FCC Enforcement Monitor

by Scott R. Flick and Christine A. Reilly

Headlines:

- *Failure to Refresh Tower Paint Garners $8,000 Fine*
- *FCC Levies $25,000 Fine for Failure to Respond*
- *$85,000 Consent Decree Terminates Investigation Into Unauthorized Transfers of Control*

Tower Owners Receive Harsh Reminder Regarding Lighting and Painting Compliance

The FCC, citing air traffic navigation safety, has fined many tower owners for noncompliance with Part 17 of the Commission's Rules. Part 17 includes regulations pertaining to the registration, maintenance and notification obligations of tower owners. The base fine for violating Part 17 requirements is $10,000.

Part 17 supplements the notification obligations imposed by the Federal Aviation Administration ("FAA"). Section 17.7 of the FCC's Rules requires that certain tower structures, including most structures over 200 feet in height and those near airports or heliports, be registered with the FCC. Section 17.21 mandates that most towers over 200 feet be lit and painted in accordance with the FAA's recommendations. These recommendations include the use of orange and white paint (alternating bands) and red or white flashing, strobe or static lights.

With the recent release of two Notices of Apparent Liability ("NAL"), the FCC continued its pursuit of those who fail to comply with its tower rules, including Section 17.50, which mandates that any tower required to be painted in accordance with the FAA's guidelines or the FCC's Rules must be cleaned or repainted as often as necessary to maintain good visibility.

In the first of the two NALs, agents from the Dallas Field Office inspected a 402-foot tower located in Quanah, Texas and determined that the existing paint, which was faded, scraped, peeling or missing in certain areas, was insufficient. The NAL indicates that the agents were unable to distinguish between the orange and white bands from a "quarter mile from the [tower]", thereby "reducing the structure's visibility."

Shortly after the Quanah inspection, agents from the Dallas Field Office also inspected a 419-foot tower located in Durant, Oklahoma. The agents found a similar situation, where the tower's paint was faded, scraped, peeling or missing in certain areas. The agents were again unable to distinguish between the

orange and white bands from "800 feet away from the [tower]", once again "reducing the structure's visibility."

The FCC levied the full base fine of $10,000 against each tower owner. The FCC also mandated that no later than 30 days after the release of the respective NAL, a "written statement pursuant to Section 1.16 of the Rules signed under penalty of perjury by an officer or director of [the tower owner] stating that the [tower] has been painted to maintain good visibility" be delivered to the Dallas Field Office.

FCC Turns Up the Heat on Those Who Fail to Respond to Its Inquiries

In last month's Enforcement Monitor, we discussed a case in which the FCC fined a company $25,000 for failing to respond to a Letter of Inquiry ("LOI"). This month brings a similar case, highlighting the FCC's increasingly tough stance on companies that fail to respond to FCC communications.

In prior years, the FCC typically issued forfeitures close to the base amount of $4,000 for failing to respond to the FCC. However, that started to change in 2005, when a telecommunications provider was fined for several major violations, including failing to file full and timely registration information and failing to respond to the FCC. Though the company did respond to the FCC's initial inquiry and requested additional time to respond to a second LOI, it did not respond to two subsequent FCC letters. The FCC fined the provider $8,000 for failing to respond to FCC inquiries.

Later in 2005, the Enforcement Bureau issued an LOI to a prepaid long distance provider for its failure to fully and timely contribute to the Universal Service Fund. The counsel for the provider requested an extension of the response period on two separate occasions, but never actually filed a response to the LOI. After the response date passed, the Enforcement Bureau contacted counsel, who indicated that it no longer represented the company. The Enforcement Bureau contacted the company directly several times, but did not receive a reply. In response, the FCC issued a Notice of Apparent Liability for Forfeiture and a Forfeiture Order for $20,000—an upward adjustment from the base fine of $3,000 for failing to file required forms or information and $4,000 for failing to respond to FCC communications. The FCC justified this increase by arguing that such misconduct "exhibits disregard for the Commission's authority that cannot be tolerated" because it threatens the FCC's ability to investigate and enforce its rules.

Most recently, the FCC investigated a telecommunications company for violations in connection with its billing practices and issued an LOI. After the company failed to respond to the LOI within the 20-day window, the FCC sent a second letter, which again went unanswered. This time the FCC increased the $4,000 base fine by an additional $21,000 (making it a $25,000 fine) because the violation was "egregious, intentional, and continuous."

The FCC appears to have run out of patience with non-responsive parties, and has been upping the ante through ever larger fines. Because the FCC views LOIs and other communications as legal orders, failure to timely respond or to provide requested information is considered a violation of an FCC order. The FCC is therefore likely to continue issuing harsh penalties against non-responsive parties, and those who deal with the FCC should be mindful to treat letters from the FCC with special care or face the consequences. Even an inadvertent failure to respond could still lead to a substantial penalty.

Disclosure of Business Radio Transfers Ends with Consent Decree and $85,000 Contribution to the U.S. Treasury

While people often think of the FCC as primarily exercising authority over the worlds of media and telephones, its jurisdiction often reaches into many other industries that rely on communications technologies. Recently, the FCC obtained a Consent Decree terminating an investigation of an international chemical manufacturing company that holds several private business radio licenses used for internal communications at its manufacturing plants.

Over the past several years, the chemical company had acquired several companies and multiple manufacturing plants. In the course of these transactions, control of various business radio licenses was transferred to the new owner without first obtaining the required approvals from the FCC. Both Section 310 of the Communications Act and Section 1.948 of the FCC's Rules require that licensees apply for and obtain FCC approval before assigning or transferring wireless radio service licenses.

In 2010 and 2011, the company voluntarily disclosed to the Wireless Telecommunications Bureau ("WTB") that it had transferred the licenses without approval, and it then filed applications seeking retroactive FCC approval of those transfers. The WTB granted the applications and then referred the matter to the Enforcement Bureau, which initiated an investigation.

To resolve the investigation, the company agreed to enter into a Consent Decree with the FCC which requires the company to institute a compliance plan that includes monitoring and reporting to the FCC for a period of three years. The Consent Decree also requires the company to make a contribution of $85,000 to the U.S. Treasury.

While it is all too easy for a few business radio licenses to get overlooked in the context of large mergers and acquisitions outside the communications industry, this Consent Decree serves as yet another reminder to non-communications companies that if they overlook FCC requirements, they do so at their peril.

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