

# FCC Enforcement Monitor

## June 2021

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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:*

- *Online Drone Retailer Fined Nearly \$3 Million for Marketing Unauthorized Devices*
- *FCC Denies Motion to Quash Letter of Inquiry Concerning Unauthorized Operation of Nevada LPFM Station*
- *Unauthorized License Transfers Lead to \$104,000 Consent Decree for New Jersey Water Service Company*

#### **FCC Affirms \$2.8 Million Fine for Marketing Unauthorized Drone Transmitters**

The FCC denied a petition asking it to reconsider a \$2.8 million fine it issued to an online company for marketing and selling audio/visual (A/V) transmitters for use with drones that did not comply with FCC rules. The FCC found that dozens of the devices transmitted in unauthorized radio frequency bands and some transmitters were operating at excessive power levels.

Pursuant to Section 302(b) of the Communications Act of 1934, “[n]o person shall manufacture, import, sell, offer for sale, or ship devices or home electronic equipment and systems, or use devices, which fail to comply with regulations promulgated pursuant to this section.” Section 2.803(b) of the Commission’s Rules prohibits the marketing of radio frequency devices unless the device has first been properly authorized, identified, and labeled in accordance with the FCC’s rules. Any electronic device which intentionally emits radio frequency energy must be authorized before it can be marketed within the United States. The FCC noted in its Forfeiture Order that these technical and authorization requirements are designed to prevent interference.

The FCC’s Enforcement Bureau, Spectrum Enforcement Division, received complaints about the company’s equipment marketing and began investigating in 2016. After the investigation, the Enforcement Bureau issued a Citation and Order for violations of Section 302 of the Communications Act and Sections 2.803 and 2.925 of the FCC’s Rules. The Citation and Order stated that the company had been illegally marketing noncompliant and unauthorized drone transmitters. The FCC then received more complaints about the company’s marketing of the transmitters and began a further investigation.

After the company failed to respond, the Enforcement Bureau issued a second Citation and Order to compel the company to respond. The company again did not answer. In June 2018, a Notice of Apparent Liability for Forfeiture for over \$2.8

million was issued to the company for its violations of the Communications Act and the FCC's rules, and for its failure to respond to the FCC's two orders. The company responded in July 2018, arguing that the Notice of Apparent Liability for Forfeiture should be cancelled, or the amount of the proposed fine should be reduced.

As we covered in detail [here](#), the FCC released a Forfeiture Order in July 2020 issuing the proposed \$2.8 million fine, declining to reduce the amount. In the Forfeiture Order, the FCC considered and rejected the company's response, which did not dispute any of the factual allegations. Among its arguments, the company asserted that it lacked fair notice of its legal obligations. The FCC rejected this argument, explaining that the company had sufficient notice of the long-standing equipment authorization rules which apply to radio frequency devices. The FCC also explained that it twice put the company on notice when it issued citations warning the company of those requirements.

The FCC also rejected the company's argument that the rules say nothing about authorization for devices that operate on both amateur and other frequencies, explaining that the rules are clear that any device emitting radio frequency energy is subject to the authorization requirements unless an exception applies. As it stands, the only current exception is for devices operating solely on amateur frequencies.

In August 2020, the company filed a Petition for Reconsideration asking the FCC to reconsider the Forfeiture Order. In June 2021, the FCC released an Order stating that upon review of the Petition for Reconsideration and the entire record, the Petition presented no new information and there was no basis for reconsideration. The FCC affirmed the Forfeiture Order and the fine.

The FCC strictly enforces its rules surrounding unauthorized devices, with a statement issued by Acting Chairwoman Rosenworcel's office noting that this fine should serve as "notice to all others that we take our policies protecting our airwaves seriously." The company will have 30 days from release of the June Order to pay the fine. If the fine is not paid within that time, the FCC may refer the matter to the Department of Justice for enforcement of the forfeiture.

### **FCC Rejects Nevada LPFM's Motion to Quash a Letter of Inquiry Regarding Unauthorized Operation**

The FCC's Enforcement Bureau recently released an Order dismissing a low power FM ("LPFM") licensee's Motion to Quash a Letter of Inquiry ("LOI") and denying the licensee's Motion for Stay.

In November 2019, the Enforcement Bureau sent a letter to the licensee of the LPFM station notifying it that its license had expired pursuant to Section 312(g) of the Communications Act. The letter explained that the station had been operating from a site that was 256 feet from the station's licensed coordinates. Pursuant to Section 73.875(b)(2) of the FCC's Rules, any change in a station's geographic coordinates, including corrections to the coordinates or a move of the antenna to another site, may only be made after the FCC grants a construction permit application. Though the licensee filed a request for authority to make the coordinate change, this request came only after it had already been operating at the new site for over a year.

The FCC noted in its 2019 letter to the licensee that Section 312(g) is clear that "[i]f a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period." FCC caselaw also makes clear that stations cannot avoid this 12-month deadline by operating from unauthorized facilities, as was the case here. The FCC found that the license had therefore expired, and the facts did not support reinstatement of the license.

The FCC then sent an LOI in April 2021 asking the Licensee if it continued to operate the station after the license expired. The licensee responded by filing a Motion to Quash the Letter of Inquiry and filing a Motion for Stay of the FCC's investigation into whether it had continued to operate the station. In June 2021, the FCC issued an Order dismissing the licensee's Motion to Quash the Letter of Inquiry, explaining that the LOI was issued pursuant to Sections 4(i), 4(j) and 403 of the Communications Act, not under its subpoena power in Section 409(e). The FCC said that because the licensee

brought its Motion to Quash under Section 1.334 of the FCC's Rules, which only applies to subpoenas, and because the LOI is not a subpoena, the Motion to Quash was "procedurally defective" and therefore dismissed it.

The FCC also denied the arguments laid out in the Motion to Quash for independent reasons. Among other arguments, the licensee had contended it has the right to operate its station pending the outcome of its appeal before the United States Court of Appeals for the District of Columbia Circuit. The FCC rejected this claim, explaining that it is premature. The FCC noted that it lacks sufficient information to determine whether the station indeed operated after the expiration of its license, and should it take a position regarding that argument it would pre-judge its own investigation. The FCC also dismissed the licensee's argument that granting the Motion to Quash would serve the public interest. The FCC stated that granting the Motion would set a precedent allowing all appellants to avoid investigation while an appeal is pending.

Finally, the FCC denied the Motion for Stay because the licensee based its motion on its likelihood of prevailing on the Motion to Quash and the pending appeal. The FCC explained that not only did it dismiss the Motion to Quash, rendering moot any argument the licensee would prevail on that motion, but a pending appeal does not preclude the FCC from continuing its investigation into whether the station operated after the expiration of its license.

### **New Jersey Water Service Company Enters Into \$104,000 Consent Decree With FCC Over Unauthorized License Transfers**

The FCC's Enforcement Bureau and a water service company have entered into a Consent Decree to resolve an investigation into whether the company violated the FCC's rules pertaining to unauthorized transfers of control and assignment of licenses. In order to end the investigation, the company has agreed to implement a compliance plan and pay a \$104,000 penalty.

Under Section 310(d) of the Communications Act, "[n]o construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."

Similarly, Section 1.948 of the FCC's Rules requires that applicants seek and receive consent from the Commission before transferring an FCC license. Section 1.948 of the Rules also requires that in the case of a transfer of control of a wireless license, the applicants must file FCC Form 603 to seek approval prior to the transfer of the license.

In 2000, the company acquired a company which held business radio licenses and private microwave licenses. In 2002, the company completed five pro forma transfers of control, and in 2019 it completed one pro forma assignment. The company discovered these transfers in an internal review of its operations, and it self-reported the prior transfers to the FCC's Enforcement Bureau in December 2020.

On the same date it self-reported, the company filed remedial applications with the FCC seeking approval of the transfers, including requests for waivers of Section 1.948(a) of the FCC's Rules. The company also filed applications on that date seeking FCC approval of the 2002 and 2019 pro forma transactions, including further requests for waiver of Section 1.948(a) of the Rules. In its filings, the company explained that in 2002, a new intermediate holding company was inserted between itself and the subsidiary holding the licenses as part of a corporate reorganization. The company further explained that due to an inadvertent administrative oversight, it failed to file the appropriate applications seeking prior FCC approval and stated that it regretted the error. The company also explained that in 2019 an indirect subsidiary merged as part of another routine corporation reorganization, and that again due to an administrative oversight, the company did not seek prior FCC approval for the assignment.

Then, in January 2021, the company self-reported to the Enforcement Bureau that it had acquired various assets from another company in December 2020, including a business radio license, and had not sought FCC approval for this transfer.

The company simultaneously filed an application with the FCC seeking approval for that transfer, and also filed a request for Special Temporary Authority to continue operating the facility.

Later that month, the company self-reported another pro forma assignment that occurred in January 2020 without prior FCC approval. The company filed a remedial application for that assignment as well.

After an investigation, the Enforcement Bureau found that the company completed a total of six transfers of control relating to 37 licenses, and seven pro forma transfers relating to 34 licenses, without obtaining prior FCC approval. In order to resolve the investigation, the FCC and the company agreed to enter into a Consent Decree in which the company will implement a three-year compliance plan and pay a \$104,000 penalty.