

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:

- *Violations of the Live Broadcasting Rule Lead to \$50,000 Consent Decree*
- *Decision Affirming Dismissal of Mississippi Station's License Renewal Application Highlights Intricacies of License Renewal Process*
- *FCC Reversal Leads to Reinstatement of Georgia Radio Station's License*

Is This Live? California Broadcaster Settles with FCC Over Violations of the Live Broadcasting Rule

The FCC recently entered into a Consent Decree with a large California-based radio broadcaster for violating the FCC's rule prohibiting the broadcast of prerecorded programming that "creates the impression that it is occurring live" (often referred to as the "live broadcasting rule"). This settlement represents the first time the FCC has publicly enforced the rule in recent years.

According to the FCC, the live broadcasting rule is effectively a consumer protection rule that ensures viewers are not misled into believing that a program is live when it is not. Under Section 73.1208 of the FCC's Rules, where "time is of special significance" to the program material aired, or "an affirmative attempt is made to create the impression that [the program material] is occurring simultaneously with the broadcast," broadcasters must disclose if the program was previously taped, filmed, or recorded. Such disclosure must be made at the beginning of the broadcast "in terms commonly understood by the public". The live broadcasting rule does not extend to prerecorded commercial, promotional, or public service programming.

The FCC began its investigation after receiving a complaint alleging that one of the broadcaster's Los Angeles-area AM stations was airing a call-in show with the word "Live" in its title even though the show was actually prerecorded. The FCC's Enforcement Bureau responded by directing a Letter of Inquiry to the station's licensee seeking additional information about the program. In response, the licensee admitted the broadcast had indeed been prerecorded and that at several times during the broadcast, the program's host had suggested that he was taking listener calls live over the air. The licensee acknowledged that even though the program created the impression that the broadcast was live, the station under investigation, as well as other commonly-controlled stations that broadcast the same program, had failed to make the required disclaimer.

To resolve the investigation, the licensee's parent company entered into a Consent Decree with the Enforcement Bureau. Under the terms of that agreement, the company: (1) agreed to pay a \$50,000 civil penalty; (2) admitted to violating the live broadcasting rule; and (3) must implement a three-year compliance plan to prevent future violations. Considering the costly penalty, broadcasters should be wary when airing prerecorded programming, taking care to determine whether the audience needs to be informed of that fact.

Undisclosed Death of Mississippi Radio Station Owner Ends in Non-Renewal of License

In a recent Memorandum Opinion and Order ("Order"), the FCC denied an Application for Review which challenged the dismissal of a Mississippi AM station's 2012 license renewal application. The application had failed to disclose that the station's licensee had previously died, and unsurprisingly, also failed to include the deceased licensee's signature.

The years-long saga began in January 2011 following the death of the station's licensee. In the event of an individual licensee's death, Section 73.3541 of the FCC's Rules requires (a) that the Commission be promptly notified in writing, and (b) within 30 days, an application be filed requesting FCC consent to an involuntary assignment of the license to a qualified person or entity (typically the executor of the licensee's estate).

No notice was given to the FCC of the licensee's death, nor was the required involuntary assignment application filed for nearly seven years. In February 2012, when the station's license renewal application came due, the application was filed on the licensee's behalf, but without the required signature of the licensee. The application was instead prepared and signed by an individual who would later be appointed the administrator of the licensee's estate. In the application, the administrator failed to mention the licensee's death and signed the application in his supposed capacity as an "Officer" of the deceased licensee.

While the license renewal application was under review, the probate court initiated a separate proceeding concerning the licensee's estate. In that proceeding, the court approved the appointment of the administrator, as well as the administrator's request to sell the station's assets to a proposed buyer for \$10,000. Only then was the now seven-years-overdue involuntary assignment application filed. Amazingly, that application was granted, with the Media Bureau approving the assignment of the license to the administrator in April 2018. However, the administrator and the station buyer approved by the court never took steps to obtain FCC approval for the sale of the station, despite Media Bureau staff specifically instructing the administrator to do so.

As a result of these failures, the FCC dismissed the license renewal application as defective for failing to disclose the licensee's death. Without renewal, the station's license was deemed expired as of June 1, 2012. In a Petition for Reconsideration challenging that dismissal, the administrator argued that reconsideration was warranted because he was not previously represented by counsel and was not familiar with the FCC's rules and procedures. In a Reconsideration Order the following year, the Media Bureau rejected this argument as unsupported by any FCC rule or precedent, noting that a party acting without legal counsel is still responsible for complying with the FCC's rules. The Media Bureau also noted that Section 73.3513(a)(1) of its Rules requires individual licensee applicants to personally sign their license renewal applications. Because the application was not signed by the licensee, and did not request a waiver of that rule, the Reconsideration Order found the application defective on that basis as well, and concluded it had been correctly dismissed.

The administrator and proposed buyer subsequently filed an Application for Review challenging the Reconsideration Order. Along with some of the administrator's prior arguments, the parties contended that there was no intent to deceive the Commission and noted that the proposed buyer is a minority as well as an innocent party in the proceeding. The parties further argued that they had been trying to negotiate a settlement with the Media Bureau, and that those negotiations should have been allowed to continue.

In the subsequent Order, the FCC noted that the parties failed to identify any error in the Media Bureau's decision. The FCC noted that, regardless of the circumstances surrounding the sale, Commission policy requires strict adherence to the license application signature requirements. With respect to ceasing negotiation of a consent decree, the FCC reminded the parties that its discretion to enter (or not) into consent decrees is not appealable. In this case, the FCC concluded there was no basis for a consent decree since the station's license had already expired due to the defective application. In that regard, the FCC found that the Media Bureau had erred in granting the 2018 involuntary assignment application given the prior expiration of the station's license. The FCC therefore denied the appeal.

Living to Fight Another Day: FCC Reversal Leads to Reinstatement of Georgia AM Station's License

In an intriguing turn of events, the FCC issued an order rescinding a decision from a few weeks earlier which revoked the license of a Georgia AM station for failure to pay delinquent regulatory fees. The FCC's reversal has, for now, reinstated the station's license and call sign.

The Media Bureau initiated the proceeding due to the broadcaster's failure to timely pay its regulatory fees owed for fiscal years 2010, 2013, 2016, 2017, and 2018. Under Section 1.1164(f) of the FCC's Rules, the FCC may revoke license authorizations for failure to timely pay regulatory fees. To resolve the broadcaster's outstanding debts, the FCC issued demand letters seeking payment, but to no avail. These letters were followed by an Order to Pay or to Show Cause demanding the broadcaster either make full payment or demonstrate why the debt is not owed. Believing that the licensee had once again failed to respond, on January 15, 2020, the FCC revoked the station's license and dismissed its pending applications for license renewal.

But even the FCC makes mistakes from time to time, and it realized it had erred in revoking the license. According to the Media Bureau, the broadcaster had in fact responded to the Order to Pay or to Show Cause on December 27, 2019, and the FCC had failed to consider that pleading when revoking the license. To correct this oversight, it reversed its Revocation Order to allow for proper consideration of the pleading, reinstating the broadcaster's license and call sign in the process.

Although the ultimate resolution of this proceeding remains to be seen, for now the broadcaster's license is once again in effect and its license renewal applications have been returned to pending status.