

FCC Enforcement Monitor

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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:

- *FCC Asserts Violation of Prohibition Against Owning Two Top-Four Stations in the Same Market and Proposes \$518,283 Fine*
- *FCC Admonishes Indiana Broadcaster for Failing to Timely File License Renewal Application*
- *Noncommercial Broadcaster Fined \$9,000 for Late-Filed Issues/Programs Lists*

Alaska TV Duopoly Violation Draws Large Proposed Fine

The FCC issued a Notice of Apparent Liability for Forfeiture (NAL) to a television licensee for violating the Commission's Duopoly Rule. That rule prohibits a party from owning two of the four highest-rated full-power TV stations in a Designated Market Area (DMA).

Section 73.3555(b)(1) of the FCC's Rules allows an entity "to directly or indirectly own, operate, or control two television stations licensed in the same Designated Market Area" only if those stations' service contours do not overlap or if, at the time the application to acquire the second station is filed, at least one of the stations is not ranked among the top four stations in the DMA.

Particularly relevant here is Note 11 to that rule, which was adopted in 2016. Note 11 prohibits the common ownership of two overlapping stations where one is a top-four rated station and the second station acquires a top-four rated station's network affiliation from that station's owner. In this instance, the buyer acquired most of the non-license assets of the third-party station, including its network affiliation, and moved that affiliation to the buyer's non-top-four station.

According to the FCC, such transactions "serve as the functional equivalent of a transfer of control or assignment of license."

The FCC noted the buyer did not contact Commission staff regarding the permissibility of the transaction nor seek a waiver of Section 73.3555 prior to closing the sale. In calculating the fine, the FCC explained that the licensee willfully and repeatedly violated Section 73.3555 of the FCC's Rules. Section 312(f)(1) of the Communications Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law, and

“repeated” when an act occurs more than once or, if an act is continuous, for more than one day. By continuously operating the station for over seven months, the FCC found the licensee’s behavior to be conscious and deliberate, and thus willful.

When determining the amount of a proposed fine, the Commission may adjust its base fine for such a violation upward or downward based upon the nature, circumstances, extent, and gravity of the violation, in addition to the licensee’s degree of culpability and any history of prior offenses. In this instance, the FCC found that because the violation resulted in substantial economic gain, an upward adjustment was appropriate, particularly in light of the licensee’s significant ability to pay.

While the FCC noted it had not previously issued a fine for a Note 11 violation, it looked at fines issued in similar instances for guidance. The Commission found that its base fine of \$8,000 for unauthorized transfers of control was sufficiently similar to use as a guidepost. As the Communications Act and the FCC’s rules contemplate a separate fine for each day of a continuing violation, the result would have been \$8,000 multiplied by the 215 days the violation persisted, for a total fine of \$1,720,000.

However, the FCC’s ability to assess fines is capped at \$518,283 for a single act or failure to act, even when it is a continuing violation. Were it not for this statutory cap, the FCC indicated there would have been a number of reasons to upwardly adjust the fine. The licensee has 30 days from release of the NAL to pay the fine or file a written statement seeking reduction or cancellation of it.

Untimely Indiana License Renewal Application Results in Admonishment Despite FCC Technical Issues

The FCC’s Media Bureau recently released an Order admonishing the licensee of an FM translator for failing to timely file a license renewal application by the April 1, 2020 deadline. The Commission initially issued a fine but later cancelled it and instead issued the admonishment.

In February 2021, the Media Bureau issued an Order and NAL fining the licensee \$1,500 for failing to timely file a license renewal application. The FCC referenced its *Forfeiture Policy Statement*, which sets a base fine of \$3,000 for failing to file a required form. In this case, however, the FCC felt that because the licensee filed the renewal application before the station’s license expired, a fine of \$1,500 was sufficient, noting that as a translator, the station was providing a secondary service.

The licensee was given 30 days from the release of the NAL to either pay the fine or file a written statement seeking reduction or cancellation of it. The licensee submitted a response, explaining that its inability to timely file the license renewal application was because of a technical issue with the FCC’s filing database, LMS.

According to the licensee, LMS incorrectly listed the expiration date of the station’s license as July 2021, rather than August 2020. Because the expiration date listed was too far in the future, LMS would not accept a license renewal application for the station. The licensee’s engineer reached out to FCC staff in February 2020 to have the expiration date corrected and was later told the error had been fixed. However, the erroneous date had in fact not been corrected and the station continued to be unable to file its license renewal application. The engineer reached out to the FCC again in July 2020 to have the problem fixed. The LMS error was resolved by the FCC on July 23, 2020 and the licensee filed its license renewal application that same day.

Despite the LMS error and the FCC’s failure to correct the problem originally, the FCC stated that the station’s failure to timely file was “due to Licensee’s own lack of diligence” and admonished the licensee for violating Section 73.3539 of the FCC’s Rules regarding license renewal filing deadlines. The FCC compared the situation to a prior case where a licensee was granted a waiver of the deadline after experiencing technical issues, but then acted diligently and kept in constant contact with FCC staff to resolve the issue and file the application. Ultimately though, the Commission acknowledged

that it did not correct the LMS issue in February 2020 when the licensee raised the issue, and on its own motion cancelled the NAL.

FCC Fines Virginia Noncommercial Broadcaster for Late-Filed Issues/Programs Lists

The FCC fined a noncommercial broadcaster for failing to timely upload the quarterly issues/programs lists for two of its TV stations. The FCC found from a review of the stations' online Public Inspection Files that a total of sixteen reports were uploaded late.

Section 73.3527(e) of the FCC's Rules requires every noncommercial educational television licensee to place in its online Public Inspection File "a list of programs that have provided the station's most significant treatment of community issues during the preceding three month period." The list must include a brief narrative of the issues addressed, as well as the date, time, duration, and title of each program addressing those issues. The list must be placed in the online Public Inspection File on a quarterly basis within ten days of the end of each calendar quarter.

The broadcaster filed applications to renew the stations' licenses in 2020. An associated FCC staff review of the stations' Public Inspection Files revealed that one station uploaded seven lists late and the other uploaded nine lists late. The FCC further pointed out that of these late-filed lists, some were more than a year late.

The FCC found that the failure to timely upload sixteen lists between the two stations constituted a willful and repeated violation of its rules. Though the broadcaster indicated the error was due to administrative oversight, the FCC noted that employee acts such as clerical errors in failing to file required forms do not excuse a violation.

The base fine for a Public Inspection File violation is \$10,000. In determining whether the amount should be adjusted upward or downward based upon the facts of the case, the FCC found that the broadcaster's failure did not constitute a "serious violation" or pattern of abuse that would prevent renewal of the stations' licenses. However, it proposed a \$9,000 fine as appropriate given the nature of the violations. The broadcaster must now either pay that amount within 30 days or file a written statement seeking reduction or cancellation of the proposed fine.