, permit, certificate, or other instrument or authorization" issued by the FCC.

In November 2009, the FCC issued a $20,000 fine to the broadcaster for operating at variance from the broadcaster's construction permit. Specifically, the FCC found that the station was broadcasting without authorization, and was being operated at a facility 34 miles from its authorized location.

When the broadcaster failed to pay the $20,000 fine, the FCC referred the matter for collections to the Department of Justice ("DOJ"), which, in turn, sued the broadcaster in Nevada District Court to recover the $20,000. The District Court granted the DOJ's motion for summary judgment, and in doing so upheld the fine against the broadcaster. The broadcaster, representing himself in court, subsequently appealed the District Court's ruling to the Ninth Circuit.

The Ninth Circuit affirmed the District Court's ruling, stating that the DOJ provided "substantial" evidence that, for more than a year, the broadcaster "willfully and repeatedly" transmitted radio signals from a different location and at different technical parameters than those specified in the broadcaster's

construction permit. In contrast, the court explained, “taking his submissions in the most generous light, [the broadcaster has] not shown a genuine issue of material fact for trial.” The broadcaster failed to contradict any of the facts underlying the alleged unauthorized operation: (1) because his construction permit required FCC approval before commencing program testing—which the FCC never granted—the transmissions were not valid under the FCC’s Rules; and (2) because the broadcaster transmitted at variance from the terms of the permit, he was not conducting valid equipment tests, which only allow transmission to assure compliance with the permit’s terms. In reviewing the amount of the fine, the Ninth Circuit found the FCC’s decision to impose the full $10,000 base fine for each of the two instances of unauthorized operation “reasonable and not an abuse of discretion."

Going, Going, but Not Gone: FCC’s Parting Gift to Company Winding Down Business Is Citation for Equipment Authorization and Labeling Violations

The FCC’s Enforcement Bureau issued a citation to a company for marketing radio frequency (“RF”) transmitters that were not properly certified or labeled.

Section 302 of the Communications Act prohibits the manufacture, import, sale, or shipment of home electronic equipment and devices that fail to comply with the FCC’s regulations. Section 2.803 of the FCC’s Rules provides that a device subject to FCC certification must be properly authorized, identified, and labeled in accordance with Section 2.925 of the Rules before it can be marketed to consumers.

In January 2016, after receiving complaints that the company marketed two types of RF transmitters in violation of the FCC’s equipment authorization and labeling requirements, the FCC sent a Letter of Inquiry (“LOI”) to the company. The LOI directed the company to provide information and documents related to the allegations. In its initial response (by email), the company stated that it would “soon be ceasing operations entirely.” In a subsequent email, the company said that it had ceased selling the two types of transmitters at issue, and no longer stocked the transmitters in the United States. The company also provided documents regarding the transmitters.

Upon review of the documents, the FCC determined that the transmitters were not properly certified or labeled with the required FCC identifier, and that the company had therefore violated Section 302(b) of the Communications Act and Sections 2.803(b)(1) and Section 2.925 of the FCC’s Rules. The FCC directed the company to immediately take steps to comply with the FCC’s authorization and labeling requirements, and to cease any marketing of unauthorized RF devices in the United States. The FCC also warned the company that future violations of these requirements could subject it to fines of up to $18,936 per day and other sanctions.

You Can Have the Telecom Company Back: Authorizations Unlawfully Transferred in Divorce Come With $392,930 Baggage

The FCC proposed to fine a provider of international and domestic telecommunications services $392,930 for (1) charging excessive universal service fees to its customers, (2) unauthorized transfers of control, and (3) failing to timely pay regulatory fees in full.

Section 54.712(a) of the FCC’s Rules prohibits Universal Service Fund (“USF”) contributors from charging customers excessive USF fees. Section 214 of the Communications Act and Sections 63.03 and 63.24 of the FCC’s Rules require that approval be obtained from the FCC prior to the transfer of control of international and domestic telecommunications service authorizations. In addition, Sections 1.1154 and

1.1157(b)(1) of the Rules require timely payment of regulatory fees to the FCC for relevant telecommunications services.

The provider was referred to the FCC for potential enforcement action by the Universal Service Administrative Company in June 2015, after it failed to respond to questions concerning collection of USF surcharges. In November 2015, the FCC issued a Letter of Inquiry to the provider to investigate whether it had violated the Communications Act and FCC's Rules.

After reviewing sample invoices and other information from the provider, the FCC determined that, in 2015, the provider billed at least three customers USF surcharges for international service even though the company was not assessed, and did not pay, USF charges on international revenue at that time.

The FCC also found that the provider had transferred its authorizations to provide both international and domestic services two times without FCC approval (for a total of four transfers). According to the FCC, the provider had a sole shareholder from 2002 to 2010; but in 2010, 51 percent of the company's shares were transferred to the original shareholder's ex-wife in compliance with a divorce decree. In September 2015, the majority stock interest reverted back to the original shareholder. No requests for approval of any of these transfers were submitted to the FCC.

In addition, the provider failed to pay regulatory fees for fiscal years 2008, 2011, and 2016. In November 2016, the provider entered into a 36-month payment plan with the U.S. Treasury Department, and made its first payment. However, the unpaid fees and late penalties totaled $80,309.88 as of October 2016.

The FCC found the provider's violations to be "a serious dereliction of its responsibilities," warranting a "significant" fine. The FCC proposed imposing the base fine for excessive USF charges of $40,000 for each instance, totaling $120,000, and $32,000 for the unauthorized transfers of control (applying the base $8,000 fine to each of the four transfers). As punishment for the provider's repeated failure to pay regulatory fees (and to deter other telecommunications licenses from engaging in similar violations), the FCC assessed "treble the harm [the provider] has caused to the Commission's regulatory fee program," for a proposed fine of $240,930 for the delinquent regulatory fees, bringing the total proposed fine to $392,930.

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.

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