

FCC Enforcement Monitor November 2018

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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:

- *Premature Construction Turns Texas LPFM's Minor Change into a Major Fine*
- *FCC Issues Notice of Violation to Miami LPFM Licensee for Unauthorized Antenna Location*
- *California Man Pleads Guilty to FCC Bomb Threat, Fatal "Swatting" Hoax*

Houston, We Have a Problem: Media Bureau Proposes \$5,000 Fine for Unapproved Construction of a Broadcast Facility

The FCC's Media Bureau issued a Notice of Apparent Liability ("NAL") to the licensee of a Houston-area low power FM ("LPFM") station for engaging in premature construction of broadcast facilities.

Section 319(a) of the Communications Act ("Act") prohibits the FCC from licensing an applicant to operate broadcast facilities unless that applicant has previously obtained a construction permit from the FCC to build those specific facilities. A construction permit sets out the facilities and operating parameters for a proposed station, including the station's frequency allotment. Though an applicant may initiate certain pre-construction measures, including site clearance and purchase of broadcast equipment that is not specific to the station (e.g., generic studio equipment, but not a frequency-tuned antenna), the applicant may not take more substantive steps until it has a construction permit in hand.

In seeking a construction permit, an applicant must show that its proposed service contour is sufficiently distant from other stations operating on the same or adjacent frequencies as to ensure no interference will be created to existing stations. If the proposed LPFM facilities do not satisfy the minimum geographic distances set out in Section 73.807 of the FCC's Rules, the applicant must obtain a waiver of those requirements by demonstrating that the proposed operation will not result in actual interference. For example, an applicant might be able to demonstrate that intervening terrain (mountains) will block the interfering signal.

According to the NAL, the LPFM applicant filed for a construction permit to modify its existing facilities. Because the proposed site would not satisfy the minimum distance requirements for two local second-adjacent FM stations, the licensee also filed a waiver request purporting to demonstrate that the proposed service contour would not reach the two FM stations' potential listeners.

Before the Commission granted either of these requests, it received a Petition to Deny from another local station, alleging that the licensee had prematurely begun construction on the proposed site without prior FCC approval. The petition alleged that the licensee had mounted an antenna on an existing tower and had already proceeded to attach a transmission line to the antenna, in contravention of the prohibition on premature construction.

The petition also alleged that the waiver request was “flawed” because it did not sufficiently protect local listeners of the two second-adjacent FM stations. According to the petition, the waiver application assumed its contour would only reach one-story structures, when, in fact, several surrounding structures were two-story.

In response, the applicant swiftly removed its equipment from the tower only three weeks after it had installed it. In a later amendment, the applicant also proposed operating at a lower power level with a different antenna to reduce the likelihood of interference to nearby two-story buildings.

Nearly ten months later, the Media Bureau issued the NAL, proposing a \$5,000 fine for the applicant’s premature construction. Though the FCC’s Rules establish a base fine of \$10,000 for unauthorized construction, the Media Bureau adjusted this amount downward, citing the brief duration of the violation and the licensee’s prior history of compliance.

The Media Bureau indicated that once the fine was “resolved,” and assuming no additional issues emerged, it intended to grant the waiver and related modification application, finding that the applicant’s new engineering solution was sufficient to prevent interference to the nearby second-adjacent stations.

Technical Foul: Miami Licensee Cited for Unauthorized Facilities

In another case involving an LPFM, the Enforcement Bureau presented a Notice of Violation (“NOV”) to the licensee of a Miami station for operating at variance from the station’s authorization. As with all other broadcast operations, LPFM stations must operate in compliance with the Commission’s technical rules and with the station’s own authorization.

In August of this year, FCC field agents investigated the Miami LPFM and found violations in nearly every aspect of the station’s operation. At the time of the investigation, the station’s license authorized it to operate on 107.9 MHz in southern Miami at a height of 62 meters. Two months prior, the station had been granted a construction permit to operate four miles west of its original location on a new frequency and at a height of 15 meters.

When the field agents located the actual transmission facilities, however, they found that the licensee was operating at a completely different location several miles away from both its licensed and newly-authorized coordinates. The station was also using an antenna located 45 meters above ground.

According to the NOV, the station was not authorized, nor did it file a construction permit application, for these new coordinates or the drastic change in its antenna height. As a result, the FCC determined that the station was operating at variance from both its licensed location and its newly-authorized location, and with an unauthorized antenna height.

The licensee has 20 days to respond to the NOV. In its response, it must provide under penalty of perjury: (1) a complete explanation of each violation; (2) a description of the licensee’s corrective actions; and (3) a timeline for completion of these actions. The FCC will then consider the licensee’s responses and all relevant information to determine what, if any, enforcement action it will take against the licensee for the violations.

Law and Order: Bomb Threats and Deadly “Swatting” Lead to Guilty Plea

In other FCC “enforcement” news, the California man who called in a bomb threat during the FCC’s December 2017 open meeting regarding Net Neutrality has pleaded guilty to dozens of counts, including making hoax bomb threats, and for his role in a 2017 “swatting” prank that led to the death of a Wichita man.

In the highly-publicized 2017 meeting, the FCC voted to roll back many of its Net Neutrality rules. However, before the Commission could take its vote, an anonymous phone call claimed there were explosives ready to be detonated in the FCC's headquarters. This led to an immediate evacuation and a brief delay of the proceedings.

The same man was also responsible for dozens of similar threats, including reports of explosives at FBI headquarters and various high schools, universities, shopping malls and TV stations around the country. He had previously received a two-year prison sentence for calling in a bomb threat to a Glendale, California TV station.

The individual also entered a plea of guilty to causing a deadly incident in Wichita when he called in a "swatting" threat to local dispatchers that led to the death of an innocent third party. "Swatting" is a dangerous form of harassment where an individual calls in a false report of some sort of emergency, triggering the dispatch of police and other first responders to another person's address. According to the Kansas U.S. Attorney's Office, the defendant was contacted by an Ohio man involved in a dispute with a rival gamer in Wichita over an online video game match. The Ohio gamer asked the California man to "swat" the Wichita gamer. According to court documents, the Wichita gamer expected this and contacted the defendant directly via social media, giving him his residential address and daring him to swat him. However, the man had actually moved away from that address the year before.

When the defendant called in a false report at the address, the new resident exited the house to greet the police and affirm his innocence. After being told to put his hands up, the man "unexpectedly dropped his hands," and was shot and killed by the police.

After being charged with the various offenses described above, the defendant ultimately entered into an agreement with federal prosecutors to plead guilty in return for a recommendation that he be sentenced to 20 to 25 years in prison. The judge is not required, however, to accept that recommendation. Both gamers involved in the swatting incident are also facing charges related to the death.