

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 Proposes \$12,500 Fine for False Certification That FM Translator was Constructed as Authorized*
- *Telecommunications Company Warned Over Apparent Transmission of Illegal Robocalls*
- *Station Licenses in Danger Over Lack of Candor and Intentional Misrepresentation Claims Before the FCC*

False Certification Brings \$12,500 Proposed Fine for Louisiana FM Translator Station

The FCC issued a Notice of Apparent Liability for Forfeiture (NAL) to the licensee of a Louisiana FM translator for falsely certifying to construction as authorized (but without intent to deceive), failing to file a required form to obtain consent to change antennas, and for constructing and operating with an unauthorized antenna for approximately two months. The violations alleged were raised by a third party Petition for Reconsideration (Petition) asking the FCC to reconsider the grant of a license to the new FM translator station. The Commission found that the station apparently violated its rules and proposed a \$12,500 fine.

In April 2018, the licensee applied for a permit to construct a new FM translator, proposing to use a directional antenna mounted 150 meters above ground level. The FCC granted a construction permit in May 2018, requiring completion by May 2021. The licensee completed construction in time and filed a license application in August 2019 certifying that the translator had been constructed as authorized. Fifteen days after the FCC issued a public notice for the application, the license was granted in September 2019. However, the Petition was filed in October, alleging that material in the license application was false, and that the translator had been constructed with an omnidirectional (rather than directional) antenna, and mounted at a height of 145 meters above ground level (5 meters lower than authorized).

In opposing the Petition, the licensee acknowledged it used an omnidirectional antenna for approximately two months in 2019, explaining that the authorized directional antenna had arrived damaged, and it was eager to commence operations. The licensee explained that it operated the facilities at a much lower power level than authorized to minimize any potential for interference from using an omnidirectional antenna. It further explained that it had no intent to deceive but did not know the significance of the antenna substitution, so it did not mention this to legal counsel who prepared the license application. In October 2019, the translator began operating with the repaired authorized antenna, but it was

mounted at 146.6 meters. In December 2019, the Licensee filed an application for a minor modification, proposing to operate the antenna 143 meters above ground level and changing the translator's community of license. The Commission granted a construction permit for this modification, and an application to license the modified facilities was filed in January 2020. The license was granted in February 2020.

Among other requirements, petitioners filing a petition for reconsideration must have either participated in the initial proceeding or show good reason why it was not possible for them to have participated earlier. In this case, the FCC found that the Petitioner had ample time to file an informal objection during the 15-day period that the license application was on public notice before it was granted. As such, the Commission dismissed the Petition as unacceptable under § 1.106(b) of its Rules. Nevertheless, the FCC acknowledged the licensee's admissions and considered on its own motion an appropriate response.

Section 74.1251(b)(2) requires FM translator licensees to request and receive permission prior to making any changes to their antenna systems. Section 1.17(a)(1) of the FCC's Rules prohibits individuals from *intentionally* providing incorrect "material factual information" or *intentionally* omitting "material information." The Commission explained that "intent to deceive" is an essential element of "misrepresentation" and "lack of candor," and thus submitting inaccurate information due to carelessness or gross negligence is not misrepresentation or lack of candor. However, Section 1.17(a)(2) of the Rules prohibits submission of incorrect information, even without deceptive intent.

The FCC found no evidence of deceptive intent and thus no misrepresentation or lack of candor. However, the FCC determined that the licensee acted negligently when it failed to tell its legal counsel that the antenna was not constructed as authorized and when it failed to review the application thoroughly before filing. The FCC found that the licensee apparently violated Section 1.17(a)(2) of the Rules because it had no reasonable basis to certify that the translator was constructed as authorized, Section 74.1251(b) by failing to file an application to alter an antenna system, and Section 74.1251(b)(2) by constructing and operating with an unauthorized antenna at an unauthorized height.

Section 1.80(b) of the Rules sets a base fine of \$3,000 for failure to file a required form and \$10,000 for construction or operation without an instrument of authorization. The guidelines do not list a base fine amount for a false certification. Thus, the FCC considers the relevant statutory factors in Section 503(b)(2)(E) of the Communications Act, including "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 such other matters as justice may require." In previous cases of false certifications by secondary stations without intent to deceive, the FCC has found a \$5,000 fine appropriate. Taking into consideration all relevant factors, especially that the translator is providing secondary service, the FCC decided to reduce the combined fine here for failing to file an application and unauthorized operation from \$13,000 (\$3,000 + \$10,000 base fines) to \$7,500. With respect to false certification, the FCC proposed an additional fine of \$5,000, consistent with the prior cases involving secondary stations. Thus, the total proposed fine is \$12,500 (\$7,500 + \$5,000).

In addition to the \$12,500 proposed fine, the Commission imposed a reporting requirement on the licensee, as it has done in the past in instances of incorrect certification without deceptive intent. Under the reporting requirement, the licensee must submit copies of the NAL with every facilities application, assignment application, or transfer of control application it files with the FCC for the next five years.

Company Notified It Is Suspected of Transmitting Illegal Robocalls and Is Directed to Investigate and Block Offending Traffic

A telecommunications company received a Notification of Suspected Illegal Robocall Traffic, putting it on notice that the FCC believes it is transmitting and originating illegal robocalls in violation of the FCC's Rules.

The company, an originator of voice traffic and a gateway provider (defined as a U.S.-based intermediate provider that receives a call directly from a foreign originating provider or foreign intermediate provider at its U.S.-based facilities

before transmitting the call downstream to another U.S.-based provider), is said to have transmitted prerecorded voice message calls without the receiving party's consent that is required by the FCC's Rules and the Communications Act. The group designated by statute to conduct tracebacks (the US Telecom Industry Traceback Consortium) notified the company of this offending traffic. The company claims to have warned its clients about transmitting illegal traffic and terminated some originating providers' traffic, but the illegal calls continued. The call content included messages about fictitious purchase orders purportedly associated with the called party, and calls purporting to be from "AMC Trading LLC" stating that "your product is ready to ship." The calls asked consumers to confirm the order. The Enforcement Bureau noted that the company at issue has close ties to two other companies that received Enforcement Bureau cease-and-desist letters in February (we wrote about that action in our February 2023 Enforcement Monitor, [here](#)). The companies have since used different names and taken steps to hide their connections to the cited companies, but they share an IP address, email domain name, customers identified as sources of illegal traffic and, in some cases, personnel.

Under Section 64.1200(n)(5) of the FCC's Rules, gateway providers are required to block all illegal traffic identified by the FCC or traffic substantially similar to that identified traffic when notified by the FCC. The Notification of Suspected Illegal Robocall Traffic serves as that notice and triggers the obligation to block. By the terms of the notification, the company must (1) promptly investigate the identified traffic; (2) block the identified gateway traffic, if the company determines it served as the gateway provider for the traffic; and (3) report the results of its investigation to the FCC's Enforcement Bureau within 14 days. If the company fails to block the identified traffic, fails to respond to the notice, or fails to provide a sufficient response, the FCC may direct providers downstream from the company to block all traffic that flows from the company. Further, U.S.-based voice service providers will be permitted to block all traffic from the company's network if after 48 hours the company fails to effectively mitigate illegal traffic, or after 14 days fails to implement effective measures to prevent new and renewing customers from using its network to originate illegal calls.

Hearing Ordered to Determine Whether Parties Lacked Candor or Intentionally Misrepresented Facts to the FCC

The FCC's Media Bureau has issued a Hearing Designation Order (HDO) that asks an Administrative Law Judge (ALJ) to determine whether a corporation and two connected individuals lacked candor and/or intentionally misrepresented facts to the FCC, abused FCC processes, and committed violations of the Communications Act and/or the Commission's rules. The FCC's ALJ presides over most hearings ordered by the Commission and, like a civil court judge, receives evidence, hears testimony, and issues an appealable decision.

According to the HDO, the former president and 100% direct owner of a company that was the prior licensee of the seven stations at issue (the Stations) misrepresented material facts and orchestrated an illusory transfer of the Stations to his niece. The hearing was launched on claims that the record raises substantial and material questions as to whether (a) the niece actually controls the Stations as stated or if the prior licensee and its owner/president still exercise *de facto* control over the Stations, and (b) the three parties engaged in misrepresentation and/or lack of candor in their filings with the FCC. Section 1.17 of the FCC's Rules prohibits intentionally misrepresenting or omitting material facts or lacking candor when dealing with the FCC. As noted above, in examining such claims, the Commission looks for an intent to deceive the FCC as a necessary and essential element of misrepresentation and lack of candor.

The president/owner, a Mexican citizen, started the company in 2005 to acquire low power television stations to serve Hispanic communities. Through 2013, he was the sole stockholder of the company, making the company's acquisition of broadcast licenses a violation of the FCC's foreign ownership rule, which prohibits a non-US citizen from owning more than 20% of the capital stock of an entity applying for a broadcast license. He did not disclose his citizenship to the FCC and therefore his company was granted the station licenses. It later sought to assign licenses for 16 stations, including those at issue, to his niece in 2010, with both parties certifying in the assignment application that their statements therein were "true, complete, and correct to the best of my knowledge and belief and are made in good faith" and "that all certifications and attached Exhibits are considered material representations." The Media Bureau granted the assignment application in April of 2010. The parties had 90 days to consummate the transaction and

notify the Commission of the consummation date. The FCC was not notified and no extensions of that deadline were requested. It was later discovered that the niece was a minor at the time the asset purchase agreement for the assignment was executed. In the years since the purported assignment of the licenses for the 16 stations, nine of them have been surrendered, sold, or cancelled due to failure to timely convert the stations to digital facilities or for extended periods of silence.

For years following the consummation deadline, the company continued to file applications as though it still controlled the 16 stations. In August of 2014, the company filed assignment applications seeking to assign the 16 stations to an entity majority-owned by members of the president/owner's family. Then, in November 2014, legal counsel for the company filed a consummation notice stating that the transaction between the company and the niece had in fact been consummated in July of 2010, within the 90-day closing window. The following day the company filed for bankruptcy protection.

In 2018, the Media Bureau directed the niece to provide information about who actually operated and controlled the Stations and to submit documents supporting her responses. She claimed that her uncle, the company's president and owner, had financed her purchase of the Stations and that she had controlled them since July of 2010. The closing certificates she provided, however, were undated. Her response also indicated that the company was to hold the closing papers for her and not file the consummation notice until certain payments were made. No details were given about the financing, or of any payments made.

The president/owner asserted that the company's assets were "under attack" due to a lawsuit against him and the company, which purportedly led to the company's bankruptcy. He also stated that, as a result of the lawsuit, "it was realized for the first time" in 2014 that he was unqualified to be an FCC licensee due to his foreign citizenship. He added that he had entered "verbal arrangements" whereby his niece "could run the stations, but the company would remain officially the named licensee with the FCC until such time as the majority of the amounts owed was paid."

In light of these discoveries, the license renewal applications for the Stations have been left pending, subject to a determination as to whether material misrepresentations to the FCC were made by the parties. This is because the Commission also considers an applicant's character in determining its qualifications to be a Commission licensee. The Commission's misconduct review is both backward-looking and forward-looking: Did the applicant commit misconduct and can it be expected to be forthright in future dealings with the FCC and to operate its stations consistent with applicable rules?

The Media Bureau designated more than a dozen issues for the ALJ to rule on, including: (1) whether the niece abused Commission processes by misrepresentation, concealment, or otherwise; (2) whether the niece abused Commission processes by entering into an undisclosed agreement to delay indefinitely the filing of a notice of the purported consummation; (3) when and whether the niece is and/or has been exercising affirmative control of the Stations; (4) whether the president/owner and his company are (and/or have been, during the most recent license term) a real-party-in-interest to the applications for the Stations; (5) whether there has been a *de facto* transfer of control of the Stations to the president/owner or his company in violation of the Communications Act and the FCC's rules; (6) whether the niece engaged in misrepresentation and/or lack of candor in her applications and communications with the Commission or otherwise violated FCC rules involving the Stations; (7) to determine, in light of the evidence, whether the license renewal applications should be granted with such terms and conditions as are appropriate, including renewal for a term less than the maximum otherwise permitted, or denied due to failure to satisfy the requirements of the Communications Act, and the licenses cancelled; (8) whether the niece possesses the character qualifications to be or remain a Commission licensee and whether the licenses for the Stations should be revoked; (9) whether the president/owner and his company should, for purposes of this proceeding, be considered one and the same entity; (10) whether he and/or the company have exercised and continue to exercise *de facto* control over

the Stations; (11) whether he and/or the company have misrepresented material information to the FCC and/or lacked candor; (12) whether he and/or the company have abused Commission processes first by filing an assignment application that lacked bona fides while maintaining de facto control of the Stations, and then by impermissibly and intentionally bifurcating ownership of the Stations for years by not timely filing the required consummation notice; (13) to determine, in light of evidence, whether he and/or the company should be ordered to cease and desist from violating FCC rules and the Communications Act, including making willfully inaccurate, incomplete, evasive, false, or misleading statements before the Commission; (14) to determine, in light of evidence, whether he and/or the company should be ordered to cease and desist from operating, controlling, managing or providing any assistance to any stations; (15) to determine, in light of evidence, whether he and/or the company should be ordered to cease and desist from preparing and/or filing applications or other documents regarding the company with the Commission; (16) to determine, in light of evidence, whether he and/or the company, to the extent allowed to assist any other licensee/permittee/applicant in any way with the operation or construction of any station, or to provide any assistance or input in any way in preparing or filing any application with the Commission, should be ordered to cease and desist from doing so without also providing a copy of any order issued in this proceeding that finds he and/or his company lacks the character to be a Commission licensee in any and all filings with the FCC in every matter in which he participates in any way; and (17) to determine, in light of the evidence, whether he and/or his company possess the character qualifications to be Commission licensees. The parties have 20 days from the mailing of the HDO to file with the FCC written notices that they will appear at the hearing and present evidence related to the issues before the ALJ.