

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:

- *Sports Entertainment Company's Malfunctioning Microphone Interferes with Public Safety Communications*
- *Florida Radio Application Dismissed Over Disclosure Issues*
- *Late Issues/Programs Lists and Children's Television Programming Reports Causes \$18,000 Proposed Fine for Maryland Television Station*

Notice of Violation Issued After Malfunctioning Wireless Microphone Transmits on Wrong Frequency

A sports entertainment company with dozens of locations across the country received a Notice of Violation from the FCC for causing interference to a city's licensed wireless operations. FCC field agents investigating interference complaints using direction finding techniques located "drifting" radio emissions in the area and determined that the source was a malfunctioning wireless microphone used by the sports entertainment company in its local operations.

The microphone was causing interference to the city's 800 MHz communication system, and as noted by the Enforcement Bureau, the sports entertainment company did not hold a license to operate the microphone on that frequency. The city used the 800 MHz facilities for public safety operations, making the interference particularly concerning.

Under the Notice of Violation, the company must respond within twenty days and (1) fully explain each violation, including all relevant surrounding facts and circumstances, (2) include a statement of the specific action(s) taken to correct each violation and prevent recurrence, and (3) include a timeline for completion of any pending corrective action(s). The Notice of Violation also indicated the possibility of further enforcement action "to ensure compliance."

Applicant Loses Chance at Noncommercial Radio Station After Failing to Make Required Disclosures

An applicant seeking to build a new noncommercial educational (NCE) station in Florida saw its application dismissed after a petition to deny raised disclosure issues with it. The company filed the application in November 2021 during the most recent filing window for new NCE applications. Applicants with applications deemed to be mutually exclusive (MX) are given an opportunity to work together to resolve technical conflicts through settlement arrangements. If the conflicts are not resolved, the FCC compares and analyzes the competing applications and tentatively selects a winning application.

The FCC's comparative analysis of MX NCE applications generally consists of three main components. When NCE FM applicants in an MX group propose service to different communities, the FCC performs a threshold fair distribution analysis under Section 307(b) of the Communications Act of 1934 to determine if one of the applicants is proposing service to an underserved area. Application conflicts that are not resolved under this "fair distribution" analysis are next compared by the FCC under an NCE point system, which is a simplified, "paper hearing" process. If necessary, the FCC then makes a tie-breaker determination, based on applicant-provided data and certifications.

In January 2023, the FCC tentatively selected the application in question from a group of four applications seeking to build a new NCE station in nearby communities. One of the competing applicants filed a petition to deny the tentative selectee's application, claiming that the applicant failed to disclose in its application all parties and omitted persons with unresolved potential qualifications issues from a 2019 FCC investigation. That investigation concerned allegations that an entity run by brothers and a third person operated a low power FM (LPFM) station at two unauthorized locations in Miami while representing to the FCC that the station was broadcasting from authorized sites that in fact had never been constructed. The entity surrendered its LPFM license in a letter arguing that the surrender made the matter moot. However, the Media Bureau issued a response stating that the matters raised in the LPFM case were not moot, because they could be relevant to determining qualifications in future broadcast applications by anyone that had an attributable interest in the LPFM entity. As a result, the Bureau required that any application filed by the brothers or anyone with an attributable interest in the LPFM entity within five years include copies of the Letter of Inquiry and FCC decision letter from that investigation.

Three members of the brothers' family (but not the brothers) were listed in the NCE application as the officers and directors of the applicant, but the application did not include (and did not reference) the letters from the investigation, as would have been required if either or both of the brothers held attributable interests. The petition to deny pointed to state corporate filings and associated contact information as proof that the brothers were connected to and controlled the applicant company, and contended that the application misrepresented the parties to the application to circumvent the disclosure requirement and hide potentially disqualifying issues.

The Bureau rejected the applicant's claim that the state filings mistakenly listed one of the brothers as an officer, finding that explanation unpersuasive. It noted that applications to construct new NCE stations must include all parties to the application and corporate officers are parties. It found that repeated state filings listing one of the brothers as an officer was evidence that the brother should have been listed as a party to the application. Section 73.3566 of the FCC's Rules says that "[a]pplications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed," and that "[i]f an applicant is requested by the FCC to file any additional documents or information not included in the prescribed application form, a failure to comply with such request will be deemed to render the application defective, and such application will be dismissed." The Bureau therefore dismissed the defective NCE application and tentatively selected the application filed by the petitioner, finding that it had the most favorable qualifications among the remaining group of mutually exclusive applicants.

Finally, in addition to dismissing the original tentative selectee's application, the Bureau expanded its earlier reporting requirement, mandating that any FCC application filed by a party to either the earlier LPFM application or the now-dismissed NCE application, or filed by a party in which any of them holds an interest, must submit with that application not just the two letters from the earlier LPFM investigation, but the Bureau's NCE dismissal letter as well. The Bureau also expanded the reporting term from the original five years to ten years from the date of the NCE dismissal letter.

Maryland Television Station Faces \$18,000 Fine for Late Issues/Programs Lists and Children's Television Programming Reports

The FCC's Media Bureau issued an \$18,000 proposed fine to a Maryland television station for failing to timely upload all of its quarterly Issues/Programs Lists and Children's Television Programming Reports to its online public inspection file

(OPIF). In May 2021, the station filed a license renewal application in which it disclosed that it had uploaded ten quarterly Issues/Programs Lists more than one year late; three such Lists between one month and one year late; and one List more than one month late. Additionally, it disclosed that it also filed three quarterly Children's Television Programming Reports more than one year late.

Section 73.3526(e)(11)(i) of the FCC's Rules requires that every commercial television station place in its OPIF "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. This list must be placed in the Public Inspection File within 10 days of the end of each calendar quarter.

Section 73.3526(e)(11)(iii) of the Commission's Rules requires every commercial television station to place in its OPIF a Children's Television Programming Report that details "the licensee's educational and informational programming efforts, including programs aired by the station that are specifically designed to serve the educational and informational needs of children" during the reporting period. In 2019, the FCC changed the Children's Television Programming Report filing requirement from a quarterly to an annual requirement.

The station's licensee explained that many of the late filings occurred during the FCC's reverse auction and post-auction period. During this time, the station relinquished its spectrum as part of the television incentive auction and entered into a channel sharing agreement with another station. As a result of confusion related to the station's operational responsibilities under the channel sharing agreement, the licensee indicated that it inadvertently failed to prepare and upload certain documents to its OPIF.

In response, the Bureau (once again) noted that inadvertence is, "at best, ignorance of the law, which the Commission does not consider a mitigating circumstance." The FCC also explained that it was clear that under a channel-sharing agreement, each licensee maintains its own individual license and associated obligations to comply with the FCC's Rules. Thus, it concluded that the licensee willfully and repeatedly violated Section 73.3526 of the FCC's Rules.

Section 1.80(b)(10) of the FCC's Rules establishes a base fine of \$10,000 for Public Inspection File violations. However, the Commission may adjust the amount upwards or downwards based upon factors such as the "nature, circumstances, extent and gravity of the violation," in addition to the licensee's "degree of culpability" and "any history of prior offenses." Taking those factors into account, the FCC found that an upward adjustment to \$18,000 was appropriate, explaining that a majority of the documents were placed in the OPIF more than a year late. However, noting that the violation did not constitute a "serious violation" nor a pattern of abuse that would prevent renewal of the station's license, the FCC indicated it would grant the license renewal application in a separate proceeding if no other issues arose.