

FCC Enforcement Monitor

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HEADLINES

Pillsbury's communications lawyers have published 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:

- *Media Bureau Hits Michigan Radio Station for Low Power Snafu*
- *Online Retailer Faces \$2,861,128 Forfeiture for Selling Unauthorized Drone Parts*
- *Enforcement Bureau Issues Advisory on Drone Accessories*

Weathering the Storm: Media Bureau Proposes Fine for Botched Low Power Operation

The FCC's Media Bureau issued an \$18,000 Notice of Apparent Liability for Forfeiture ("NAL") to a Michigan radio licensee accused of omitting material facts from an FCC application and operating its station at variance from its license.

Under Section 312(g) of the Communications Act of 1934 ("Act"), a broadcast station's license automatically expires after the station fails to broadcast for 12 consecutive months. Section 73.1745(a) of the FCC's Rules requires a station to broadcast according to the "modes and power" specified by its license, and Section 73.1765 permits licensees to request special temporary authority ("STA") to operate at variance from their license for a limited time.

The licensee originally applied for renewal of its license in May of 2012. Section 309(k) of the Act provides several criteria that the FCC must consider when reviewing license renewal applications. The FCC will grant an application if: (1) "the station has served the public interest, convenience, and necessity;" (2) the licensee has not committed any serious violations of the Act or the FCC's Rules; and (3) the licensee has not committed any other violations of the Act or the FCC's Rules that, taken together, would indicate a pattern of abuse.

In February 2015 (while the renewal application was still pending), the licensee requested an STA to remain silent, claiming that his facilities would require significant repair after a broken water main flooded the studio.

The following month, the licensee of several religious broadcast stations filed an objection to the license renewal application, alleging that the broadcaster was "untruthful" about the circumstance of the flood. It also claimed that the licensee had broken a contract between the two parties, "attempted to extort money" from a Texas broadcaster, and failed to pay money to another broadcaster.

In May 2016, the Media Bureau inquired into the length of time the licensee's station had been silent. The licensee responded that the station had returned to air shortly after the STA was filed, but a "clerical error" had prevented the licensee from notifying the FCC. As evidence, the licensee provided sworn declarations, as well as bills and ad orders for another one of the licensee's stations. The licensee also indicated that the station was operating with a lower-powered transmitter than specified in the license due to a lightning-related power surge the previous year.

Unsatisfied, the Media Bureau sent the licensee a second letter demanding more information about the station's operations. The licensee responded with more information relating to the station in question, including a letter from an engineer which confirmed that while the station was licensed to operate at 50 kW, it was only operating at 1.4 kW.

That same day, the licensee requested an STA to operate at that reduced power level, stating that the station was "currently operating at the reduced power level of 1.4 kW" and needed to continue at this reduced power for the next 180 days. The requested STA was not granted until over a year later.

The Media Bureau ultimately concluded that the station was operating with a "non-conforming" transmitter and at significant variance from its 50 kW authorization. The Bureau also found that the licensee failed to timely request an STA to operate at that reduced power, and failed to disclose a material fact in its second STA request when it said that it was "currently operating" at the lower level despite having operated at that reduced power for over a year. The NAL also indicated that it was "at best misleading" to suggest that the station would be back to full power within 180 days. Section 1.17(a)(1) of the FCC's Rules prohibits individuals from intentionally providing incorrect "material factual information" or intentionally omitting "material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading."

As a result, the Media Bureau proposed: (1) a fine of \$10,000 for operating without the appropriate authorization for the service; (2) an additional \$3,000 fine for failing to file a required form; and (3) a \$5,000 fine for failing to disclose a material fact in the STA request.

Fortunately for the licensee, the Media Bureau did not find these acts to be "serious violations" or a pattern of abuse, and therefore granted the station's license renewal application in a separate action. In doing so, the Media Bureau denied the religious licensee's objections, noting that the FCC does not adjudicate private contractual disputes.

Flight Delay: Online Drone Retailer Dinged for Marketing Dozens of Noncompliant Drone Parts

The FCC proposed a \$2,861,128 penalty against a group of commonly-owned companies in the United States and Hong Kong for marketing unauthorized drone equipment.

Pursuant to Section 302 of the Act, **the FCC regulates radio-frequency energy-emitting devices** ("RF" devices) that can potentially interfere with radio communications. The FCC sets limits on a device's spurious emissions, transmission power, and on which bands it may operate. Generally, noncompliant devices may not be imported, marketed or sold in the United States.

An "intentional radiator" is an RF device that is designed to generate and emit RF energy as an elemental function (e.g. a Wi-Fi transmitter or cell phone), and is subject to the FCC's stringent "certification" procedure. Though amateur equipment need not be certified, it can only be operated in amateur bands and by amateur license holders. A device capable of operating outside of these amateur bands cannot be advertised as amateur equipment and must be FCC-certified prior to marketing and use.

According to the NAL, the seller's website offers audio and visual transmitters intended for use with unmanned drones. In 2015, the FCC's Enforcement Bureau responded to complaints of the sale of noncompliant devices by issuing the seller

a Citation and Order. After the seller continued selling the devices, the Bureau followed up with a Letter of Inquiry (“LOI”) seeking additional information. When the seller failed to respond to all of the LOI’s questions, the Bureau issued a further Citation and Order (“Citation”), which the seller ignored outright.

Despite the LOI and Citation, the website continued to offer at least 65 A/V devices operable on frequencies outside of the amateur bands, including on bands restricted to Federal agencies. The FCC also found several devices capable of operating at nearly twice the permitted power level. According to the FCC, none of these devices were certified.

In its response, the seller never disputed the devices’ technical parameters, but argued that it is not subject to the FCC’s Rules because it does not market its devices in the United States. Unsurprisingly, the FCC did not accept this response, alleging the company: (1) has an office and customer service operations in the United States; (2) admitted in past litigation that it marketed its products in the U.S. through its website; (3) sells and ships products directly to U.S. customers; and (4) posted on its own social media account, “Wishing our US customers a very happy Independence Day!”

The FCC states that the company “willfully and repeatedly” violated its orders by failing to fully respond to the LOI and failing to respond entirely to the subsequent Citation. Section 1.80(b) of the FCC’s Rules sets a base forfeiture of \$7,000 for each instance of marketing unauthorized equipment, and \$4,000 for failing to respond to an FCC order. Section 503(b)(2)(D) of the Act sets a statutory maximum of \$19,639 for each day of a continuing violation, up to \$147,290 for a single act or failure to act. The FCC may also adjust its penalty upward for “egregious, intentional, or repeated” violations.

For 50 of the noncompliant models, the FCC upwardly adjusted the base fine amount for a total proposed fine of \$12,250 per model. For the 15 device models that were either capable of operating on restricted frequencies or at excessive power levels, the FCC proposed the maximum fine of \$147,290 per device. The FCC also proposed a fine of \$19,639 for each failure to respond to the LOI and Citation.

Beyond the proposed total fine of \$2,861,128, the FCC also demanded that the company submit a signed affidavit explaining its future plans for ensuring compliance with the FCC’s rules.

A/V Club: FCC Issues Enforcement Advisory on Drone Accessories

Published on the same day as the aforementioned NAL, the Enforcement Bureau issued an Enforcement Advisory (“Advisory”) reminding manufactures and retailers that all drone-related audio and video transmission equipment must comply with the FCC’s Part 15 Rules before being marketed to the public.

The Advisory notes the growing prevalence of websites selling either unauthorized or completely noncompliant drone accessories. By definition, drone-mounted A/V transmitters are “intentional radiators,” which generally must be certified before they are advertised or sold in the United States. In addition to satisfying the FCC’s emissions and power requirements, a certified device must include a unique FCC Identifier, a compliance statement, and a warning to consumers against technical modifications. Beyond the accessories, the aerial device itself must also satisfy the FCC’s Rules.

As stated above, A/V transmitters that exclusively function in amateur bands do not need to be certified, but can still only be used by licensed amateur operators.

The FCC’s release of such advisories frequently foreshadows where the FCC will be focusing future enforcement efforts. For example, past FCC advisories on equipment authorization, robocalls, and unauthorized radio broadcasts have all preceded significant enforcement actions ranging from notices of violations to hefty fines and even property seizures.

As the FCC’s multimillion-dollar fine and Enforcement Advisory make clear, online retailers will no longer be able to fly under the radar.