

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:

- *TV Network Draws Proposed Fine of \$504,000 for Transmitting False EAS Tones*
- *FCC Cites Equipment Supplier for Marketing Unauthorized Devices*
- *FCC Proposes \$62 Million Penalty Against Wireless Provider for Excessive Connected Devices Reimbursement Claims*

FCC Proposes \$504,000 Fine Against TV Network and Its O&O Station Group for EAS Rule Violations

The FCC issued a Notice of Apparent Liability for Forfeiture (NAL) to a TV network and its O&O station group, asserting violations of the Commission's Emergency Alert System (EAS) rules. Specifically, the FCC alleged violations of Section 11.45 of its rules, which prohibits the transmission of false or deceptive EAS tones.

The EAS is a nationwide public warning system designed to alert the public in case of emergencies, such as severe weather warnings or AMBER alerts. In order to maintain the effectiveness of such alerts, EAS tones may only be aired in actual emergencies, authorized tests, and qualified public service announcements (PSAs). Section 11.45 strictly prohibits airing the EAS tones, or simulations thereof, except in connection with one of these permitted uses.

The FCC received information from several sources alleging that during the television broadcast of a promotional segment in November 2021, the network transmitted EAS tones that were not connected to an emergency, authorized test, or qualified PSA. In January 2022, the FCC's Enforcement Bureau sent a Letter of Inquiry seeking information regarding the potential violation and requesting, among other things, recordings of the promotional segment. The network responded, admitting that it aired a three-second excerpt of the EAS Attention Signal, and admitting that it was not aired in connection with any permitted use.

The network also acknowledged that it broadcast the promotional segment over 18 owned-and-operated TV stations and transmitted it to 190 network-affiliated TV stations, as well as transmitted it on its sports radio network, which has a nationwide reach of nearly 15 million listeners. Based on the network's admissions and the FCC's review of the segment, the Commission found that the network willfully violated Section 11.45(a) of the Commission's Rules in its capacity as a broadcast TV programming network, as the licensee of multiple television stations, and by transmitting the segment via

radio stations. The FCC explained that although it was shorter than the full EAS Tones, the three-second clip used in the segment had the same dual-tone frequency, pitch, and timbre as the actual EAS Tones, and was recognizable by viewers or listeners as substantially similar to the EAS Tones.

Pursuant to 47 U.S.C. § 503(b)(2)(A), which governs broadcast station licensees, the FCC is authorized to issue fines of up to \$59,316 per violation, but the total amount for a single act may not exceed \$593,170. The FCC noted that while the base fine for violations of the EAS rule is \$8,000, it looks at the particular facts of each case and may upwardly adjust that amount based on a number of specific factors, including the number of transmissions at issue, the network's large nationwide audience reach, the gravity of the violation, the violator's degree of culpability, ability to pay, and the serious public safety implications of the apparent violation.

In this instance, the FCC noted that in its capacity as a broadcast licensee, the network transmitted the EAS tones one time over each of its 18 stations, for a base fine of \$144,000. Additionally, the FCC found that an upward adjustment was warranted, given the network's sizeable audience reach, the fact that its stations are in the top five, and fifteen of the top twenty, television markets in the U.S., and that it was rebroadcast through multiple network-affiliated TV and radio stations. The Commission also noted that the segment involved the self-promotion of the network's upcoming programming, and as a longtime licensee, the network was well aware of the EAS rules. The FCC found no reason for a downward adjustment, and noting the network's ability to pay, concluded that a total proposed fine of \$504,000 was appropriate. The network has 30 days from release of the NAL to pay the fine or file a written statement seeking its reduction or cancellation.

Electronic Equipment Supplier Cited for Marketing Unauthorized Devices

The FCC issued a Citation and Order (Citation) to a Washington State electronic equipment supplier for illegally marketing unauthorized radio frequency (RF) devices. The Commission found that the supplier unlawfully marketed an RF device capable of operating outside of the FM frequency band, did not use a permanently attached antenna (or an antenna that uses a unique connector), and lacked equipment authorization for the device, which itself lacked appropriate labeling and user manual disclosures. The FCC also found that three additional RF devices marketed by the supplier lacked appropriate labeling and user manual disclosures. The Citation directed the supplier to comply with the FCC's equipment authorization and marketing rules and to cease marketing unauthorized devices, warning that the supplier could be fined up to \$22,021 per day for each unauthorized model marketed, as well as be subject to other sanctions.

Pursuant to Section 503(b)(5) of the Communications Act of 1934 (the Act), the FCC cannot impose a monetary fine against most non-regulatees who violate the Act or the FCC's rules unless the FCC has previously issued a citation to the violator, provided the violator a reasonable opportunity to respond, and the violator continues to violate the rules described in the citation. Given this restriction, the FCC issued the Citation (rather than imposing a fine), and the supplier is now on notice that it can be fined for future violations of the Act and the Commission's equipment authorization and marketing rules.

Section 2.803(b) of the FCC's Rules prohibits the marketing of an RF device unless the device has first been properly authorized, identified, and labeled in accordance with the FCC's rules. Generally, RF devices must undergo testing to verify that they comply with FCC-prescribed technical requirements before the devices can be marketed in the United States. As detailed in Pillsbury's [Primer on FCC Radio Frequency Device Equipment Authorization Rules](#), equipment authorization procedures differ depending on the type of equipment involved.

These rules require that RF devices be certified, labeled with an FCC Identifier, and that the label be placed in a "conspicuous location on the device." The rules also require that devices which intentionally emit RF signals be "designed to ensure that no antenna other than that furnished by the responsible party shall be used with the device." A permanently attached antenna or an antenna that uses a unique coupler is considered sufficient to comply with this rule.

In 2020, the FCC's Enforcement Bureau, Spectrum Enforcement Division (Division), received information indicating the supplier was marketing a transmitter which operated outside of the FM frequency band. The Division sent a Letter of Inquiry (LOI) to the supplier, which responded, admitting that it had marketed the transmitter outlined in the LOI, and admitting to marketing three additional FM Transmitters which lacked appropriate labeling and user manual disclosures. The supplier also stated it did not have a copy of the user manual, but that it was available from the manufacturer's website. The user manual on the manufacturer's website did not contain the required FCC language.

After receiving the LOI, the supplier ceased marketing the devices at issue. The Division's Citation indicated the manufacturer violated Section 302(b) of the Act and Sections 2.803(b), 2.925, 15.19, 15.21, 15.201, 15.203, and 15.239 of the FCC's Rules by marketing a device that was capable of operating outside of the FM frequency band, did not use a permanently attached antenna or an antenna that uses a unique connector, lacked an equipment authorization, and lacked the appropriate labeling and user manual disclosures. The FCC also found that the supplier marketed three additional models that lacked the appropriate labeling and user manual disclosures. The supplier has 30 days from the date of the LOI to respond, and is on notice that if it violates the rules described in the LOI in the future, pursuant to 47 U.S.C. § 503(b)(2)(D), the FCC may impose a fine of up to \$22,021 for each violation or each day of a continuing violation, and up to \$165,159 for any single act or failure to act, which is the maximum for rule violations unrelated to broadcasting or common carrier facilities.

Broadband Device Provider Faces \$62 Million Fine for Excessive Reimbursement Claims

The FCC adopted an NAL with a proposed \$62 million penalty against a wireless company for allegedly claiming inflated reimbursements for hundreds of thousands of devices the company provided to consumers as part of the FCC's Emergency Broadband Benefit Program (EBB). The EBB was established by congressional action in late 2020 in response to the COVID-19 pandemic to help keep Americans connected to broadband by providing a temporary discount on monthly broadband bills and connected devices for low-income households. EBB was administered for the FCC by the Universal Service Administration Company (USAC), which enrolled more than 9 million American households for subsidized broadband service and devices. Participating EBB providers are eligible to receive reimbursement for connected devices at the device's market value less a required customer co-pay. The EBB was replaced in 2021 by the Affordable Connectivity Program.

Since 2012, the company had participated in the FCC's Lifeline program as an eligible telecommunications carrier and, when the EBB began, elected to participate in that program to provide monthly wireless service to qualified customers at no charge, claiming an unspecified reimbursement amount per month from the EBB fund. The company also provided connected tablets to customers and claimed reimbursement from the fund through March 2022. The tablet was not sold at retail and appears to have been manufactured exclusively for the company.

Under Section 54.1608(e) of FCC's EBB Rules, an officer of the participating provider, when submitting a reimbursement claim, must certify under penalty of perjury that "the connected device claimed meets the Commission's requirements, that the reimbursement claim amount reflects the market value of the device, and that the connected device has been delivered to the household." Market value is typically determined by the retail price of the device. As noted above, the tablet model for which the company received reimbursement was not commercially available to retail customers and seems to have been manufactured exclusively for the company, with specifications unlike other devices in the marketplace. When market value of a device is unavailable, the FCC (1) identifies device characteristics that are likely related to market value; and (2) assesses whether the devices submitted by the provider as purportedly comparable to the device it provided are, in fact, comparable for purposes of assessing market value. If the FCC finds that is not the case, it determines an appropriate market value by identifying other widely available devices having similar characteristics and reviewing the price range of those devices.

The FCC's comparison with similar devices available at retail led it to determine the company's device held a market value of \$60.00. While redacting certain details, including the amount per device claimed for reimbursement, the FCC concluded that the company received \$32,900,700 in excessive reimbursements during the 10 months the company participated in the program and over-collected at least \$20,792,800 from the EBB fund during the three months covered by the FCC's investigation.

For its part, the company claimed that USAC had approved its device and approved the reimbursement rate. The FCC noted that USAC is not authorized to pre-approve device market values and that back-end audits, not an approval process, are used to keep participants honest. Additionally, the FCC relies on the certifications made by participating providers.

Section 503(b)(2)(B) of the Act (which covers common carriers) authorizes the FCC to assess a fine of up to \$237,268 per day, with a statutory maximum of \$2,372,677 for a single act or failure to act. The FCC considered each device reimbursement claim that was above market value to be a separate violation. In deciding the precise amount of a proposed fine, the FCC also looks at the "nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require." Because the EBB program is relatively new, the FCC's forfeiture guidelines and case law do not provide a base fine for this type of violation. In light of this, the FCC proposed a \$62,000,000 penalty, which is felt was sufficient to penalize the company and act as a deterrent to other companies that might seek to receive reimbursement above the allowable amount. The FCC also noted that "[e]very dollar misdirected from the EBB Program to providers that violate [its] rules is a dollar that could instead have been used to make broadband service more affordable for low-income Americans."

The company has 30 days to respond to the NAL, explaining why the FCC should not move forward with the fine, remove the company from the ACP program, and/or revoke the company's Section 214 authorizations which allow it to operate.