

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 Seeks \$20,000 Fine for Long-Term Unauthorized Operations at California AM Station*
- *Failure to File License Applications Brings \$13,000 Proposed Fine for Washington LPTV Stations*
- *FM Translator's Violation of Program Origination Rules Leads to \$1,500 Fine*

AM Station's Years-Long Unauthorized Modification of Nighttime Facilities Results in \$20,000 Proposed Fine

The FCC's Media Bureau issued a \$20,000 Notice of Apparent Liability for Forfeiture ("NAL") to the licensee of a California AM station for the station's ongoing operation outside its licensed parameters. This action comes as the FCC is evaluating the station's August 2021 license renewal application. That evaluation requires the FCC to consider whether during its license term: (1) the station has served the public interest, convenience, and necessity; (2) there have been any serious violations by the station of the Communications Act or FCC Rules; and (3) there have been any other violations by the station which, taken together, constitute a pattern of abuse. The alleged violations at issue were not disclosed in the station's license renewal application.

Since 1970, the station has been authorized to operate a directional signal at night at a power level of 5 kW. In 1993, the licensee received special temporary authority ("STA") from the FCC to operate the station at night in non-directional mode at a reduced power of 1 kW. That authority was last extended in late October 1996, with a warning that the station needed to "return to licensed operation or to file FCC Form 301 for modification of its nighttime facilities." The licensee did not return to licensed operation or file a Form 301. Following a 2016 complaint and an admission by the licensee, the Enforcement Bureau learned that the station had continued to operate non-directionally at night at 1 kW. The FCC again warned the licensee that it had to either apply for an STA and then return the station to licensed operation, or apply to modify the station's license to reflect its actual operation. The licensee did not request an STA or apply to modify the station's license.

Four years later, another complaint against the station alleged that the station had been operating non-directionally at 1 kW for more than 30 years. When contacted, the licensee confirmed this and said that directional operation causes significant loss to the station's coverage area and that, because the station had not received any consumer or broadcaster complaints, it would not be in the public interest, convenience and necessity for its signal to not cover roughly 75% of the population it seeks to serve. The licensee also highlighted the public safety role the station has played since it went on the air almost 75 years ago.

Last month, the licensee requested an STA to continue operating non-directionally at night with reduced power. The Media Bureau denied the request due to the licensee's lack of justification for needing to operate with an alternate antenna system and at reduced power. The STA request also did not include any engineering studies proving the proposed facility would protect co-channel and first adjacent stations. An FCC interference study found that the proposed facility would in fact interfere with multiple stations. In the STA denial, the Media Bureau ordered the station to immediately terminate its unauthorized non-directional nighttime operation and either resume its licensed directional operation at night or file an application to modify its nighttime operation so as to eliminate the interference being caused by its unauthorized nighttime operation.

The FCC cited several rules it believed the station had violated. Section 301 of the Communications Act and Sections 73.1350(a), and 73.1745(a) of the FCC's Rules each require licensees to operate according to their FCC-granted authorizations. Section 73.1560(a)(1) requires AM stations to maintain their antenna input power "as near as practicable to the authorized antenna input power" and "not [] less than 90 percent nor greater than 105 percent of the authorized power," which the station would have violated by operating at reduced power without authorization. The NAL stated that the licensee also violated Sections 73.1635 and 73.1690(b) of the FCC's Rules, which set out the circumstances under which a station must request an STA to operate at variance and when it must apply for a construction permit to alter the station's facilities.

Ultimately, the FCC decided an upward adjustment of the \$13,000 base fine to \$20,000 was appropriate, pointing to the station's prolonged and intentional unauthorized operation and the licensee's argument that it, not the FCC, is better positioned to judge how the station can best serve the public interest. In situations where violations have occurred over many years, the FCC is generally prohibited by the Communications Act from considering any violation that occurred prior to the station's current license term, which here began in late 2013. Once this enforcement action is resolved, the FCC indicated it intends to renew the station's license for two years instead of the typical eight-year term. This shorter renewal term will give the Commission an opportunity to review the station's rule compliance and determine whether it is operating in the public interest two years from now.

FCC Proposes \$13,000 Fine for Washington LPTV Licensee That Failed to File License Applications for Modifications

A Washington state broadcaster failed to timely file license to cover applications and allegedly engaged in unauthorized operation of two low power television stations as a result. In response, the FCC's Media Bureau issued an NAL proposing a \$13,000 fine.

The stations' digital channels were displaced in the Broadcast Spectrum Incentive Auction, and they were granted construction permits for new displacement channels in June 2018. The licensee was also granted STAs to begin temporary operations on the displacement channels. The displacement permits expired in June 2021. While the stations claimed to have completed construction to operate on their new channels by October 2018 and December 2018, respectively, both stations failed to file applications for licenses to operate permanently on their new channels before their permits expired.

Licenses to cover were belatedly filed for both stations in August 2022. When FCC staff alerted the licensee that the license applications had been filed late (after the construction permits had expired), the licensee submitted amendments asking for the displacement permits to be reinstated and requesting the license applications be granted.

In the NAL, the FCC concluded that the licensee had apparently failed to timely file license applications as required by Section 74.788(a) of the FCC's Rules and therefore engaged in unauthorized operations for over four years. The licensee argued that as a small religious broadcaster, it had been operating without FCC counsel for years, and did not realize that it needed to file license applications when the stations began operating with their new facilities. However, the FCC explained that licensees are responsible for compliance with the Rules, and ignorance of a rule does not excuse a violation. The FCC also rejected the licensee's argument that no fine should be proposed, noting that the cases cited by the licensee to that effect involved far shorter unauthorized periods of operation.

When issuing fines, Section 503(b)(2)(E) of the Communications Act requires the FCC to account for the nature, circumstances, extent, and gravity of the violation. The FCC also considers the degree of culpability, any history of prior offenses, and the ability of the violator to pay the fine. The FCC referenced its *Forfeiture Policy Statement*, which sets a base fine of \$3,000 for failing to file a required form and a base fine of \$10,000 for construction and operation without an instrument of authorization. In this case, the FCC reduced the proposed fine to \$6,500 per station (noting that LPTV stations provide a secondary service) but declined to reduce the fines to \$3,500 as it had done for similar violations, citing the lengthy, four-year period of time the stations had apparently engaged in unauthorized operations. The FCC indicated it would grant both license applications by separate action upon payment of the proposed fine if no other issues arose.

Licensee of FM Translator Fined \$1,500 for Violating the FCC's Rules Against Translators Originating Programming

A Texas licensee entered into a Consent Decree with the FCC's Media Bureau, agreeing to pay \$1,500 for violating the FCC's program origination rules.

From September 2019 until July 2021, the licensee held a license to operate an FM translator station. The translator was shut down on April 15, 2020, and the licensee obtained an STA allowing the translator to remain silent. The licensee later notified the FCC that the translator had resumed operations in April 2021. While the translator was still silent, the licensee had filed a license renewal application and noted the translator was not operating.

A competing broadcaster filed an objection to the renewal, claiming the translator had been silent for just over a year and arguing that the translator's license had therefore expired as a matter of law pursuant to Section 312(g) of the Communications Act. In a supplemental submission, this broadcaster also alleged the translator had not been rebroadcasting the signal of its primary station when it was operating. Section 74.1263(b) of the FCC's Rules prohibits an FM translator station from airing the programming of an AM or FM primary station during extended periods when the primary station is not operating.

The FCC issued a Letter of Inquiry to the licensee in May 2022. The licensee responded, providing documentation to support its claims that the translator had resumed operations in early April 2021 and therefore had not been dark for a full year. The licensee admitted that due to a malfunction, the translator aired programming between October 12, 2021 and November 7, 2021 that had not aired on the primary station.

The FCC dismissed one of the objecting broadcaster's petitions for being untimely filed and rejected allegations that the licensee's statements in its request for an STA were "suspicious." However, to resolve the FCC's investigation, the licensee agreed to enter into a Consent Decree with the FCC under which it will pay a civil penalty of \$1,500, and admitted that the translator "broadcast programming intended to be rebroadcast from" the primary station's digital channel. In the Consent Decree, the Media Bureau agreed to grant the pending license renewal application provided that the fine is paid and there are no issues other than those resolved by the Consent Decree precluding such a grant.