December 21, 2020

Legal Memorandum

*“Eye on FCC Enforcement” Edition*

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# $125,000 Fine Imposed for FM Station’s Violations of Antenna Structure, Contest, and Live Broadcast Rules

A Florida FM station’s recent slate of FCC rule violations have been resolved by a [Consent Decree](https://docs.fcc.gov/public/attachments/DA-20-1419A1.pdf) (the “Decree”) that levels the highest fine discussed in this “Eye on Enforcement” memo: $125,000. The substantial fine addresses multiple, often extended violations of the FCC’s rules governing antenna structures, deceptively conducted contests, and live broadcasts.

According to the Decree, the licensee’s violations regarding its antenna structure encompassed at least three separate FCC rules: the duties for an antenna structure owner to (1) either daily monitor the structure’s lighting system or install and properly maintain an automatic alarm system designed to detect and provide notification of lighting failures; (2) to “immediately” notify the FAA of certain lighting extinguishments that are not corrected within 30 minutes; and (3) to notify the FCC when an antenna structure changes ownership or height (which, generally, is to be done by electronically filing FCC Form 854). In response to an anonymous, late-2019 complaint asserting that the licensee’s antenna structure had not been properly lit for more than a year, the Enforcement Bureau’s Miami Field Office (the “Bureau”) conducted an investigation.

First, the Bureau discovered that the then-listed registrant of the antenna structure was no longer in business, suggesting that the antenna structure had changed owners without appropriate notification to the Commission. Then, after further investigation and inquiry, the Bureau discovered (and the licensee admitted) that the licensee had acquired the antenna structure in 2012, but had failed to notify the Commission of its acquisition. The licensee also admitted that it had failed to monitor the structure’s lighting system for approximately 453 days and, consequently, had failed to notify that FAA of a lighting extinguishment as required by the Commission’s rules.

Turning to the licensee’s other violations, two separate, late-2018 complaints alleged that the station had run afoul of the FCC’s contest rules by preselecting the winners to two station-conducted contests. Among other things, the Commission’s contest rules (1) prohibit stations from “prearranging or predetermining” any part of a contest involving intellectual knowledge, intellectual skill, or chance, and (2) require stations to fully and accurately describe the material terms of their contests, to conduct their contests “substantially as announced or advertised,” and to refrain from describing a contest with false, misleading, or deceptive material terms. Separately, the Commission’s live broadcast rules also require broadcasters to expressly announce that material is prerecorded when “time is of special significance” or when the broadcaster attempts to create the impression that the program material is occurring “simultaneously with the broadcast.”

According to the complaints filed against the licensee, one of the two station-conducted contests at issue involved a scavenger hunt that a female listener “solved . . . earlier than anticipated, thereby circumventing the station’s desired goal of enhancing its broadcast listenership through a protracted competition.” The station therefore allegedly arranged for the listener to win the contest and, at the same time, for her and her partner to sign non-disclosure agreements so that the station could “continue” the contest. The second contest required listeners to call the station at specific times during the day; however, the station allegedly prerecorded calls between station employees and their friends posing as contest participants, which the station, in turn, broadcast at the designated call-in times. You may wonder what tipped the complainants off that the calls were prerecorded? Apparently, “there was no live DJ on air at the time the listeners were asked to call in”! The latter misstep caused the station to run afoul not just of the FCC’s contest rules, but also the FCC’s live broadcast rules, each of which separately contributed to the Decree’s substantial aggregate fine.

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The Decree serves as a good reminder to broadcasters (and especially those broadcasters who also own antenna structures) of the importance of continued regulatory compliance across all areas of station operation. Perhaps most significantly, each of the circumstances described above demonstrates how seemingly discrete compliance issues can easily “snowball” into multiple rule violations if left uncorrected.

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# $25,000 Fine Proposed for LPFM Station’s Alleged Unauthorized Station Operation, Failure to Make Station Available for FCC Inspection, and EAS Compliance Issues

A Florida low power FM (“LPFM”) licensee has received a [Notice of Apparent Liability for Forfeiture](https://protect-us.mimecast.com/s/zvmTCOYkRQsp0Vo6i7-sMO?domain=docs.fcc.gov) (the “Notice”) proposing the second-highest fine addressed in this memo—$25,000—for the licensee’s apparent failures to (1) operate its station in accordance with the terms of its license and the Commission’s LPFM technical rules; (2) make the station available for FCC inspection; and (3) maintain required EAS equipment.

The technical rules implicated by the licensee’s apparent violations include the requirement for each LPFM station to maintain its transmitter power output “as near as practicable to, but not more than 105% of,” its authorized transmitter power output, as well as the prohibition on broadcast operations other than those permitted by the Communications Act and a station’s FCC license. The Commission’s rules also require an LPFM licensee to make its station available for agency inspection during the station’s business hours and any time the station is in operation, and to install and maintain rule-compliant EAS equipment.

According to the Notice, agents from the Enforcement Bureau’s Miami Field Office (the “Bureau”) first identified potential violations when they discovered that the licensee was broadcasting from the roof of a multi-unit residential building located approximately a third of a mile away from the transmitter location authorized on the station’s license. The Bureau also discovered that the licensee’s antenna specifications varied from those indicated on the station’s license; the licensee never notified the Commission that it was using a different antenna.

These issues led the Bureau to contact a station representative to request to inspect the station’s transmitter site. The station representative responded by indicating that the station could not accommodate an inspection because the licensee’s president was “out of the country with no scheduled return date.” After several more attempts to contact the licensee, according to the Notice, the Bureau finally reached the licensee’s president, scheduled an inspection, and learned that the licensee’s president was the station’s chief operator and that he was unable to remotely modify the station’s transmitter settings.

Per the Notice, the Bureau’s subsequent site inspection confirmed the licensee’s suspected violations related to the unauthorized transmitter location and antenna type, and revealed two more violations: the Bureau observed that (1) the station’s transmitter operating well in excess (at approximately 222%) of its authorized power limits; and (2) the station did not appear to have any EAS equipment installed. Although the licensee explained that the station’s EAS equipment was installed at another location, despite multiple follow-ups the Bureau was never able to verify that such equipment existed.

All told, the proposed $25,000 fine represents the sum of the base forfeiture amounts for each of the licensee’s apparent violations discussed above: $10,000 for unauthorized operations, $7,000 for failing to permit a Commission inspection, and $8,000 for failing to install required EAS equipment.

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# $15,000 Fine Imposed on FM Translator Licensee Who Provided Incorrect Information to FCC and

# Engaged in Unauthorized Antenna Operations

In another case involving impermissible variances between an FCC authorization and the operations of the facility to which it applies, an Arizona FM translator licensee has entered into a [Consent Decree](https://docs.fcc.gov/public/attachments/DA-20-1134A1.pdf) (the “Decree”) that, among other things, requires the licensee to pay a $15,000 fine. In contrast to the foregoing examples, this Decree was issued in the context of the licensee’s deviations from an FCC construction permit—rather than the facility’s pre-existing broadcast license—highlighting the fact that regulatory pitfalls (and punishments) can occur at all stages of the broadcast ownership process.

The Arizona licensee filed an application to switch channels by changing the authorized operational parameters of one of its FM translators. Although the Commission granted the application and issued a construction permit authorizing the channel change, when the licensee subsequently filed an application for a license to cover the modified facilities, one of the licensee’s neighboring FM station operators filed an informal objection. Then, when the Arizona licensee amended its pending application in light of the objection, the amendment drew anotherinformalobjection from a separate, neighboring FM translator licensee.

The informal objections set forth numerous allegations against the Arizona licensee; according to the Decree, the Commission determined that the licensee had indeed committed the following three violations: (1) constructing facilities not authorized by a valid Commission construction permit; (2) commencing program tests with non-conforming facilities; and (3) failing to timely amend a license application and failing to correct the required “program test letter” to reflect that the facilities constructed were not those specified in the construction permit. In particular, the Arizona licensee admitted that for approximately six months after the program test period commenced, the translator’s antenna was mounted at the wrong height and oriented in the wrong direction, thus violating the FCC’s rules requiring a licensee to obtain Commission approval prior to making changes in antenna direction or service area and prohibiting unauthorized broadcast facility operations. Those same deviations from the construction permit’s authorized antenna parameters, in turn, caused the licensee to violate the FCC’s rules regarding facility testing because the station’s statement in the required program test letter that the station had “commenced program tests . . . with the facilities authorized in the [construction permit]” turned out to be false. Finally, the licensee violated another FCC rule when it failed to amend its license application within 30 days of discovering the antenna variances cataloged above.

The Decree reinforces many of the lessons set out in the prior sections of this memorandum. And it adds another: if you discover a regulatory issue, you should move quickly to analyze it and, if necessary, correct it.

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# $15,000 Fine Resolves LPFM’s Violations of FCC’s Rules Governing Underwriting, Cross-Ownership, Assignments and Transfers of Control, and LPFM Holding Period

Commercial stations aren’t the only ones who have been subject to recent FCC enforcement actions: another recent [Consent Decree](https://docs.fcc.gov/public/attachments/DA-20-1112A1.pdf) (the “Decree”) resolves a noncommercial Rhode Island low power FM Station (“LPFM”) licensee’s violations of the FCC’s (1) cross-ownership rules, (2) LPFM assignment and transfer of control laws, (3) recently altered holding-period rule, and (4) underwriting laws.

The first three rules noted above all concern various aspects of the FCC’s rules governing LPFM ownership. As relevant to the Decree: the FCC’s cross-ownership rules prohibit a party with an attributable interest in a full power radio station from simultaneously holding an interest in an LPFM station; the LPFM assignment and transfer of control laws require a licensee to file a *pro forma* transfer of control application (FCC Form 316) whenever more than 50% of the licensee’s governing board “suddenly” changes; and—until February 2020, when the following rule changed—an LPFM license could not be transferred or assigned for three years from the date on which the license was issued. (The latter rule now prohibits the assignment or transfer of a *construction permit* for *18 months* from the date on which the permit is issued.)

According to the Decree, the licensee at issue violated each of the foregoing rules for fairly straightforward reasons: one of its directors simultaneously held an attributable interest in a Rhode Island AM station for a period of time after the LPFM station received its license, and the licensee underwent a 100% change in its board of directors approximately 14 months after the LPFM station’s license was issued.

The final violation resolved by the Decree touches on a subject with which noncommercial educational stations are quite familiar: the FCC’s underwriting rules and the relevant provisions of the Communications Act. Among other things, those rules and provisions prohibit NCE stations from broadcasting unduly promotional announcements on behalf of for-profit entities in exchange for consideration. Although the prohibition seems straightforward in theory, many complexities can arise in its application to the creative and language choices used in specific on-air announcements. According to the Decree, the LPFM station’s announcements breached the underwriting laws by containing, “at various points, comparative or qualitative descriptions, price information, calls to action, or inducements to buy, sell, rent, or lease.” Although the precise announcements the Commission found to be problematic are not set out in the Decree, we obtained copies of some of the announcement texts that were at issue in the Decree to help provide you with examples of language the FCC **might have** determined to be problematic, including the following:

* For a construction company, **arguably** comparative and qualitative descriptions that the company made the announcer’s “house . . . look awesome” and is “a preferred Better Business Bureau remodeling company.”
* For a car dealership, **arguable** inducements to purchase, as well as pricing information that the dealership offers “instant approval” and “a $500 grocery card . . . or Visa gift card with the purchase of a new vehicle.”
* For a door installation company, **arguable** purchase inducements that the company was “offering a free key pad with installation,” and **arguably** comparative and qualitative descriptions that the company “has the fastest delivery” and has “been your local garage door experts since 1975.”
* For a realtor, **arguably** calling listeners to action by announcing that owning property is “one of the most important decisions you will ever make, [so] why not go to the best?”

Taken together, the foregoing violations cost the licensee $15,000. It’s worth noting, though, that the $15,000 amount constitutes a “reduction of the . . .[typical] penalty, based upon [the licensee’s] inability to pay.” Thus, the risk of greater fines for licensees who can shoulder the financial burden should give NCE licensees all the more reason to carefully comply with the underwriting and cross-ownership rules, and for LPFM licensees to also carefully comply with the LPFM assignment and transfer of control laws and revised holding-period rule.

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# Failures to Timely File License Renewal Applications Costing Stations a Proposed $3,000 a Pop

Over the past several months, the Commission has issued multiple Notices of Apparent Liability for Forfeiture (the “Notices”) for TV and radio licensees’ apparent failures to timely file license renewal applications. The Notices address renewal applications for [LPTV stations](https://docs.fcc.gov/public/attachments/DA-20-1440A1.pdf), [AM stations](https://docs.fcc.gov/public/attachments/DA-20-1430A1.pdf), and [FM stations](https://docs.fcc.gov/public/attachments/DA-20-1337A1.pdf), and target stations located from [Alabama](https://docs.fcc.gov/public/attachments/DA-20-1290A1.pdf) all the way to the [U.S. Virgin Islands](https://docs.fcc.gov/public/attachments/DA-20-1304A1.pdf).

Across the Notices—and regardless whether the relevant licensee offered an explanation for its failure to timely file—the Commission appears to have settled on a general practice of proposing the full “base” fine amount of $3,000 for each station that fails to timely file a license renewal application. For instance, one [Notice](https://docs.fcc.gov/public/attachments/DA-20-1430A1.pdf) proposes an aggregate $6,000 fine for the untimely filing of license renewal applications for two distinct Alabama AM stations, notwithstanding the licensee’s explanation that it was “struggling financially” and “working days and many nights” just to keep the two stations on air.

Notably, however, each Notice addresses circumstances where the relevant untimely renewal applications were, nonetheless, filed prior to the date on which the stations’ underlying license terms were set to expire. Generally, a station’s broadcast license expires approximately four months after its license renewal application is due. As we wrote over the summer, filing a late renewal application *before* a license actually expires appears to be different, in the FCC’s eyes, from a renewal application filed *after* license expiration: a June 2020 [Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture](https://docs.fcc.gov/public/attachments/DA-20-584A1.pdf) proposed a $7,000 fine for an untimely renewal application filed *after* the station’s license expired. There, the FCC justified the increased fine amount on the fact that each broadcast after the station’s license had expired constituted “unauthorized operation” of the station.

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# Political File Consent Decrees Continue to Roll In

Political file consent decrees continue to be inked between the Commission and various radio broadcasters at a fairly steady clip. By our count, more than a dozen political file consent decrees have been released over the last month or so. As you may recall, the Commission began to issue such decrees in July in an attempt to address what it viewed as widespread non-compliance with the political file recordkeeping rules and governing laws. The decrees affect radio broadcasters large and small and—if the continuing releases are any indication—are likely to continue to be issued throughout the current radio license renewal cycle (which runs through 2022). It remains to be seen if television broadcasters will face the same or similar political file issues during the current television license renewal cycle (which began earlier this year and runs through 2023). We’ll keep you posted.

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*Tim Nelson, Editor*

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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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