

# FCC Enforcement Monitor

## August 2020

By Scott R. Flick, Warren A. Kessler and Simone A. Wood

### 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:*

- *More Stations Settle with FCC Over Political File Violations*
- *FCC Fines Drone Retailer Nearly \$3 Million for Marketing Unauthorized Devices*
- *California FM Translator Fined for Operating Above Power Limits*

#### **Political Ad Troubles Continue: Dozens of Radio Stations Settle With FCC Over Political File Violations**

As election season heats up, the FCC remains focused on broadcasters' Political File recordkeeping. In the past month alone, the Media Bureau has entered into scores of consent decrees with radio broadcasters stemming from violations of the Commission's Political File rules. This barrage of enforcement actions follows similar settlements reached last month (covered [here](#)).

This month's consent decrees continue to involve obligations under Section 315(e)(1) of the Communications Act, which requires broadcasters to place in their Political File records of requests to purchase political advertising time made: (1) by or on behalf of a candidate for public office (i.e., federal, state, or local candidates); or (2) by a non-candidate third party whose ad communicates a message relating to a "political matter of national importance." Section 73.1943 of the FCC's Rules requires stations to upload this documentation "as soon as possible," which the FCC considers to be "immediately absent unusual circumstances." The FCC has repeatedly emphasized that these recordkeeping requirements are essential to a candidate's ability to assert a right to equal time over the airwaves, as well as to keep the electorate informed so that they can evaluate the validity of political messages and hold political interests accountable.

The investigations arose from issues identified in each of the affected stations' license renewal applications. The license renewal application form requires stations to certify compliance with the FCC's Public Inspection File rule, and the Political File is part of the Public Inspection File. For stations that were unable to make this certification, further investigations uncovered deficient Political File records in a number of cases.

In particular, FCC staff indicated that failures to timely upload political file materials has been a recurring problem, and that when the rules say that records of a request to purchase airtime must be uploaded to the Public File "as soon as possible," the FCC interprets that to mean within *one business day* of the date of the request.

The recent flood of consent decrees has increased awareness of broadcasters' Political File obligations and has brought recordkeeping and other related compliance issues to the forefront for broadcasters both large and small. While last month saw settlements involving six large radio broadcasters operating roughly 1,900 stations nationwide, recent actions have targeted licensees controlling just a handful of stations.

While the settlements to date have not included monetary payments, by entering into consent decrees, the licensees are now on the hook for additional compliance measures, including preparing and implementing comprehensive compliance plans, along with filing periodic FCC compliance reports.

Political File obligations continue to be some of the most nuanced and complicated rules the FCC enforces, and the FCC's guidance in this area continues to evolve. Stations are therefore advised to work closely with counsel to understand their obligations and develop procedures to ensure compliance. Additional information on the political broadcasting rules is also available in our [Advisory](#) on the subject.

### **Drone Retailer Hit with Nearly \$3 Million Fine for Marketing Unauthorized Devices**

The FCC recently issued a \$2,861,128 fine against a large online drone retailer for marketing unauthorized drone equipment and failing to fully respond to a Commission request for information in the course of the investigation.

Section 302 of the Communications Act restricts the manufacture, import, sale, or shipment of devices capable of causing harmful interference to radio communications. In addition, under Section 2.803(b) of the FCC's Rules, devices that emit radiofrequency (RF) energy must first undergo the Commission's **equipment authorization procedures** before being marketed for sale in the United States. Such devices must also adhere to strict identification and labeling requirements.

Following several complaints about the company's marketing of noncompliant RF transmitters intended for use in operating drones, the FCC's Spectrum Enforcement Division issued a Letter of Inquiry ("LOI") in January 2016 seeking information and documents related to the allegations. In response, the company informed the FCC that it no longer sold the noncompliant transmitters in the United States. The FCC responded by issuing a citation identifying the relevant rules and warning that continued marketing of noncompliant devices could lead to significant fines.

Despite this warning, the FCC continued to receive complaints about the company's marketing of certain drone equipment, and issued a second LOI investigating these new claims. After receiving only a partial response, the FCC issued another citation, this time for the company's failure to fully respond to the Commission's inquiry. In June 2018, the FCC issued a Notice of Apparent Liability for Forfeiture ("NAL") proposing a \$2,861,128 fine against the company for marketing RF devices in violation of the FCC's rules and for failing to fully respond to the Commission's inquiries. The NAL claimed that the company continued to market 65 uncertified transmitters on its website, twelve of which operated on frequencies designated for federal government operations, including aviation systems, and thus posed a serious interference risk.

In July 2018, the company filed a response to the NAL seeking a reduction or cancellation of the fine on the grounds that: (1) the Commission's rules do not address "versatile" drone equipment that can operate on both amateur and non-amateur frequencies; (2) the company had no notice that marketing transmitters that could operate on unauthorized frequencies was unlawful; and (3) the requirement to fully respond to the LOI violated the company's Fifth Amendment right against self-incrimination. The company also presented factors it believed justified a reduction of the fine, including its inability to pay and the claim that it had ceased selling the 65 models identified in the NAL and would use "best efforts" to avoid marketing certain other noncompliant devices identified by the Enforcement Bureau.

The FCC rejected each of the company's arguments. It first noted that the company did not properly obtain certifications for the 65 transmitters at issue, and that although devices operating solely on amateur frequencies are exempt from the Commission's authorization requirements, that exemption does not apply to devices capable of operating on non-amateur

frequencies. The company's proposed reading of the rule would effectively allow any RF device designed to intentionally generate and emit energy (e.g., Wi-Fi routers or mobile phones) to avoid authorization simply by incorporating the capability to also operate on amateur frequencies. Moreover, the FCC noted that the company (not the Commission) is responsible for identifying equipment subject to the Commission's authorization rules and ensuring compliance.

The FCC also concluded that the long-standing equipment authorization requirements, along with the citation issued by the Enforcement Bureau, provided sufficient notice of the company's regulatory obligations. The FCC explained that citations are intended to provide such notice by alerting entities that do not hold FCC authorizations of rule violations. In this case, the FCC identified two noncompliant models being marketed and warned the company that continued violations could lead to sanctions. According to the FCC, violations continued despite that clear warning.

The FCC then noted that the company did not have a Fifth Amendment right against self-incrimination since that is a right held by individuals and not corporations. During the investigation, no company principal asserted a Fifth Amendment right, but even assuming they had, an individual possessing the records of the collective entity cannot assert such a right on the entity's behalf.

Finally, the Commission found the company had failed to provide the documentation needed to demonstrate an inability to pay, and that the intentional, repeated, and egregious nature of the violations, which included threats to public safety, warranted the full fine amount. While the Commission considered other potential downward adjustment factors, such as low sales of the equipment at issue and lack of actual interference experienced, those arguments were rejected and the full fine assessed.

### **California FM Translator Station Receives \$12,000 Fine for Exceeding Power Limits**

In a recent Memorandum Opinion and Order, the FCC upheld a \$12,000 fine against a California FM Translator station for operating outside of its licensed parameters.

Section 1.903(a) of the FCC's Rules requires that wireless licensees operate in accordance with the rules applicable to their particular service, and only with a valid Commission authorization. In addition, and relevant to this case, Section 74.1235(e) of the Rules prohibits FM Translator stations from operating with a transmitter power output that exceeds 105 percent of the station's authorized output.

In April 2017, the Enforcement Bureau issued an NAL proposing a \$12,000 fine against the station following multiple on-site inspections and an April 2016 Notice of Violation for operating at power levels exceeding the station's authorization. During the FCC's investigation prior to issuing the NAL, the station had acknowledged installing a higher power transmitter while its primary transmitter was being repaired, but claimed that normal operations had resumed in compliance with the station's license upon completion of the repairs. Upon further inspection, however, FCC agents observed continued violations, leading to the proposed fine.

The station sought reduction or cancellation of the fine, arguing that: (1) the Bureau should have first notified the station before issuing the NAL; (2) operating at higher transmitter output power was a permissible "good faith" effort to achieve the authorized power level specified in the station's license while its primary equipment was being repaired; and (3) the station was a non-profit entity with minimal funding. The Enforcement Bureau rejected these arguments and issued a Forfeiture Order for \$12,000.

In response, the station filed a Petition for Reconsideration repeating its prior arguments and asserting that the station's history of compliance at least warranted a downward adjustment of the fine. The Bureau rejected these arguments and reaffirmed the \$12,000 fine, noting that nothing in the Communications Act nor FCC Rules requires the provision of

notice and an opportunity to cure violations before fines are proposed. The FCC also dismissed the station's argument that a downward adjustment was warranted based on the station's history of compliance. As the FCC explained, the station had the opportunity to raise that argument in its initial response to the NAL, but had failed to do so. In any event, the FCC disagreed with the station's characterization of its record as "unblemished," citing numerous prior sanctions imposed against the station for unauthorized operations.

As a result, the FCC ordered the station to pay the \$12,000 fine within 30 days of the Order's release.