February 19, 2021

Legal Memorandum

*“Eye on FCC Enforcement” Edition*

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# Commission Imposes $233,000 Fine for Station Group Owner’s 26 Violations of Sponsorship ID Rules and Terms of Prior Consent Decree Governing Compliance with that Rule

A large radio licensee faces a six-figure penalty for multiple violations of the FCC’s sponsorship identification rule coupled with its failure to comply with the terms of a prior consent decree that also addressed sponsorship ID problems. An FCC [Forfeiture Order](https://docs.fcc.gov/public/attachments/FCC-21-19A1.pdf) (the “Order”) formally imposes a $233,000 fine against the licensee for those violations; the fine was initially proposed back in an August 2019 [Notice of Apparent Liability](https://docs.fcc.gov/public/attachments/FCC-19-70A1.pdf) (the “2019 Notice”).

The licensee named in the Order entered into a 2016 consent decree with the FCC, in which it admitted that 178 of its broadcasts had violated the sponsorship identification laws and agreed to pay a $540,000 fine and implement a compliance plan to help avoid future violations. As part of the 2016 consent decree, the licensee was required (for a three-year period, from January 2016 to January 2019) to report to the FCC any subsequent noncompliance with the sponsorship identification rules within 15 calendar days of discovering such noncompliance.

As explained at length in the Order (and the 2019 Notice), during that three-year period, the licensee discovered 26 violations of the sponsorship ID rules across seven of its stations. The Order makes clear that the licensee failed to timely report many of those violations; 13 of the violations were not reported until nearly eight months after they had occurred.

As broadcasters are aware, the sponsorship ID laws require stations to clearly identify on-air the sponsor of broadcast or programming material whenever any valuable consideration is paid or promised in exchange for such material. The policy underlying the requirements is that listeners and viewers are entitled to know who seeks to persuade them.

When a broadcaster fails to satisfy those requirements, the FCC sets a base forfeiture of $4,000 for each such violation. However, it’s important to note that the final forfeiture amount can easily climb much higher than that base “starting point.” In this case, for example, the $233,000 aggregate fine reflects an upward adjustment to $8,000 per instance (i.e., double the base forfeiture amount), which the FCC found justified as a result of the licensee’s “prior history of rule violations.” The Order imposes the remaining $25,000 of the $233,000 aggregate fine due to the licensee’s violation of the terms of the 2016 consent decree. (For those doing the math, the 26 violations times $8,000 per violation comes to $208,000.)

Although the licensee did not contest the factual findings set forth in the 2019 Notice, the licensee did request an “unspecified reduction or rescission of the proposed forfeiture,” arguing that the $233,000 amount is excessive under Commission precedent and also noting that the licensee underwent bankruptcy and restructuring such that purportedly played only an attenuated role in the actions that resulted in the violations. The FCC in the Order rejected that request, finding “no reason to cancel, withdraw, or reduce” the fine.

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# Consent Decree Including $10,000 Fine Resolves LPFM Station’s Violations of Underwriting Rules

The FCC’s underwriting rules were at issue in a recent [Consent Decree](https://docs.fcc.gov/public/attachments/DA-20-1112A1.pdf) (the “Decree”) resolving the broadcast by a noncommercial educational (“NCE”) low power FM (“LPFM”) licensee of nine announcements that contained prohibited promotional references. The Decree is the latest of several enforcement actions across the last year that have resolved underwriting violations by LPFM stations.

As NCE licensees are well aware, the FCC’s underwriting rules prohibit NCE stations from airing commercial advertisements. Although NCE stations can identify contributors who provide financial support, they cannot *promote* a contributor’s products, services, or businesses. The line between permissible identification and prohibited promotion, however, can at times be difficult to ascertain.

In the case of the LPFM licensee (based in Georgia) at issue here, the Decree explains that nine announcements aired by the station crossed that line by using “comparative and/or qualitative language to describe products or services, calls to action and/or the solicitation of future contact, . . . pricing language and/or . . . inducements to do business, and . . . ‘menu listings’ (e.g., excessive arrayal) of products or services.”

The base forfeiture amount for any one violation of the FCC’s underwriting rules is set at $2,000, which could have resulted in an $18,000 or greater fine for the Georgia LPFM licensee. However, the Decree reduces the total fine amount for the violations to $10,000, given the licensee’s “documented inability to pay” the full amount.

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# Failures to Timely File License Renewal Applications

# Generally Costing Stations $1,500 to $3,000

We’re continuing to see multiple Notices of Apparent Liability for Forfeiture (the “Notices”) roll in for radio licensees’ apparent failures to timely file license renewal applications. Some of the latest such Notices address renewal applications for [AM stations](https://docs.fcc.gov/public/attachments/DA-21-141A1.pdf), [FM stations](https://docs.fcc.gov/public/attachments/DA-21-139A1.pdf), [LPFM stations](https://docs.fcc.gov/public/attachments/DA-21-171A1.pdf), and [FM translator stations](https://docs.fcc.gov/public/attachments/DA-21-112A1.pdf); the Notices target stations in multiple states.

Across the Notices—and regardless whether the relevant licensee offered an explanation for its failure to timely file—the Commission appears to be continuing to propose the full “base” fine amount of $3,000 for each full-power station that fails to timely file a license renewal application. Additionally, some of the recent Notices have addressed failures to timely file license renewal applications for LPFM and FM translator stations; each of the Notices we’ve seen for such stations so far has proposed a $1,500 fine, based on the fact that such stations “provid[e] a secondary service.”

It’s also worth noting that the Commission has reduced the proposed $3,000 amount down to $500 in the case of at least one late-filed application; that situation dealt with an Alabama full-power FM licensee’s failure to timely file a license renewal application for the station. According to a recent [Order](https://docs.fcc.gov/public/attachments/DA-21-43A1.pdf) (the “Order”), that reduction was based on the licensee’s documented inability to pay, and the reduction amount was calibrated based on “a percentage of the Licensee’s gross revenues compared to that assessed against gross revenues in prior cases.”

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# Numerous Radio Broadcasters Still Entering

# Into Political File Consent Decrees

Political file consent decrees continue to be inked between the Commission and various radio broadcasters at a fairly steady clip. By our count, approximately a dozen additional political file consent decrees have been released since the beginning of 2021. As you may recall, the Commission began entering into such decrees in last summer in an attempt to address what it viewed as widespread non-compliance with the political file recordkeeping rules and governing laws. The consent 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 continue to monitor this issue.

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# FCC Issues Enforcement Advisory Reminding Broadcasters of

# EAS Compliance Obligations

The FCC’s Enforcement Bureau recently issued a [Public Notice](https://docs.fcc.gov/public/attachments/DA-21-10A1.pdf) (the “Notice”) reminding broadcasters (and all emergency alert system (“EAS”) participants) of their EAS compliance obligations and warning of the potential for enforcement action for failures to comply with the FCC’s EAS rules. In particular, the Notice explained that the report issued by the FCC’s Public Safety and Homeland Security Bureau covering the most recent national test of the EAS system identified several issues that had apparently impaired dissemination of EAS messages, including failures to make those messages accessible to individuals with hearing and vision disabilities.

As broadcasters are well aware, the EAS is a national public warning system that enables the President of the United States to communicate live to the public during a national emergency. EAS participants must transmit presidential messages during national emergencies and may also transmit local messages, such as severe weather alerts and AMBER (America’s Missing: Broadcast Emergency Response) alerts.

The Notice provides useful information regarding how EAS participants (including broadcasters) can improve their participation in EAS and ensure compliance with the FCC’s rules. The information is especially useful under current circumstances, as the COVID-19 pandemic continues to affect daily life and severe weather continues to crop up across the nation.

At a high level, the Notice provides the guidance regarding the following “key requirements” contained in the FCC’s rules:

* EAS participants must ensure that their EAS equipment’s monitoring and transmitting functions are available whenever the participant’s stations and systems are operating.
* EAS participants must transmit national level EAS messages, required monthly tests, and required weekly tests.
* EAS participants must ensure that an EAS message is accessible, including by ensuring that visually transmitted messages satisfy certain display requirements.
* EAS participants must submit their national test results to the FCC in the EAS Test Reporting System (the “ETRS”).

The base forfeiture amount for failing to have compliant EAS equipment installed and operational, or for transmitting “false” EAS alerts (such as broadcasting EAS tones when the tones do not correspond to a valid EAS alert), is $8,000. Notably, however, the Notice explains that fines can combine to form a “substantial” aggregate sum, citing to a 2014 Forfeiture Order in which fines of $280,000 and $1.12 million were assessed against entities who misused EAS tones.

We encourage you to read the Public Notice, to regularly monitor your EAS equipment, testing, and reporting obligations, and contact your communications counsel or the Association hotline with any questions.

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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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