Advisory

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Communications

June 2015

FCC Enforcement Monitor

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Headlines:

- *Educational FM Licensee Receives $8,000 Fine for Unauthorized Operation*
- *FCC Cancels $6,000 Fine for Late Filings due to Licensee's Inability to Pay*
- *Blaming Prior Legal Counsel, Telecommunications Provider Pays $2,000,000 Civil Penalty*

Continued Unauthorized Operation Leads to $8,000 Fine

A New York noncommercial educational radio station received an $8,000 fine after repeatedly failing to operate its station in accordance with its authorization. Section 301 of the Communications Act prohibits the use or operation of any apparatus for the transmission of communications or signals by radio, except in accordance with the Act and with a license granted by the FCC. In addition, Section 73.1350(a) of the FCC's Rules requires a licensee to maintain and operate its broadcast station in accordance with the terms of the station authorization.

In response to a complaint, an FCC agent discovered in October of 2012 that the licensee was operating the station from a transmitter site in Buffalo, New York, a location about 36 miles from the authorized site. The FCC made repeated attempts to contact the licensee. Ultimately, the president of the licensee confirmed the unauthorized operation and agreed to cease operating from Buffalo. The FCC then issued a Notice of Unlicensed Operation to the licensee, warning it that future unauthorized operations could result in monetary penalties.

After receiving another complaint, the FCC determined that the licensee had resumed unauthorized operation in November of 2012. In response, the FCC's Enforcement Bureau issued a Notice of Apparent Liability (NAL) proposing an $8,000 fine. The FCC explained in the NAL that although the base fine for operating at an unauthorized location is $4,000, the egregiousness of the licensee's violation warranted an upward adjustment of an additional $4,000. The FCC based this decision on the fact that the licensee had moved the location of its transmitter to a significantly more populous area more than 30 miles from its authorized location in an effort to increase the station's audience while potentially causing economic or competitive harm to radio stations licensed to that community.

Following the NAL, the licensee sought a reduction or cancellation of the fine, claiming that it made good faith efforts to remedy the violation, had a history of compliance with the FCC's Rules, and was unable to pay the fine. The FCC concluded that the licensee took no remedial actions until after it was notified of the violation, and found that the licensee's continued operation from the unauthorized location after receiving a Notice of Unlicensed Operation demonstrated a deliberate disregard for the FCC's Rules. Finally, the licensee failed to provide any documentation supporting its inability to pay claim. Accordingly, the FCC rejected the licensee's arguments and declined to cancel or reduce the $8,000 fine.

In Rare Decision, FCC Cancels Fine Based on Station's Operating Losses

In October of 2014, the FCC's Video Division proposed a $16,000 fine against the licensee of a Class A TV station for violating (i) Section 73.3539(a) of the FCC's Rules by failing to timely file its license renewal application, (ii) Section 73.3526(11)(iii) for failing to timely file its Children's Television Programming Reports for eight quarters, (iii) Section 73.3514(a) for failing to report those late filings in its license renewal application, and (iv) Section 73.3615(a) for failing to timely file its 2011 biennial ownership report. The FCC also noted a violation of Section 301 of the Communications Act because the station continued operating after its authorization expired.

The Video Division later reduced the fine to $6,000 after the licensee requested a reduction or cancellation of the fine due to its inability to pay. However, because the licensee supported its claim that it was unable to pay based on operating losses alone, a majority of which consisted of undisclosed "deductions" and "depreciation," the FCC determined that the licensee failed to provide enough evidence to warrant cancellation of the fine.

Subsequently, the licensee filed a Petition for Reconsideration, stating that the Video Division failed to properly calculate the reduced fine amount because it did not consider that the operating losses placed the station in severe financial distress. The FCC explained that it typically uses gross revenues when evaluating a licensee's ability to pay, and will cancel fines based on operating losses only in extreme cases of severe financial distress, such as when the licensee faces foreclosure, is unable to secure funding to cover its losses, or its owners personally guarantee loans on the licensee's behalf. The licensee's Petition for Reconsideration provided the FCC with additional documents regarding the significance of various deductions and depreciation listed on the station's tax returns, and noted that the station owner and employees guaranteed loans to keep the station operating.

After considering the facts presented in the Petition, the FCC determined that cancelling the fine served the public interest. The FCC nonetheless admonished the licensee for committing multiple violations of the FCC's Rules and the Communications Act. The FCC also warned the licensee that because cancellation or reduction of a fine based on inability to pay is wholly within the discretion of the FCC, a similar request in the future might not yield the same result.

Head in the Cloud: Telecommunications Provider Claims "Good Faith Reliance on Previous Legal Advice" Led to Multiple Violations

A California cloud-based call center software solutions provider agreed to pay $2 million to the government and implement a long-term compliance plan to resolve an FCC investigation against it for failure to comply with its obligations as a telecommunications provider under the Communications Act and the FCC's Rules.

The provider admitted that it (i) failed to comply with requirements to register with the FCC before providing interstate telecommunications services, (ii) failed to obtain FCC authorization prior to providing international telecommunications services, (iii) failed to pay required regulatory fees, and (iv) failed to file Telecommunications Reporting Worksheets, international traffic and revenue reports, and reports certifying its compliance with the FCC's customer proprietary network information (CPNI) rules. The provider also failed to make required payments to the Universal Service Fund, the Telecommunications Relay Service Fund, and the Local Number Portability and North American Numbering Plan cost recovery mechanisms.

In November 2012, the provider disclosed to the Enforcement Bureau that, on the advice of prior legal counsel, it had treated its customer offerings as information services, rather than telecommunications services. The provider also stated that it believed it was an end-user, rather than a provider of telecommunications services. As a result, it failed to comply with the Federal Regulatory Reporting and Contribution rules, the CPNI rules, and International Section 214 rules.

Upon receiving contrary advice from subsequent legal counsel, the provider took immediate steps to fulfill its obligations as a telecommunications service provider, such as filing overdue FCC forms, applying for International Section 214 authority, and filing a request for special temporary authority. To resolve the investigation into mistakes already made, however, the provider agreed to pay a $2 million civil penalty and to implement a long-term compliance plan to ensure future compliance with the FCC's Rules.

* *We would like to thank Summer Associate Lori Panosyan for her contribution to this Advisory.*

If you have any questions about the content of this Advisory, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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