

FCC Enforcement Monitor October 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:

- *Rhode Island LPFM Station Issued \$15,000 Fine for Underwriting Violations*
- *In Reversal, FCC Rescinds Grant of Construction Permit for Portland FM Translator Over Interference Concerns*
- *Unauthorized Operations and EAS Violation Result in Proposed \$25,000 Fine for Florida LPFM Station*

Rhode Island LPFM Station's Underwriting Violations Cost \$15,000

The FCC's Enforcement Bureau entered into a Consent Decree with the licensee of a Rhode Island low power FM (LPFM) station to resolve an investigation into violations of the FCC's underwriting laws and other rules governing the ownership of LPFM stations.

The underwriting laws aim to preserve the unique nature of the commercial-free, local programming LPFM stations provide to the public, and in turn these stations benefit from access to spectrum and fewer regulatory requirements. To accomplish this, Section 399B of the Communications Act of 1934 and Section 73.503(d) of the FCC's Rules prohibit such stations from broadcasting promotional announcements on behalf of for-profit entities in exchange for compensation. The FCC's rules also place ownership restrictions on LPFM stations, prohibiting (1) a party from holding an attributable interest in another broadcast station; (2) a transfer of control of an LPFM station without first obtaining FCC approval; and (3) a transfer or assignment of an LPFM license within three years from the date of issue.

Between May 2016 and January 2020, the FCC received a series of complaints concerning announcements broadcast by the station. Specifically, the complaints alleged that the station had broadcast commercial advertisements, and questioned the station's compliance with the ownership limitations for LPFM stations. The Enforcement Bureau followed up by issuing multiple letters of inquiry to the broadcaster seeking information regarding the underwriting practices and ownership structure of the station. In response, the broadcaster admitted that, over a 16-month period, it received compensation for at least 17 announcements aired on behalf of for-profit entities. The station also acknowledged that one of its board members held an attributable interest in another radio station, and that a transfer of control effectuating a complete change in board membership took place on March 21, 2016, roughly one year after the FCC issued the station license, and without prior FCC approval. In fact, the required FCC transfer application was not filed until March 14, 2019.

To resolve the investigation, the license holder entered into a Consent Decree with the Enforcement Bureau under which it must pay a \$15,000 civil penalty and implement a five-year compliance plan to prevent future violations.

Upon Further Review: FCC Rescinds Oregon FM Translator Construction Permit Grant Over Predicted Interference

In a recent Memorandum Opinion and Order, the FCC reversed the prior grant of a construction permit to the licensee of a Portland, Oregon FM translator station due to concerns over predicted interference to listeners of a local radio station.

Under Section 74.1204(f) of the FCC's Rules, the Commission will reject applications for FM translator stations if the proposed operation would cause interference to an existing broadcast station. To prove such interference, a station opposing grant of such an application must provide "convincing evidence" of the impact of the proposed operation on its listeners. This evidence includes the name and address of affected listeners, certifications or similar evidence from those listeners that they listen to the existing radio station at their address, evidence that such listener's address is within the 60 dBu contour of the proposed FM translator, and evidence demonstrating that grant of the authorization will result in interference to the listener's reception of the existing station at that address. Additionally, the FCC's rules (which have since been amended to require online public notices) required at the time that applicants seeking authorization to construct an FM translator station publish public notice of the application in the local newspaper to provide the public with an opportunity to participate in the proceeding.

The FM translator applicant filed an application for a construction permit in December 2017, which the Media Bureau accepted for filing and placed on public notice, establishing a January 10 deadline for interested parties to file petitions to deny the application. The application was unopposed during this time and was subsequently granted on February 1, 2018. However, on March 1, 2018, the licensee of a nearby LPFM station filed a petition for reconsideration of the grant. The petitioner argued that the application grant should be rescinded because the proposed translator station would cause interference to its listeners, and included engineering and listener data to support its claim. The petitioner also noted that it did not participate in the proceeding before the application grant because the applicant had not provided the required public notice.

In response, the applicant opposed the petition by claiming that the petition itself was not properly verified, as it was signed by the Executive Director rather than an attorney or corporate officer, and that Section 74.1204(f) of the FCC's Rules, which the petitioner had relied on to show impermissible interference, did not actually protect LPFM stations.

In a letter order published in October 2018, the Media Bureau agreed with some of the arguments raised by the petitioner, but ultimately denied the petition. With respect to the public notice requirements, the Bureau agreed that where applicants fail to provide proper public notice, it typically rescinds the application grant and requires compliance with that rule to allow interested parties to participate in the proceeding. Here, however, the Media Bureau concluded that the substantial technical information provided by the petitioner suggested there was an opportunity to fully participate in the earlier proceeding and therefore no further proof of compliance with the public notice rules was needed.

In terms of the arguments raised in the petition itself, the Bureau concluded that the signature of the licensee's Executive Director was an adequate form of verification and that Section 74.1204(f) of the FCC's Rules does in fact protect LPFM stations. However, the Media Bureau determined that it could not accept the specific engineering method the petitioner used to demonstrate predicted interference, known as the "Longley-Rice" model. The Bureau reminded the petitioner that while it will accept an analysis based on this "alternate" model in limited circumstances, when the application under review uses the prediction methods found in the FCC's rules, the Bureau is precluded from considering an alternate analysis method to challenge the application. As a result, the Bureau concluded that the petitioner had not provided "convincing evidence" that the construction permit grant would result in interference for listeners of the existing station.

Following the Bureau's decision, the petitioner sought review by the full Commission. In an order adopted two years after the original Media Bureau decision, the Commission found that the Bureau had erred in concluding that the analysis submitted by the petitioner did not support claims of interference. Specifically, the Commission found that even excluding the contested engineering analyses, the petitioner's list of listeners and their sworn declarations constituted "convincing evidence" of predicted interference. The Commission therefore rescinded the grant and dismissed the construction permit application.

Unauthorized Operations Lead to Proposed \$25,000 Fine Against Florida LPFM Station

The Enforcement Bureau recently issued a Notice of Apparent Liability for Forfeiture (NAL), proposing a \$25,000 fine against the licensee of a Jupiter, Florida LPFM station for failing to operate in accordance with the station's licensed parameters and to comply with other terms of the station's authorization.

Section 301 of the Communications Act prohibits radio transmissions absent authorization from the FCC. Sections 73.840 and 73.845 of the FCC's Rules require LPFM stations to maintain their transmitter output power at certain authorized levels and to otherwise operate in accordance with their station authorization. Section 73.878(a) also requires LPFM stations to make station facilities available for inspection during the station's business hours and at any time that the station is operating. Lastly, under Section 11.11(a) of the FCC's Rules, LPFM stations must install and maintain certain Emergency Alert System (EAS) equipment, such as decoders and encoders, at their stations.

The LPFM station's unauthorized operations initially came to light in the course of a separate investigation of a nearby broadcast station. On February 19, 2020, FCC field agents monitored the LPFM station's transmissions and determined that it was transmitting from a location approximately 0.33 miles from its authorized site and that the station was not using the type of antenna specified in its license. The agents confirmed that the station had not sought approval to operate at that location or with the different antenna. Several days later, an agent called the station during business hours to request an inspection of its transmitter site. The station representative denied the request, explaining that the station's president was out of the country indefinitely and no other staff member was capable of responding to the agent's questions about the station.

After several additional attempts, on March 6, 2020 investigators inspected the station's facilities and confirmed that its transmitter power output exceeded authorized levels by more than 200% and that the antenna in use was not authorized in its license. Investigators also noticed that the station did not have the required EAS equipment installed. When asked, the station president responded that the equipment was located offsite but could not provide EAS testing logs to the investigator. On April 9, 2020, FCC field staff issued a Notice of Violation which cited the violations observed and instructed the station to provide a sworn statement responding to the issues identified. In its response, the station asserted that it had "taken care of the violations," but did not provide the required sworn statement.

Given the observed violations and the station's failure to cure the violations or seek authorization from the FCC to modify its operating parameters, the Enforcement Bureau concluded that the station had failed to operate in accordance with its authorization and the FCC's rules. Notably, the Bureau stressed that these types of violations harm the Commission's broader efforts to manage the radio spectrum, investigate potential violations, and maintain accurate technical data on its licensees. The Bureau also found that the station's failure to make its facilities available to Bureau agents upon request in violation of the rules was harmful to the Commission's oversight efforts. Finally, the Bureau determined that the station had violated the Commission's EAS rules, which require that the station have the proper EAS equipment installed.

In accordance with the FCC's established base fines for unauthorized operation (\$10,000), failure to permit inspection of a broadcast station (\$7,000), and failure to install EAS equipment (\$8,000), the Bureau proposed a \$25,000 fine and instructed the licensee to either pay the full fine amount or submit evidence supporting reduction or cancellation of the fine within thirty days.