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FCC Enforcement Monitor January 2024

By Scott R. Flick, Elizabeth E. Craig, and Adam J. Sandler

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 Broadcaster Faces $150,000 Fine for Failure to Negotiate Retransmission Consent in Good Faith*
- *Sponsorship ID and Political File Violations Lead to $500,000 Consent Decree for Radio Broadcaster*
- *$26,000 Fine for Georgia Radio Station EEO Rule Violations*

FCC Finds That TV Broadcaster Failed to Negotiate Retransmission Consent in Good Faith

Responding to a complaint by a cable TV provider, the Federal Communications Commission found that a broadcaster failed to negotiate retransmission consent for its New York TV station in good faith. The enforcement action involves a *Notice of Apparent Liability for Forfeiture* (NAL) proposing a $150,000 fine against the broadcast licensee. The licensee was represented in the negotiations by another broadcaster who provides services to the station at issue.

Under Section 325 of the Communications Act of 1934, as amended (the Act), TV stations and multichannel video programming distributors (*i.e.*, cable and satellite TV providers) have a duty to negotiate retransmission consent agreements in good faith. In a 2000 *Order*, the FCC adopted rules relating to good faith negotiations, setting out procedures for parties to allege violations of the rules. The *Order* established a two-part good faith negotiation test. Part one of the test is a list of objective negotiation standards, the violation of any of which is deemed to be a per se violation of a party's duty to negotiate in good faith. Part two of the test is a subjective "totality of the circumstances" test in which the FCC reviews the facts presented in a complaint to determine if the combined facts establish an overall failure to negotiate in good faith.

In this case, the cable provider complained that the broadcaster, through its negotiator, proposed terms for renewal of the parties' agreement that would have prohibited either party from filing certain complaints with the FCC after execution of the agreement. For its part, the broadcaster did not dispute that it proposed the terms in question, but argued that (1) "releasing FCC-related claims or withdrawing FCC complaints is not novel," (2) "parties typically agree to withdraw good faith negotiation complaints once retransmission consent agreements have been reached," and (3) no violation could have occurred since the proposed term was not included in the final agreement reached.

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The FCC disagreed, stating that its 2000 *Order* made clear that proposing terms which foreclose the filing of FCC complaints is a presumptive violation of the good faith negotiation rules. The FCC also disagreed with the broadcaster's contention that terms not included in a final agreement could not violate the good faith rules. Finally, while the licensee argued that it was not responsible for actions taken by the party negotiating on its behalf, the FCC reiterated that licensees are responsible for the actions of their agents, and the licensee in this case delegated negotiation of the agreement to its agent.

Relying upon statutory authority and its *Forfeiture Policy Statement*, the FCC arrived at a proposed fine of $150,000. The *Forfeiture Policy Statement* establishes a base fine of $7,500 for violating the cable broadcast carriage rules, and the FCC asserted that the alleged violations continued for 10 days (the time period from first proposing the terms at issue and the signing of the agreement without them), yielding a base fine of $75,000. The FCC then exercised its discretion to upwardly adjust the proposed fine to $150,000, asserting that the increase was justified based on the licensee's financial relationship with a large TV company, its prior rule violations, and the FCC's view that a larger fine was necessary to serve as a meaningful deterrent against future violations.

Repeated Violations of Sponsorship ID and Political File Rules Lead to $500,000 Consent Decree

A large radio station group entered into a consent decree with the FCC's Media Bureau, agreeing to pay a $500,000 civil penalty for two of its stations' violations of sponsorship identification laws and the Political File rule.

Section 317(a)(1) of the Act and Section 73.1212(a) of the FCC's Rules require broadcast stations to identify the sponsor of any sponsored content broadcast on the station. This requirement applies to all advertising, music, and any other broadcast content if the station or its employees received something of value for airing it. The FCC has said that the sponsorship identification laws are "grounded in the principle that listeners and viewers are entitled to know who seeks to persuade them . . . ."

Separately, Section 315(e)(3) of the Act requires broadcasters to place information about requests to purchase political advertising time in the station's online Political File "as soon as possible." Section 73.1943(d) of the FCC's Rules clarifies that "as soon as possible" means "immediately, absent unusual circumstances."

In this case, from early October 2021 to late March 2023, the stations aired one-hour episodes of a program styled as though it was a news interview/public affairs program regularly airing on the stations, as well as 30-second advertisements promoting the program. Neither the programs nor the advertisements indicated that they were sponsored content or identified the sponsor.

The programs and related advertisements were initially paid for by the state Republican party, and later by a co-host of the program who shared hosting duties with a county Republican party chairman. The FCC's investigation determined that the hosts of the program were exclusively in charge of the content for the show, including selecting the guests and ultimately producing the show. The investigation also revealed that the programs included appearances by legally qualified candidates for public office who communicated messages relating to political matters of national importance. Records of these candidate appearances and national issue discussions were not uploaded by the stations to their respective online Political Files.

To resolve the investigation, the radio station group entered into a Consent Decree with the Media Bureau in which it admitted its actions violated Sections 315(e) and 317(a) of the Act and Sections 73.1212(a) and 73.1943 of the FCC's Rules.

In addition to agreeing to pay a $500,000 civil penalty, the Consent Decree requires the radio station group to develop and implement a compliance plan to avoid future violations, designate a compliance officer to oversee it, implement a

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compliance training program for its employees, and file annual compliance reports with the FCC until the two stations' next license renewal applications are granted and the grants become final.

Former Licensee of Georgia Radio Stations Fined $26,000 for EEO Violations

The FCC issued a $26,000 fine to a large radio broadcaster for violations of its Equal Employment Opportunity (EEO) rules by several Georgia radio stations previously owned by the broadcaster.

The FCC's EEO rules prohibit broadcasters from discriminating in hiring on the basis of race, color, religion, national origin, or gender and require non-exempt broadcasters to conduct and document broad job vacancy recruitment efforts. The FCC's investigation into the stations' EEO compliance appears to have stemmed from the FCC's processing of their license renewal applications. As part of the license renewal process, FCC staff reviews a station's rule compliance over the course of its eight-year license term. The radio stations in question were licensed to the broadcaster at the time of the claimed rule violations but were later sold. In 2020, the broadcaster entered into a tolling agreement with the FCC to facilitate grant of the license renewal applications and assignment of the renewed stations' licenses to a third party. However, the tolling agreement preserved the FCC's right to fine the broadcaster, with the broadcaster agreeing to waive any right it might have to assert that it no longer holds the stations' licenses.

In February 2022, the FCC issued an NAL for $32,000 against the broadcaster for violations of the FCC's EEO rules. Specifically, the FCC asserted that the stations had failed to timely (1) upload an annual EEO Public File Report to the stations' Public Inspection Files; (2) place a copy of that report on the stations' websites; and (3) self-assess their EEO program for any deficiencies.

Section 73.2080(c)(6) of the FCC's Rules requires that a station's annual EEO Public File Report be timely placed in the station's Public Inspection File and on its website, if it has one. Section 73.2080(c)(3) of the FCC's Rules requires that a licensee analyze its EEO recruitment program on an ongoing basis. Section 73.3526(e)(7) of the Rules separately requires a licensee to place required information, including its annual EEO Public File Report, in its stations' Public Inspection Files.

In the stations' most recent license renewal applications, the licensee disclosed that it had not uploaded its 2018 annual EEO Report to the stations' Public Inspection Files in a timely manner (the EEO Report was not uploaded to the stations' Public Inspection Files and websites until more than nine months after the deadline). The FCC's February 2022 NAL proposed a $32,000 fine, asserting willful and repeated violations of Sections 73.2080(c)(6), 73.2080(c)(3), and 73.3526(e)(7) of the FCC's Rules. While the licensee had already admitted in its license renewal applications to the late uploads of the 2018 Report, it argued in its response to the NAL that, among other things, that there was no basis for claiming that the stations had failed to analyze their EEO recruitment program, and that the upward adjustment based on past violations was unfair.

In its subsequent order, the FCC noted that the licensee did not contest that it violated Sections 73.2080(c)(6) and 73.3526(e)(7) of the Rules because of the late uploads. The FCC then asserted that it properly found that the stations violated Section 73.2080(c)(3) by failing to analyze their EEO recruitment program. According to the FCC, the record indicated that for more than nine months, the stations failed to realize that they had not uploaded their 2018 Report to their Public Inspection Files and websites, and thus were not analyzing their EEO program "on an ongoing basis."

The Commission found that the $26,000 fine proposed in the NAL for failing to upload and maintain the 2018 annual EEO Report in the stations' online Public Inspection Files and websites, and the $6,000 fine proposed for failing to adequately analyze the stations' EEO program, were appropriate. The FCC stated that the upward adjustments from the normal base fines for these violations ($10,000 and $2,000, respectively) were justified, citing the broadcaster's history of prior violations and the circumstances of the case.

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Nevertheless, the FCC was forced to concede that it had never before imposed a fine for failing to analyze a station's EEO program based solely on a failure to post or upload an annual EEO report in a timely manner. The FCC therefore rescinded the $6,000 fine for failure to analyze the EEO program, and issued a fine of $26,000 for the remaining violations, which must be paid within 30 days.

However, the FCC clarified in its order that making a station's EEO report publicly available is now deemed an essential part of the self-assessment requirement under Section 73.2080(c)(3). As a result, all FCC licensees are now on notice that the FCC will consider the timeliness of posting an annual EEO Public File Report in the Public Inspection File and on its website as a factor in determining whether a station has complied with the Section 73.2080(c)(3) self-assessment requirement.

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