July 21, 2020

Legal Memorandum

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# Apparent Violations of FCC’s Underwriting Rules

# Draw $15,000 Proposed Fine

A low power FM (“LPFM”) licensee’s alleged airing of commercial material may end up costing the station $15,000, according to a recent [Notice of Apparent Liability for Forfeiture](https://docs.fcc.gov/public/attachments/DA-20-435A1.pdf) (the “NAL”) issued by the FCC’s Enforcement Bureau.

The NAL centers on the FCC’s underwriting rules, which prohibit noncommercial educational (“NCE”) stations (including all LPFM stations) from airing commercial advertisements. Although NCE stations can identify contributors who provide financial support, they cannot go further and *promote* a contributor’s products, services, or businesses.

NCEs must at times make difficult decisions as to whether on-air copy identifying a particular donor crosses the line from mere identification into impermissible, commercial promotion. In the case of the LPFM licensee targeted by the NAL, the FCC’s Enforcement Bureau has made a preliminary determination that the relevant announcements—apparently broadcast more than 1,600 times over a three-month period in late 2018 on behalf of 14 underwriters—did not present a particularly difficult decision. The Commission apparently received “multiple complaints” alleging that the LPFM station was “essentially operating . . . as a commercial station.” Upon investigating those complaints—and according to the NAL—the Enforcement Bureau discovered announcements that were “replete with prohibited promotional references,” including the following impermissible types of statements:

* Employing comparative and/or qualitative language to describe products or services (for example, stating that an underwriter’s employees are “some of the most well-known”);
* Using pricing language and/or offering inducements to do business (for example, explaining how customers could receive “$30 off” their bill); and
* Employing “menu listings” of products or services (for example, describing various food options available for purchase from the underwriter).

Additionally, at least six of the announcements targeted by the NAL were greater than 30 seconds in length, with some “close to or exceeding 60 seconds in length.” Although the FCC’s rules do not set a strict time limitation on underwriting announcements, the FCC has repeatedly explained that the longer an announcement is the more likely it is to be deemed impermissibly promotional.

By our count, this marks the second apparent violation of the Commission’s underwriting rules targeted by the Enforcement Bureau thus far this year (the other being an early January [Consent Decree](https://docs.fcc.gov/public/attachments/DA-20-12A1.pdf)). Accordingly, perhaps now would be an especially good time for NCE stations to review their underwriting policies and announcements to ensure compliance with the FCC’s rules. It appears that the FCC is not—even in the difficult COVID-19 economy—currently shying away from enforcing what it believes to be violations of its underwriting rules.

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# Enforcement Bureau Issues Two Notices of Apparent Liability for Apparent Violations of FCC’s Station-Conducted Contest Rules

In a pair of recent Notices of Apparent Liability for Forfeiture (the “[First Notice](https://docs.fcc.gov/public/attachments/DA-20-693A1.pdf)” and “[Second Notice](https://docs.fcc.gov/public/attachments/DA-20-447A1.pdf)”), the FCC has proposed fines of $5,200 and $6,000, respectively, for two radio licensees’ apparent failures to timely award promised contest prizes to the winning contestants. According to the Notices, each proposed fine is meant to “advance[] the Commission’s longstanding goal of protecting the public form being deceived by broadcast contests.”

*The “contest rule”*. The FCC’s station-conducted contest rule is the source of the alleged violations described in each Notice. Among other things, the FCC’s rule requires broadcast licensees to “fully and accurately disclose the ***material terms***” of a broadcast or advertised contest, either by periodically broadcasting those terms or making them available in writing on a publicly accessible Internet website and periodically broadcasting the availability of those written terms. The FCC’s rule also requires that any station-conducted contest be executed “substantially as announced and advertised,” including by awarding prizes without any “unreasonable delay.”

*What are the “material terms” of a contest?* According to the FCC, the material terms include those that define the operation of and affect participation in the contest—for example, how to enter or participate; eligibility restrictions; entry deadline dates; whether prizes can be won; when prizes can be won; the extent, nature and value of prizes; the basis for valuation of prizes; time and means of selection of winners; and/or tie-breaking procedures.

*The apparent violations*. In the case of the First Notice, the licensee apparently ran a contest for Elton John concert tickets, but never awarded the tickets to the contest winner despite the winner’s repeated attempts to claim the prize. After the night of the concert passed without the winner getting to feel the love that night, the winner filed a complaint with the FCC. Subsequently—after receiving a letter of inquiry from the FCC—the radio station offered the contest winner “free tickets to an Elton John performance in Las Vegas, along with complimentary airline and hotel accommodations”; around the same time, the station also apparently reminded all station employees about the importance of following the FCC’s station-conducted contest rules.

In the case of the Second Notice, the licensee apparently ran a contest in 2016 with an advertised prize of an all-inclusive stay at a resort in Mexico, but failed to award the prize to the contest winner despite the winner’s “many calls, emails, and messages” attempting to collect the prize. According to the licensee, the resort operator “reneged on its commitment” to provide the prize, and the station employee in charge of the contest failed to inform management of the issue. In late 2018, the station ultimately offered the winner $3,600 (which the station represented to be twice the value of the advertised prize) and the licensee and the winner signed a settlement agreement indicating that the winner “would like to rescind his complaint” with the FCC.

Ultimately, in both cases the Notices tentatively determine that the licensees’ failure to timely award the prizes apparently violated the FCC’s requirement to conduct the contests “substantially as announced and advertised.” For the concert tickets, the necessary deadline to award the prize was the date of the concert, and for the all-inclusive stay in Mexico, the licensee’s contest rules set a 30-day deadline by which the prize was to be claimed. And although in both cases the winners ultimately received a substantial prize offer from the stations, the Notices make clear that subsequent remedial measures, including “the award of additional prizes,” “does not excuse [an] apparent rule violation.”

*Upward variations in proposed fines*. As a final word of caution, the First Notice provides a salient example of how FCC violations can snowball into greater proposed fines in the case of station groups. In calculating the proposed fine in the First Notice, the Enforcement Bureau cites a previous fine issued against one of the licensee’s sister stations for operating an AM station in excess of its authorization—i.e., a prior fine issued against another station nominally owned by another, associated company. Based on that separate, prior fine, the First Notice proposes a greater fine for the apparent contest rule violation than the base amount set by the FCC’s rules, making clear that when setting fine amounts “it is appropriate to consider the compliance history of all stations controlled by [a] Licensee’s parent.” (Separately, the Enforcement Bureau also proposes a greater fine than the base amount set by the FCC’s rules in the Second Notice; however, in that case the determination rests primarily on the licensee’s apparent failure to resolve the issue for approximately two years, despite the winner’s repeated efforts to claim the prize during that time.)

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So what should broadcasters take away from the Notices? Compliance with the FCC’s rules are a necessity when a station conducts or promotes its own contest on-air, and those rules require broadcasters to hew closely to the terms and rules established for the contest, including when and how prizes will be awarded. Failure to comply—and/or unreasonable delay in awarding a prize—can subject your station to the potential for significant fines and unbudgeted legal expenses.

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# Radio Station Fined $7,000 for Failing to Timely File License Renewal Application and Operating Station After Its Authorization Expired

As we pass the mid-point of the second year of the current radio license renewal cycle (which began in mid-2019 and continues until mid-2022), it is perhaps unsurprising that the Commission has issued a [Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture](https://docs.fcc.gov/public/attachments/DA-20-584A1.pdf) (the “NAL”) highlighting the importance of complying with the Commission’s license renewal regime. The NAL addresses two distinct violations apparently committed by an AM station licensee (the “Licensee”) that can result from failing to comply with applicable license renewal deadlines. First, the NAL tentatively finds that the Licensee failed to timely file a license renewal application. Second—doubling the Licensee’s trouble—the Licensee apparently continued to broadcast after its license had expired, thus engaging in unauthorized operation of the station. For these missteps, the Commission proposed a $7,000 fine and, as an “additional measure[]” to ensure future compliance, indicated that it plans to grant only a two-year license term (i.e., requiring the station to file again for renewal of the station’s broadcast license in only two years) rather than the full eight-year term, and even then only if no other issues are discovered that would preclude granting the Licensee’s renewal application.

Underlying the NAL are two important concepts of which broadcast licensees should be aware when navigating the license renewal application process. The first concept is one of timing. Absent express FCC direction to the contrary, the Commission’s rules require broadcast station license renewal applications to be filed “**not later than the first day of the fourth full calendar month prior to the expiration date of the license sought to be renewed**.” In this case, the Licensee should therefore have filed its renewal application by June 3, 2019 (because June 1, 2019 fell on a Saturday, FCC rules extended the filing deadline until the next weekday—June 3). It did not. Instead, the Licensee filed its renewal application nearly five months later—well after the October 1, 2019, date on which the station’s broadcast license expired, and well after FCC staff had notified the station that “all authority to operate the [s]tation was terminated.” Consequently, the NAL tentatively determines that the Licensee is liable both for (1) failing to timely file a license renewal application and (2) operating its station after its broadcast license had expired.

The second concept is the unfortunate reality that FCC staff are not always sympathetic to difficulties that might have played a part in a licensee’s rule violation. In the present case, at the same time the Licensee filed its belated license renewal application it also filed a request for special temporary authority to continue broadcasting and a petition for reconsideration of the staff’s cancellation of the station’s license, explaining that its sole shareholder suffered a stroke in June 2019 and passed away in August before the application deadline. Despite those tragic circumstances, the NAL nonetheless tentatively concludes that a $7,000 fine is appropriate, based on the fact that a licensee’s lack of intent to violate the FCC’s rules generally does not excuse a violation.

In the Commission’s words: “It is a licensee’s responsibility to comply with the Rules.” And, ultimately, the NAL serves as a potent reminder to all broadcasters that the Commission means what it says.

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# $1,500 Fine Proposed for Low Power FM Broadcaster’s

# Late Filing of License Renewal Application

Continuing the theme of “lessons to be learned” from license renewal enforcement actions, in another [Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture](https://docs.fcc.gov/public/attachments/DA-20-593A1.pdf) (the “NAL”), the FCC proposed a $1,500 fine for the failure of an LPFM station to timely file its license renewal application. Unlike in the case of the AM station described in the article above, the LPFM station at least filed its license renewal application a few days before its broadcast license was set to expire. Although the NAL tentatively concludes that the licensee willfully violated FCC rules when it filed its license renewal application on January 27, 2020—*nearly four months after* the applicable October 1, 2019, application filing deadline—the NAL is silent regarding any liability for unauthorized operation of the station.

Additionally, the NAL proposes lowering the fine to $1,500, which is half of the $3,000 “base” fine for late-filed applications/reports. On this point, the NAL makes clear that the filing of the license renewal application prior to the date of the station’s license expiration was a mitigating factor that counseled in favor of a lower financial penalty. And, finding that the violation did not rise to the level necessary to warrant a denial of the LPFM station’s renewal application, the NAL indicates that the FCC plans to grant the application pending further review.

At bottom, the contrast between the two cases discussed above demonstrates that every FCC deadline is important—catching problems early may help to avoid the dreaded “snowball” effect that has the potential to create even greater problems down the line.

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# Radio Broadcasters Agree to Pay $8,000 Fine to Resolve FCC Investigation into Unauthorized Assignment of Station Licenses

In another noteworthy [Order and Consent Decree](https://docs.fcc.gov/public/attachments/DA-20-535A1.pdf) (the “Decree”), the Media Bureau resolved an investigation into two radio broadcasters (the “Broadcasters”) who allegedly assigned the broadcast licenses for two radio stations—an AM station and an FM translator station (the “Stations”)—without prior FCC authorization. The Broadcasters admitted that an unauthorized assignment had occurred, and agreed to pay $8,000 for the violations.

Under both the Communications Act and FCC rules, broadcast licensees are generally prohibited from assigning or transferring construction permits or station licenses without first applying to and receiving approval from the Commission. The FCC must examine such applications to ensure that the proposed assignment or transfer will serve the public interest, convenience, and necessity.

The two licensees at issue in the Decree had a history of jointly participating in local marketing agreements (“LMAs”), including one entered into in 2014 regarding the Stations. The 2014 LMA was written and attributable, and specified that the then-current licensee of the Stations retained full control of operations, programming, personnel, and facilities. And although the Commission did not take issue with the LMA in the Decree, the LMA appears to have set the stage for the subsequent problematic conduct.

Nearly a year after the Broadcasters entered into the 2014 LMA—in January 2015—the Broadcasters entered into an Asset Purchase Agreement (the “APA”) in which the then-current licensee of the Stations agreed to sell, among other assets, the Stations’ licenses. Over three years later—in October 2018—the Broadcasters amended the APA to provide that the then-current licensee would be reimbursed for taxes related to the APA. Finally, without FCC consent, the Broadcasters executed a Bill of Sale to complete the sale of the Stations, effective December 31, 2019.

Several months later, the Broadcasters belatedly filed an application with the FCC disclosing the unauthorized assignment of the Stations’ broadcast licenses and requesting the Commission’s post-hoc consent to the assignment (ordinarily such applications must be filed at least 45 days prior to the contemplated effective date of the assignment or transfer of control in order to afford sufficient time for the application to be put out on Public Notice and for interested parties to prepare and file formal petitions, if they so choose). According to the application, the Broadcasters “mistakenly believed that the ownership change would be implemented through the process of filing the [Stations’ license] renewal applications,” which were due by June 3, 2020. This mistaken approach has resulted in an $8,000 penalty for the admitted violations.

Fundamentally, the Decree makes clear that any broadcaster seeking to assign its license(s) or transfer control of its station(s) must carefully follow Commission rules and procedures to do so. If those rules and procedures are not followed, ignorance will almost certainly not be sufficient to excuse a monetary penalty.

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*Tim Nelson, Editor*

[BROOKS, PIERCE, McLENDON,](http://www.brookspierce.com/)

[HUMPHREY & LEONARD, L.L.P.](http://www.brookspierce.com/)

[Mark J. Prak](mailto:mprak@brookspierce.com)   
[Marcus W. Trathen](mailto:mtrathen@brookspierce.com)  
[David Kushner](mailto:dkushner@brookspierce.com)  
[Coe W. Ramsey](mailto:cramsey@brookspierce.com)  
[Stephen Hartzell](mailto:shartzell@brookspierce.com)

[Julia C. Ambrose](mailto:jambrose@brookspierce.com)

[Elizabeth E. Spainhour](mailto:espainhour@brookspierce.com)

[J. Benjamin Davis](mailto:bdavis@brookspierce.com)

[Timothy G. Nelson](mailto:tnelson@brookspierce.com)

[Patrick Cross](mailto:pcross@brookspierce.com)

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This Legal Review should in no way be construed as legal advice or a legal opinion on any specific set of facts or circumstances. Therefore, you should consult with legal counsel concerning any specific set of facts or circumstances.

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