

# FCC Enforcement Monitor

## March 2020

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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:*

- *Rebroadcast Changes Lead to FM Translator Station Fine*
- *Delinquent Regulatory Fees Threaten AM Station License*
- *Procedural Missteps Lead to Dismissal of Stations' Applications in Administrative Proceeding*

#### **North Carolina FM Translator's Primary Station Change Leads to Fine**

**Following a Notice of Apparent Liability issued last year**, the FCC recently issued a Forfeiture Order fining a North Carolina FM Translator station \$2,000 for changing the station it rebroadcasts without notifying the Commission. However, in an oversight by the FCC, the Order was issued in error as the station had already paid the outstanding fine.

Sections 74.1232(b) and 74.1251(c) of the FCC's Rules set forth eligibility, licensing, and other technical rules applicable to FM translator stations. Under Section 74.1232(b), an entity may not hold multiple FM translator licenses to retransmit the same signal to substantially the same area without showing a "technical need" for an additional station. Section 74.1251(c) requires a translator licensee to notify the FCC in writing if it changes the primary station it rebroadcasts.

The Media Bureau's investigation began in response to a Petition for Reconsideration challenging the grant of a construction permit for the translator station. The licensee originally applied for the permit in July 2018, but amended its application to change its primary station. The Bureau granted the amended application the following month.

In its filing, the petitioner acknowledged that it was not a party to the application proceeding, but argued that it was effectively precluded from participating because the FCC granted the application only ten days after the amended application was placed on public notice. The Commission ultimately dismissed the challenge, determining that ten days is a reasonable amount of time to prepare and file a pleading and further concluded that the petitioner had sufficient notice of the amended application. The Commission also found that reconsideration of the application grant is not required in the public interest under the FCC's rules.

In April 2019, the station filed a license application for the now-constructed station, which the Commission granted shortly thereafter. In response, the petitioner filed a new petition contesting the grant of the license itself claiming that

(1) there was no “technical need” for the translator, such as issues with poor signal quality, and (2) the translator was not operating as authorized. This petition prompted the FCC’s review of the station’s rebroadcasting practices.

In December 2019, the FCC issued a Memorandum Opinion and Order and Notice of Apparent Liability that again rejected the petitioner’s argument that there was no “technical need” for the translator station, noting that this issue is considered at the permitting, not the licensing phase, and that a showing of technical need is only required when the same party proposes to own more than one translator rebroadcasting the same signal in substantially the same area.

The FCC did, however, conclude that the station violated the FCC’s rules by rebroadcasting a station not specified in its authorization without notifying the FCC. The FCC found that for roughly a month, the translator rebroadcast a nearby AM station, rather than the FM station specified in its license.

Despite these violations, the FCC concluded that permittees are entitled to a “high degree of protection” and a presumption that the Commission’s public interest determination in granting the permit should remain in effect unless it is shown that the station’s operation would go against the public interest. As a result, the Commission dismissed the license challenge and instead proposed a fine to resolve the violations.

The Notice of Apparent Liability proposed a \$2,000 fine. Although the base fine amount for failure to file required information is \$3,000, and \$4,000 for unauthorized transmissions, the FCC proposed the reduced fine due to the short duration of the violations and a lack of history of prior offenses. The Commission recently followed this NAL with a Forfeiture Order requiring the station to pay the \$2,000 fine or file a written statement justifying a reduction or cancellation of the fine. Days later, however, the Commission issued a separate order cancelling the Forfeiture Order, noting that the station had actually already paid the fine, and indicating that the Forfeiture Order was therefore “issued in error”.

### **Delinquent Payments Come at a High Price: Failure to Pay Regulatory Fees Threatens California AM Station**

As previous CommLawCenter posts [demonstrate](#), failure to pay regulatory fees can lead to significant penalties, including license revocation. In one recent example, the FCC initiated a license revocation proceeding against a California AM station, ordering it to either pay its delinquent regulatory fees or demonstrate why no payment is due.

Section 9 of the Communications Act (the “Act”) requires the FCC to “assess and collect regulatory fees” to recover the costs of its regulatory activities. When a payment is late or incomplete, a monetary penalty equal to 25 percent of the fee amount owed will be assessed. The Act also requires the FCC to charge interest on the debt owed. In addition to these monetary penalties, Section 9A(c)(4) of the Act and Section 1.1164(f) of the FCC’s Rules provide that the FCC may revoke a licensee’s authorization for failure to timely pay regulatory fees. If the FCC wishes to pursue that option, the licensee must be given at least 60 days to either pay the debt or demonstrate why the fees are inapplicable. Although applied sparingly by the FCC, the Commission may waive, reduce, or defer payment of the debt where a party demonstrates “extraordinary circumstances” that outweigh the public interest in recovering the regulatory fees.

The FCC claimed the California station has racked up roughly \$14,300 in unpaid regulatory fees for fiscal years 2007, 2008, 2012, 2013, 2014, 2015, and 2016. The station had already been notified of the fees in a July 2015 letter from the FCC in which the Commission stated that it would not take action on the station’s pending license renewal application until it resolved its debts.

When the debt was not paid, the FCC issued an Order to Pay or Show Cause. The station must now either pay the fees, interest, and penalties due within sixty days, or file a responsive pleading justifying waiver, reduction or deferment of payment. In the absence of payment or an adequate response, the Commission warned that it may proceed to revoke the station’s license.

### **Procedural Missteps Lead to the Dismissal of Applications Designated for Hearing**

The FCC's Administrative Law Judge recently issued an Order dismissing several applications designated for hearing last year. The Order resolves a years-long saga involving ownership challenges to several AM stations in Illinois and Missouri and a complex administrative proceeding that ensued.

The proceeding began in 2012 when a listener filed a Petition to Deny the stations' license renewal applications, claiming that the licensee of record was a "front" for an on-air personality, and convicted felon, who supposedly was the station's true owner. This individual had previously set up a trust for the purpose of acquiring radio assets and appointed his son the sole beneficiary and a local attorney as the sole trustee. Following his son's passing, the man reassigned the beneficiary interest in the trust to a girlfriend who subsequently entered into an agreement to assign the trust's assets to a new trust. The parties subsequently filed the requisite FCC applications seeking approval for that assignment. In 2016, the listener filed a new Petition to Deny challenging these assignment applications. In response, the FCC designated the applications and the stations' previously-filed license renewal applications for a hearing before an Administrative Law Judge ("ALJ").

After an initial conference among the parties, representatives for the trust sought a stay of the proceeding due to its ongoing Chapter 7 bankruptcy proceeding. In the following months, the ALJ attempted to convene a meeting of the parties and resume discovery, but changes in the trust's legal representation and other developments in the bankruptcy proceedings stalled these efforts. Throughout the proceeding, the trust's representatives failed to comply with the FCC's rules and procedures for parties to a hearing proceeding. Critically, the trustee did not attend the prehearing conference set by the ALJ for December 5, 2019. On December 20, 2019, the trustee filed a Notice of Appearance to establish his *pro se* appearance in the proceeding.

Following this filing, on January 24, 2020, the ALJ issued an Order instructing the trustee to show cause or face dismissal of the pending applications in which the ALJ documented both procedural and substantive issues with actions taken on behalf of the trust in the proceeding. The ALJ noted that the December 20 appearance contained numerous errors. The trustee's Notice failed to indicate that the party will appear on the date fixed for hearing, was unsigned, and did not include adequate service of process to the other parties.

In addition to these procedural issues, the ALJ concluded that the trustee could not appear *pro se* because the trustee was not a party to the proceeding. As the ALJ explained, the trustee is a representative of the entity that owns the stations, and does not appear on his own behalf. Moreover, as a licensed attorney, the trustee is not entitled to the deference typically afforded *pro se* litigants. The ALJ also indicated that given the trustee's role in the case, relevant rules which prohibit lawyers from advocating in a trial in which they may be called as a witness presented an obvious obstacle to the *pro se* appearance. The ALJ underscored that these missteps reflected the parties' *laissez-faire* approach throughout the proceeding. Citing the numerous junctures at which the proceeding could have been terminated, the ALJ issued one more Order requiring the parties to show cause for why the applications should not be outright dismissed for failure to prosecute.

The trust and its representatives failed to submit a response to the ALJ's Order, and therefore it did not come as a surprise when the ALJ terminated the proceeding and dismissed the pending applications with prejudice. The ALJ, in a word of caution to all FCC licensees, emphasized that there are duties inherent in the privilege of being entrusted with an FCC license, and part of those duties includes complying with the FCC's rules, procedures, and orders.