
FCC Enforcement Monitor

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Headlines:

- *FCC Fines Radio Licensee \$10,500 Despite Claims of Public File Sabotage*
 - *Unlocked Gate Costs AM Licensee \$7,000*
 - *Class A Licensee Faces Hobson's Choice: Pay \$12,000 Fine or Revert to Low Power Status*
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Whodunit, Who Cares? FCC Fines Radio Licensee \$10,500 for Missing Issues/Program Lists

The FCC's Enforcement Bureau denied a licensee's Petition for Reconsideration of a June 2015 Forfeiture Order, affirming the \$10,500 fine against the licensee of two Michigan radio stations (one AM and one FM) for failing to place five Quarterly Issues/Programs Lists in the stations' public inspection files, and for failing to immediately notify the FCC upon a change of tower ownership.

Section 73.3526 of the FCC's Rules requires each commercial broadcast licensee to maintain a public inspection file containing specific information related to station operations. Under Subsection 73.3526(e)(12), a licensee must create a list of significant issues affecting its viewing area in the past quarter and the programs it aired during that quarter to address those issues. The list must then be placed in the station's public inspection file by the tenth day of the month following that quarter. In addition, Section 17.57 of the Rules requires tower owners to immediately notify the FCC of any change in ownership information.

In February 2010, the licensee acquired the stations and accompanying tower from another company. In December 2010, the licensee filed a notification of change in tower ownership. However, the FCC promptly rejected the application as deficient and directed the licensee to refile its ownership change notification.

During a September 2011 inspection, an FCC agent found that the licensee's public inspection files were missing five quarters of Issues/Programs Lists. The agent also determined that the ownership change notification had never been refilled. The FCC subsequently issued a Notice of Apparent Liability for these violations and proposed a \$13,000 fine—\$10,000 for the missing Issues/Programs Lists and \$3,000 for the absent ownership change notification.

The licensee did not contest the violations, but asked for a cancellation or reduction of the fine, arguing that (1) it made good faith attempts to correct the violations, (2) the missing Issues/Programs Lists had been removed by a third party, (3) it was unable to pay the fine due to financial difficulties, and (4) it had a history of compliance with the FCC's Rules. In its June 2015 Forfeiture Order, the FCC reduced the fine to \$10,500 due to the licensee's history of compliance. However, the FCC found no basis for any further reduction. It explained that, while it may reduce a proposed penalty when a violation arose "just prior" to an FCC inspection, the Issues/Programs Lists were allegedly removed more than two months before the inspection—leaving the licensee adequate time to identify and correct the deficiency. The FCC also stated that the licensee had not shown the "severe financial distress" necessary to warrant a reduction, and that good faith efforts to correct violations must be made *prior* to notification of the violation to be considered as a basis for a fine reduction.

The licensee subsequently filed a Petition for Reconsideration, arguing that the Issues/Program Lists were in the public inspection file until the general manager of its major competitor deliberately removed them. Because the Petition failed to demonstrate a material error in the Forfeiture Order or raise any new facts or arguments, the FCC chose not to address the merits of the licensee's arguments. The FCC noted, however, that even had it considered the merits of the licensee's Petition, it still would have found no basis for reconsideration, explaining that the alleged third-party removal of the lists did not diminish the licensee's liability for failing to identify and correct the deficiency in the two months between the alleged removal and the inspection.

The Price of Convenience: AM Licensee Is Fined \$7,000 for Leaving the Gate to Its Tower Unlocked for Contractors

The FCC's Enforcement Bureau upheld a Forfeiture Order against a New York AM licensee for leaving the gate to its tower unlocked for several days so that contractors could have access. Section 73.49 of the FCC's Rules requires towers having radio frequency potential at the base to be enclosed within effective locked fences or other enclosures.

On July 11, 2013, an FCC agent conducted a random inspection of the licensee's tower. The agent found that the gate to the tower was in good condition, the gate was closed, and there was a padlock on the gate. However, the padlock was unlocked, which allowed unrestricted access. The FCC found the unlocked gate of particular concern because of the tower's location in a residential neighborhood.

Later that month, the FCC issued a Notice of Violation to the licensee. In response, the licensee admitted to intentionally leaving the gate unlocked for approximately six days to allow personnel from a tower repair company to access the site in order to finalize a proposed bid for a tower repair project.

In June of 2014, the FCC issued a Notice of Apparent Liability for \$7,000—the base fine for failing to maintain an effective AM tower fence—for the willful and repeated violation of Section 73.49. The licensee argued in response that the fine should be vacated because the violation was not "willful," but rather the result of its "inadvertent error" in incorrectly assuming the contractors would lock the gate when they left.

The FCC disagreed, stating in its June 2015 Forfeiture Order that an intent to violate the law is not relevant when determining if a "willful" violation has occurred. It explained that all that is necessary is that the licensee knew it was doing the act in question, and that, in this case, the licensee admitted to intentionally leaving the gate unlocked. The FCC further explained that the acts of third parties, such as the contractors, do not diminish the licensee's liability for the violation. In addition to being "willful," the FCC found that the

violation was “repeated” (an independent basis for assessing the fine) because the gate had been left unlocked for several days.

The licensee subsequently filed a Petition for Reconsideration, making similar arguments to those made in its response to the Notice of Apparent Liability. Because the Petition did not demonstrate a material error in the Forfeiture Order or raise any new facts or arguments, the FCC did not address the merits of the licensee’s arguments and affirmed the \$7,000 fine. The FCC added that, even if it had reached the merits, it would not have found any basis for reconsideration.

More Status, More Problems: Class A Licensee Must Choose Between Paying \$12,000 Fine and Reverting to Low Power Status for Failure to Timely File Children’s Programming Reports

The FCC’s Media Bureau proposed a \$12,000 fine for a Washington state Class A television licensee for failing to timely file 15 Children’s Television Programming Reports, and for failing to report these violations in its license renewal application. However, the FCC stated that the licensee could avoid the fine if it chose to revert to low power status.

Section 73.3526 of the FCC’s Rules requires that commercial full-power and Class A TV stations maintain a public inspection file containing specific information related to station operations. Subsection 73.3526(e)(11)(iii) requires licensees to prepare and place in their public inspection file a Children’s Television Programming Report for each calendar quarter showing, among other things, the efforts made during that three-month period to serve the educational and informational needs of children. These Reports must be placed in the station’s public inspection file by the tenth day of the month following that quarter.

In addition, Section 73.3514(a) of the FCC’s Rules requires licensees to include all information requested by an application form when filing it with the FCC. The license renewal application form requires licensees to certify that they have complied with Section 73.3526 and have timely filed their Children’s Television Programming Reports with the FCC.

In August of 2014, the licensee filed its license renewal application, triggering an FCC inspection of the licensee’s online public inspection file. During the inspection, the FCC found that the licensee had filed its Children’s Television Programming Reports days or months late for 15 quarters between 2011 and 2015. The licensee did not report these apparent violations on the license renewal application.

The base fine for failing to file a required form or information is \$3,000. Using its discretion, the FCC proposed a fine of \$9,000 for the licensee’s failure to file its Children’s Television Programming Reports in a timely manner for 15 quarters. It also proposed a \$3,000 fine for the licensee’s failure to report these violations in its license renewal application, for a total fine of \$12,000—with a twist. Because low power TV licensees are not subject to the public inspection file requirements, the FCC explained that the licensee will no longer be liable for the proposed fine if it elects to now revert the station to low power status (which would eliminate the station’s ability to participate in the upcoming broadcast spectrum auction).

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

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