FCC Enforcement Monitor

by Scott R. Flick and Christine A. Reilly

Headlines:

- *Inadequate Sponsorship ID Ends with $44,000 Fine*
- *Unattended Main Studio Fine Warrants Upward Adjustment*
- *$16,000 Consent Decree Seems Like a Deal*

Licensee Fined $44,000 for Failure to Properly Disclose Sponsorship ID

For years, the FCC has been tough on licensees that are paid to air content but do not acknowledge such sponsorship, and an Illinois licensee was painfully reminded that failing to identify sponsors of broadcast content has a high cost. In a recent Notice of Apparent Liability ("NAL"), the FCC fined the licensee $44,000 for violating its rule requiring licensees to provide sponsorship information when they broadcast content in return for money or other "valuable consideration."

Section 317 of the Communications Act and Section 73.1212 of the FCC's Rules require all broadcast stations to disclose at the time the content is aired whether any broadcast content is made in exchange for valuable consideration or the promise of valuable consideration. Specifically, the disclosure must include (1) an announcement that part or all of the content has been sponsored or paid for, and (2) information regarding the person or organization that sponsored or paid for the content.

In 2009, the FCC received a complaint alleging a program was aired without adequate disclosures. Specifically, the complaint alleged that the program did not disclose that it was an advertisement rather than a news story. Two years after the complaint, the FCC issued a Letter of Inquiry ("LOI") to the licensee. In its response to the LOI, the licensee maintained that its programming satisfied the FCC's requirements and explained that all of the airings of the content at issue contained sponsorship identification information, with the exception of eleven 90-second spots. In these eleven spots, the name of the sponsoring organization was identified, but the segment did not explicitly state that the content was paid for by that organization.

Though the licensee defended its program content and the disclosure of the sponsor's name as sufficient to meet the FCC's requirements, the FCC was clearly not persuaded. The FCC expressed particular concern over preventing viewer deception, especially when the content of the programming is not readily distinguishable from other non-sponsored news programming, as was the case here.

The base forfeiture for sponsorship identification violations is $4,000. The FCC fined the licensee $44,000, which represents $4,000 for each of the eleven segments that aired without adequate disclosure of sponsorship information.

Absence of Main Studio Staffing Lands AM Broadcaster a $10,000 Penalty

In another recently released NAL, the FCC reminds broadcasters that a station's main studio must be attended by at least one of its two mandatory full-time employees during regular business hours as required by Section 73.1125 of the FCC's Rules. Section 73.1125 states that broadcast stations must maintain a main studio within or near its community of license. The FCC's policies require that the main studio must maintain at least two full-time employees (one management level and the other staff level). The FCC has repeatedly indicated in other NALs that the management level employee, although not "chained to their desk", must report to the main studio on a daily basis. The FCC defines normal business hours as any eight hour period between 8am and 6pm. The base forfeiture for violations of Section 73.1125 is $7,000.

According to the NAL, agents from the Detroit Field Office ("DFO") attempted to inspect the main studio of an Ohio AM broadcaster at 2:20pm on March 30, 2010. Upon arrival, the agents determined that the main studio building was unattended and the doors were locked. Prior to leaving the main studio, an individual arrived at the location, explained that the agents must call another individual, later identified as the licensee's Chief Executive Officer ("CEO"), in order to gain access to the studio, and provided the CEO's contact number. The agents attempted to call the CEO without success prior to leaving the main studio.

Approximately two months later, the DFO issued an LOI. In the AM broadcaster's LOI response, the CEO indicated that the "station personnel did not have specific days and times that they work, but rather are 'scheduled as needed.'" Additionally, the LOI response indicated that the DFO agents could have entered the station on their initial visit if they had "push[ed] the entry buzzer."

In August 2010, the DFO agents made a second visit to the AM station's main studio. Again the agents found the main studio unattended and the doors locked. The agents looked for, but did not find, the "entry buzzer" described in the LOI response.

The NAL stated that the AM broadcaster's "deliberate disregard", as evidenced by its continued noncompliance after the DFO's warning, for the FCC's rules warranted an upward adjustment of $3,000, resulting in a total fine of $10,000. The FCC also mandated that the licensee submit a statement to the FCC within 30 days certifying that its main studio has been made rule-compliant.

CLEC Avoids Potentially Massive Fines with Voluntary Disclosure

Like most FCC regulatees, Competitive Local Exchange Carriers ("CLEC") are required to file various reports and certifications on a regular basis and pay annual regulatory fees. In addition, CLECs are also required to contribute to the Universal Service Fund ("USF"), which was established by the FCC in order to, among other things, promote the quality and availability of telecommunications services at reasonable and affordable rates.

According to a recently released Consent Decree, a Mississippi based CLEC voluntarily disclosed to the FCC that, among other things, it had failed to pay its annual regulatory fees and timely file its 1) quarterly USF revenue report (FCC Form 499-Q), 2) annual USF revenue report (FCC Form 499-A), and 3) annual Customer Proprietary Network Information ("CPNI") certification. As a consequence of failing to file the

USF reports, the CLEC had also failed to make the mandatory contributions to the USF, the Telecommunications Relay Services Fund, the North American Numbering Plan and Local Number Portability Administration. According to the Consent Decree, the CLEC later submitted the required regulatory fees, FCC Forms 499, the associated contributions, and its CPNI certification. The Consent Decree cited potential violations of Sections 9(a)(1), 222, 225, 251(e)(2), and 254(d) of the Communications Act of 1934, as amended (the "Act"), and Sections 1.1154, 1.1157, 43.61, 52.17, 52.32, 54.706, 54.711, 64.604, and 64.1195 of the FCC's Rules.

As a result, the Consent Decree required the CLEC to "voluntarily" contribute $16,000 to the Department of the Treasury, to implement a compliance plan that includes establishing certain internal procedures, to provide employee training, and to submit compliance reports to the FCC for a period of three years. As discussed below, without the Consent Decree, the CLEC could have found itself in a much worse position.

Under Section 9(a) of the Act and Sections 1.1154 and 1.1157 of the FCC's Rules, regulatory fees must be paid by the established deadline, which usually falls on a date between August and October each year, or be subject to a 25% late-filing penalty. In addition to the late penalty, the FCC also has the authority to assess interest.

Section 254(d) of the Act and Sections 54.706 and 54.711 of the FCC's Rules require certain telecommunications providers to file quarterly and annual Telecommunications Reporting Worksheets (FCC Forms 499Q and 499-A respectively). The FCC has stated that the quarterly and annual revenue report worksheets are more than an "administrative tool" and are a "fundamental and critical component of the Commission's Universal Service program", with the failure to timely file such reports resulting in "delayed payments, and difficulty in calculating contributions to the USF…." The importance of such revenue reports is reinforced by the FCC's consistent history of fining telecommunications providers $50,000 for each missing or late-filed report.

The FCC also has the authority to levy heavy penalties for failure to pay USF contributions. There is a base forfeiture of $10,000 (per month) for failure to pay the *full amount* of the monthly USF contribution. A telecommunications provider's failure to contribute any portion of its monthly USF contribution generally results in a $20,000 (per month) fine. Under the authority provided in Section 503(b)(2)(E) of the Act, the FCC also has the authority to levy an upward adjustment, which usually equals 50% of the outstanding USF contributions.

Finally, the FCC has indicated that the CPNI certification "includes some of the most sensitive personal information that carriers have about their customers as a result of their business relationship." As evidence of the importance associated with protecting consumer data, the FCC has recently increased the typical fine associated with failure to file the annual CPNI certification, which is due annually on March 1, from $20,000 to $25,000. These annual certifications provide an ongoing record that a telecommunications provider has procedures in place to protect against unauthorized disclosure of certain sensitive consumer information. The FCC's Rules do not include a base forfeiture for CPNI violations. The FCC's ability to fine for such violations originates from Section 503 of the Act. Under that section, the FCC has the authority to impose monetary forfeitures of up to $150,000 for each violation or each day of a continuing violation, up to a maximum of $1,500,000.

The difference here between the imposed voluntary contribution and the more typical fines for such violations is substantial. Telecommunications providers and others with lurking rule violations may wish to carefully assess their compliance history, and consider initiating communications with the Enforcement Bureau before the Bureau calls on them.

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