
FCC Enforcement Monitor

by Scott R. Flick and Christine A. Reilly

Headlines:

- *Late-Filed License Application Garners \$7,000 Fine*
 - *FCC Fines Noncommercial Broadcaster \$5,000 for Alien Ownership Violation*
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“Inadvertent Error” Results in \$7,000 Fine for West Virginia Broadcaster

The FCC recently issued a combined Memorandum Opinion and Order and Notice of Apparent Liability (the “Order”) fining a West Virginia FM broadcaster for unauthorized operation and failure to file a required form. The base fines associated with these types of rule violations total \$13,000. However, based on the circumstances detailed below, the FCC decided to reduce the overall fine to \$7000.

The licensing process begins with the grant of a construction permit and concludes with the grant of a station license authorizing permanent operation of the newly-constructed facilities. Pursuant to Section 73.3598(a) of the FCC’s Rules, construction must be completed within three years and a license application must be promptly filed with the FCC when construction is completed. Subsection (e) of this rule provides that a construction permit will be automatically forfeited upon its expiration if construction is not completed and a license to cover application has not been filed within the allotted three year period.

In the instant case, the FM broadcaster was forced to utilize an emergency antenna as a consequence of a 2002 tower collapse. In June 2004, the FM broadcaster sought to modify its station to relocate its authorized tower site to a location less than two miles away. As part of this process, the FM broadcaster filed an application for a construction permit. The FCC granted the application in July 2004 and issued a construction permit slated to expire in July 2007.

According to the Order, the FM broadcaster filed its license application in May 2011, almost four years beyond the expiration of the 2004 construction permit. The license application included a request for a waiver of Section 73.3598(e), indicating that the authorized construction had been completed by April 2006, well in advance of the three year expiration date, but that due to an “inadvertent error”, the license application was not filed prior to the construction permit’s July 2007 expiration. In support of its waiver request, the FM broadcaster cited a May 2011 case in which the FCC had “affirmed the staff’s practice

of waiving Section 73.3598(e) of the Rules in situations where the applicant conclusively demonstrates that it completed construction prior to the expiration of the construction permit, notwithstanding the tardy filing of the license to cover application.” In response, the FCC’s Order noted that the prior waivers occurred where the delay in meeting the deadline was “relatively minor”, as was the case in the cited May 2011 decision, where a license application was filed three days after the expiration of the construction permit. The FCC concluded that a four year delay could not be considered minor. Ultimately, the FCC rejected the FM broadcaster’s waiver request, dismissed the license application, and on its own motion, granted the station special temporary authority to operate while it reapplied for a new construction permit. The FCC levied the full \$3,000 fine for failure to timely file a license application, but reduced the unauthorized operation fine (for the period the station operated with modified but unlicensed facilities) from \$10,000 to \$4,000 since the station had previously held a valid license.

Noncommercial Broadcaster Fined \$8,700 for Alien Ownership and Public Inspection File Violations

As a follow up to a 2007 Notice of Apparent Liability (“NAL”), the FCC issued a Forfeiture Order fining a Texas noncommercial broadcaster \$8,700 for violations of the alien ownership provisions of the Communications Act of 1934, and Section 73.3527, the Public Inspection File Rule for noncommercial stations.

The 2007 NAL stated that the noncommercial broadcaster timely filed its 2005 license renewal application. However, the application indicated that the licensee was unable to certify that the station’s public inspection file was complete, noting that the file was missing four years of issues/programs lists. Section 73.3527(e)(8)(i) of the FCC’s Rules requires noncommercial broadcasters to prepare and place in their public inspection file a report each quarter identifying the station’s programming response to significant community issues during the prior quarter.

The FCC also received an objection to the station’s license renewal application. The objector alleged violations of the Public Inspection File Rule and the foreign ownership restrictions, unauthorized transfers of control, financial misdeeds, fraud, theft, misappropriation of funds, and other criminal activity. The non-commercial broadcaster opposed the individual’s objection as meritless.

According to the NAL, the FCC concluded that the objection “contain[ed] a number of conclusory allegations unsubstantiated by any extrinsic evidence” since the individual “fails to invoke any provision of the Act or the Rules” and “fails to provide specific evidence.” However, the FCC determined that at least two of the allegations—pertaining to violations of the foreign ownership restrictions and the Public Inspection File Rule—were substantiated and warranted a penalty under the FCC’s forfeiture policies.

In its response to the NAL, the noncommercial broadcaster, a non-stock, non-profit entity, admitted that during the prior license term, its board of directors included two foreign nationals for a period of time, which resulted in a “voting interest above the 20% benchmark” permitted by the Communications Act of 1934. The noncommercial broadcaster corrected this violation two years prior to submitting its 2005 license renewal application. Due to the proactive nature of the correction, the FCC elected to reduce the base forfeiture from \$8,000 to \$5,000. The FCC did not elect to reduce the \$10,000 base forfeiture associated with the violation of the Public Inspection File Rule since the disclosure was made in response to a question contained in a required form and the “violations were extensive, occurring over a four-year period and involving at least 16 missing issues/programs lists.”

According to the Forfeiture Order, the noncommercial broadcaster’s response to the NAL requested the proposed fines be cancelled based on its inability to pay fines totaling \$15,000. The response provided “copies of tax returns from 2004 and 2005, an audited financial statement for 2006 and a profit and loss statement for the first six months of 2007.” Based on the supporting documentation, and the FCC’s policy

that fines in the amount of five percent of gross revenues are reasonable (and up to 7.9 percent is not deemed excessive), the fine was reduced to \$8,700, equaling five percent of the average gross revenues for the combined period covering 2004, 2005 and 2006.

If you have any questions about the content of this publication, please contact the authors below, or the Pillsbury attorney with whom you regularly work.

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