December 22, 2022

Legal Memorandum

*“Eye on FCC Enforcement” Edition*

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| *Headlines:* | [Nearly](#_Nearly_$3.4_Million_1) **[$3.4 Million](#_Nearly_$3.4_Million_1)** [in Fines for Children’s Commercial Time Limits Certifications; FCC Signals Possible Change in Calculation of Future Fines](#_Nearly_$3.4_Million_1)[Over](#_Over_$500,000_Fine) **[$500,000](#_Over_$500,000_Fine)** [Fine for Violating Local Television Ownership Rules’ Prohibition on Common Ownership of Two Top-Four Same-Market Television Stations](#_Over_$500,000_Fine)**[$20,000](#_$20,000_Fine_for_1)** [Fine and Short-Term License Renewal for Operating at Variance from Licensed Parameters](#_$20,000_Fine_for_1)**[$11,000](#_Comment_Deadlines_Set)** [Fine for Unauthorized Silence, Late Renewal](#_Comment_Deadlines_Set)[**$0** Fine and, Instead, FCC Grant for Successful Defense of Assignment Application](#_FCC_Grants_Assignment) |

 As the holiday season continues to barrel along and the end of the year grows closer and closer, we hope this year-end “Eye on Enforcement” memorandum will help provide your station with important lessons to take into 2023 and beyond. Below, you’ll find a collection of some of the most instructional—whether due to a decision’s significance or its identification of one or more common enforcement “traps”—FCC enforcement actions over the last part of 2022.

 We wish your stations, viewers, and listeners the happiest of holidays and a warm and bright New Year!

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# Nearly $3.4 Million in Fines for Children’s Commercial Time Limits Violations; FCC Signals Possible Change in Calculation of Future Fines

The FCC made clear that children’s programming issues are still top-of-mind for enforcement purposes, particularly in a [Notice of Apparent Liability for Forfeiture](https://docs.fcc.gov/public/attachments/FCC-22-70A1.pdf) (“NAL”) proposing fines against more than 100 stations (each a “Station”) across the country—including several large TV ownership groups—in connection with a program-length advertisement run during several children’s programs in November and December 2018. In the NAL, the Commission underscored its commitment to combatting these types of advertisements and signaled a possible change in the way it will calculate associated fines for violations of the children’s commercial time limits rules in the future.

*Background*. As television broadcasters are well aware, for decades the FCC—pursuant to the Children’s Television Act of 1990—has by rule limited the amount of commercial matter that may be aired in programming originally produced and broadcast primarily for children ages 12 and younger. Those commercial limits are 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays. There are additional limits on “commercial matter,” however, that extend beyond the foregoing basic hourly limits, including prohibitions on certain website displays, host-selling, and—as relevant to the NAL—“program-length” advertisements. The Commission takes program-length advertisements especially seriously, based on the concern that “young children often have difficulty distinguishing between commercials and programs.”

Fundamentally, when a program associated with a product contains one or more commercials for that product, the FCC considers the entire program to be “commercial time” that counts against the hourly limits. Such a program-length advertisement can arise unexpectedly in the context of children’s programming, for example, when a toy in the likeness of the program’s main character is advertised during the children’s program, or even when a character featured in the program appears briefly in an advertisement for product (e.g., a video game) not directly related to the show.

*The Apparent Violations and Proposed Forfeitures in the NAL.* According to the NAL, through a series of renewal application disclosures, the Commission learned that the Stations each broadcast program-length advertisements several times in November and December 2018 by airing commercials for Hot Wheels Super Ultimate Garage during episodes of Team Hot Wheels. As a result, the NAL determined that each of the stations apparently violated the children’s TV commercial limits and are therefore apparently liable for significant forfeitures.

Specifically, the NAL found the majority of Stations apparently liable for eight violations of the children’s commercial time limits rules, notwithstanding the fact that many stations reported airing eleven total Hot Wheels Super Ultimate Garage Commercials. In arriving at that total, the NAL—which was issued by the full Commission—states that “in instances where a single airing of a program episode is impacted by multiple advertisements for a product related to the program, we agree with Bureau precedent that licensees are liable for only one program-length commercial.” The NAL’s calculation of violations across stations’ multicast streams is also instructive. Again, according to the NAL: “multicast streams are not exempt” from the commercial time limit restrictions and thus for the two Stations who aired the eight programs on both their primary and .2 programming streams, those “two licensees are liable for **sixteen** program-length commercials.”

The FCC’s rules provide that the base forfeiture for a violation of the children’s time limits rule is $8,000, but may be adjusted up or down based on factors including: (1) the number of instances of commercial overages; (2) the length of each overage; (3) the period of time over which the overages occurred; (4) whether or not the licensee established an effective program to ensure compliance; and (5) the specific reason that the licensee gave for the overages. Notably, the fact that several Stations claimed the overages were inadvertent did not mitigate the fines each Station received. Many Stations received the Hot Wheels programming from a provider with the commercial already embedded, and removed the programming as soon as the error was discovered. Yet the FCC was not swayed by these oversights—“[r]egardless of the technical or logistical constraints of airing programming, every licensee bears nondelegable responsibility for compliance with its regulatory obligations.”

The FCC imposed an upward adjustment to each of the forfeitures, though amounts of adjustment differed. The Stations in the largest ownership group received the highest fines—up to $32,000 per Station—in part based on the group’s “history of prior offenses for similar violations” and the group’s ability to pay (i.e., in the FCC’s words, given the group’s “large revenues, a higher fine is appropriate to have an adequate deterrent effect”). Other Stations received fines of between $20,000 and $26,000 based on the Commission’s determination of the above factors in each case.

*Potential Change in Fine Calculations for Future Violations.* As in past enforcement actions regarding violations of the limits on commercial matter in children’s 12-and-under programming, the fines in this case were calculated as a single violation at the base forfeiture amount and adjusted upward from there. Put differently, the NAL assessed fines starting at $8,000 for each Station—regardless of the number of “violations” the particular Station committed. Then, the NAL proceeded to use the number of “violations” a particular Station committed to inform the FCC’s adjustment to each Station’s $8,000 base forfeiture amount. However, the NAL expressly signals that in the future the FCC may begin calculating fines by assessing an individual instance of the base forfeiture amount for *each* commercial overage, and before performing any adjustments to the overall fine amount. This change in approach could have the effect of increasing fines for such violations, particularly in cases where multiple overages occurred over a period of time. Using the NAL as an example, where most Stations committed eight violations, each would face a base forfeiture of $64,000 (8 violations x $8,000) plus any upward adjustments.

*The Takeaway.* It is important as ever for broadcasters to regularly review and monitor their children’s programming to ensure that commercial time limits and other rules are strictly followed. It is not enough to rely on programming providers’ assertions that programming will meet the required standards—every effort should be made to review your station’s content and remain vigilant to prevent costly violations.

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# Over $500,000 Fine for Violating Local Television Ownership Rules’

# Prohibition on Common Ownership of Two Top-Four Same-Market Television Stations

Over the dissent of Commissioner Nathan Simington, the FCC issued a significant [Forfeiture Order](https://docs.fcc.gov/public/attachments/FCC-22-83A1.pdf) (the “Order”) levying a $518,283 penalty—the maximum allowed by law—against a large media company (the “Company”) for violating the FCC’s prohibition against owning two top-four television stations in the same Designated Market Area (“DMA”). The Order was issued against the backdrop of the forthcoming 2022 Quadrennial Review proceeding and broadcasters’ continuing efforts to lobby the FCC to reconsider its decades-old ownership rules in light of fundamental media marketplace changes caused by the continuing rise of digital media and advertising outfits.

*Background*. The so-called “Local Television Ownership Rule” prohibits a single entity from owning two full-power television stations in the same DMA if both stations are ranked among the top-four stations in the market. In addition, the Commission has further clarified that the rule applies in equal force to a single entity acquiring two top-four stations through acquisition of the network affiliation of a station from another station in the same DMA, even if the license does not change hands. In other words, the owner of the #1 station in a DMA cannot purchase the network affiliation of the #2 station (even without acquiring the station’s license), and then move the affiliation to a lower-ranked station it owns in the same DMA. According to the Order, however, that is just what the Company did.

 The Company operated the #1 station in the Anchorage, Alaska DMA, an NBC affiliate, and entered into an agreement to acquire most of the non-license assets of the #2 station in the DMA, a CBS affiliate. The Company then began broadcasting the prior station’s CBS programming on a second station the Company owned in the same market. The result, according to a Notice of Apparent Liability for Forfeiture issued by the FCC in July 2021 (the “NAL”), was the Company’s de facto acquisition of the #2 station in the market, in violation of the Local Television Ownership Rule. The Company filed a response to the NAL, asking that it be cancelled along with the forfeiture. The Order addresses that response.

*The Company’s Arguments and the Order.* In its response to the NAL the Company argued that two exceptions to the Local Television Ownership Rule should have permitted its actions, though the Commission rejected both arguments in this case. First, an entity may own two top-four stations in the same DMA by organically improving the ranking of a station through operational improvement such that a station moves up into one of the top-four positions. The Company argued in this case that when it purchased and began broadcasting the CBS programming, it did so on a station it had already organically grown to be ranked #4 in the DMA, and therefore the Company’s purchase and utilization of the CBS affiliation did not result in any *new* top-four combination owned by the same entity in the market—the Company still owned two top-four stations, they had just improved from #1 & #4, to #1 & #2. The FCC rejected this argument on two grounds. First, there was some dispute whether the Company’s second station was ranked #4 or #5 at the time the CBS affiliation was purchased. Second, the Commission determined that acquisition of the CBS network affiliation still had the practical effect of “acquiring” the #2 station in the market, in violation of the Local Television Ownership Rule, even if the programming was transferred to the station that had previously been ranked #4. It was this aspect of the Order, in particular, that drew Commissioner Simington’s dissent. The Commissioner made plain that he views the relevant FCC rule as permitting the Company to improve the ranking of a #4 station in the market through acquisition without violating the Local Ownership Rule.

The Company also argued that the so-called “network offer exception” applied in this instance. This second exception allows a network like CBS to offer a top-four affiliation to an existing owner of two stations in a market (one in the top-four, the other outside the top-four). This action may result in the entity owning two top-four stations in the DMA, but is considered organic growth permitted under FCC Rules. Again, however, the Commission determined that the exception did not apply in this case because the CBS network was not a party to the Company’s acquisition of the other station’s non-license assets, which extended beyond just the network affiliation (though CBS had previously offered the affiliation to the Company directly, and later agreed to move its affiliation to the Company’s second station).

After rejecting these and other arguments made by the Company, the Order affirmed the finding that the Company violated the Local Television Ownership Rule. The base forfeiture for “unauthorized substantial transfer of control” is $8,000, which the FCC assessed against the Company for *each day* the Company continued to operate the #1 and #2 stations in the DMA. The Order determined that the violation had continued for 215 days, which would result in a fine of $1,720,000 (215 days x $8,000 per day), though the final forfeiture was reduced to the statutory maximum of $518,283.

The Company has indicated that it intends to appeal the FCC’s decision.

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# $20,000 Fine for Operating at Variance from Licensed Parameters

One of the most common traps into which a station can fall is operating its facilities—either knowingly or unexpectedly—at variance from the parameters specified on the station’s broadcast station license. The FCC dealt with just such a situation in a [Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture](https://docs.fcc.gov/public/attachments/DA-22-1102A1.pdf) (the “Notice”) and [Forfeiture Order](https://protect-us.mimecast.com/s/r5DtCyP5nRHNgzoWSja3AO?domain=docs.fcc.gov) (the “Order”) granting a short-term, 2-year license renewal and imposing a $20,000 fine for the licensee (the “Licensee”) of a California AM station (the “Station”) who admitted to decades of operation at variance from the authorized parameters of the Station’s FCC license.

*Background*. Since 1970, the Licensee has been authorized to operate the Station in non-directional mode at 10 kW during daytime hours, and in directional mode at 5 kW during nighttime hours. However, in 1993 the Licensee obtained special temporary authority (“STA”) to operate in non-directional mode at only 1 kW during nighttime hours. This STA was extended several times, until it ultimately expired in November 1996.

At the time it granted the last STA extension, the FCC alerted the Licensee that upon the expiration of the STA the Station would either need to “return to licensed operation” or file an application to modify its nighttime facilities. According to the Order, the Licensee never did file a modification application, and the Enforcement Bureau received multiple complaints—including in 2016 and 2020—alleging that the Station continued to operate at night in non-directional mode at 1 kW. In response to subsequent FCC inquiries, the Licensee admitted to continuing to operate in non-directional mode at 1kW power “for more than thirty years.” According to the Licensee, it had engaged in such unauthorized operation because otherwise at night it would lose coverage to a significant amount of the Station’s primary service area and, “in the absence of any interference complaints,” the Station determined that “it would NOT be in the public interest, convenience, and necessity” to lose that coverage.

*The Order.* Because the Licensee admitted to operating the Station at variance from its authorized parameters, and has done so for decades (including the entirety of its most recent license term), the Order requires a forfeiture against the Licensee for “willfully and repeatedly violat[ing] . . . [the Act] and . . . the Commission’s rules.” The base forfeiture is $10,000 for operating without an instrument of authorization, and $3,000 for failure to file required forms or information. Because the alleged violations spanned the entirety of the Station’s current license term, and appear to have been intentional, the Order applies an upward adjustment to the base forfeitures, for a total proposed forfeiture of $20,000.

In addition, the FCC granted the Station only a limited 2-year license renewal, in which time the Commission will have an “opportunity to review the Station’s compliance with the [Communications Act of 1934 and FCC Rules] and to take whatever correction actions, if any, that may be warranted at that time.”

*The Takeaway*. It may go without saying, but broadcasters *must* abide by all requirements of their FCC licenses, including the technical parameters governing station operations. A licensee may not unilaterally determine that the public interest would be better served by deviating from the technical parameters specified in a station’s FCC license. If a variation is desired or required, you must either seek STA to operate at a variance, or request a modification as appropriate.

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# $11,000 Fine for Unauthorized Silence, Late Renewal

Another relatively common enforcement “trap” for stations is when technical or other issues require a station to go silent and the station fails to provide the FCC with requisite notice and, potentially, a request for special temporary authority (“STA”) to remain silent. Indeed, stations must be aware of all relevant FCC deadlines or risk enforcement action by failing to miss a required filing date. Both issues were on display in another [Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture](https://docs.fcc.gov/public/attachments/DA-22-1103A1.pdf) (the “Order”), in which the FCC proposed an $11,000 fine and short-term license renewal for the licensee (the “Licensee”) of an Alabama Class D AM station (the “Station”) where the Licensee failed to timely file a license renewal application and the Station was silent without authorization for four months.

*Background*. The Licensee initially sought STA to go silent on March 22, 2021, due to the Station’s transmitter being damaged in a storm. The FCC granted STA through November 15, 2021. The Station, however, remained silent for approximately four months past the STA expiration date—until March 17, 2022, when the Station again resumed operations. Due to damage to its transmitter, several days later the Station *again* requested and received STA, this time to operate at reduced power, on March 25, 2022. That reduced power STA expired on September 21, 2022, yet according to the Order the Station is currently still operating at reduced power.

 Additionally, the Licensee failed to timely file a license renewal application for the Station. Due to a prior short-term license renewal, the Station’s next license renewal application was due by February 1, 2021—four months prior to the Station’s short-term license expiration date of June 17, 2021. According to the Order, the Licensee did not file its license renewal application until June 27, 2022, more than a year after the license’s expiration date.

*The Order.* The Order proposes an aggregate $11,000 fine for the series of violations outlined above. The base forfeiture amounts at issue are $5,000 for unauthorized discontinuance of service and $3,000 for failure to file required forms. The Order therefore proposes individual fines of $5,000 for the Station’s period of unauthorized silence, $3,000 for the Licensee’s failure to request an extension of the STA to operate the Station at reduced power, and $3,000 for the Licensee’s failure to timely file its license renewal application.

Notably, in spite of the renewal application being filed more than a year late, the FCC declined to pursue any enforcement action related to the Station’s unauthorized operation after its license expiration date. Among other things, the Order cites the following “unique factors” that counsel in favor of the FCC not taking additional enforcement action in this case: the Commission (1) did not notify the Licensee of its impending license expiration; (2) did not cancel the Station’s license, STA, or call sign (or otherwise notify the Licensee of the expiration); and, instead, (3) granted the Licensee’s STA request after the license had expired, which the Order notes “may have contributed to the Licensee’s confusion over the renewal deadline.”

*The Takeaway*. Along with the previous article, this action provides a good reminder that broadcasters must abide by the terms of their FCC licenses, and remain up to date on all filing obligations. If STA is granted by the FCC, whether to operate at reduced power or go silent for a period of time, it is vital to track when such STA will expire and either resume normal operation or request an extension of time prior to expiration. Moreover, licensees must be aware of their license term, and be prepared to timely file a license renewal application. Ultimately, the Order makes clear that its leniency regarding the Station’s late-filed renewal application is unique: “if this case were in a different procedural posture (i.e., had we cancelled the Station’s license and had that cancellation become final), we would not be able to accept and process a late-filed application to renew the Station’s license.”

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# FCC Grants Assignment Applications, Dismisses Objection Claiming Reversionary Interest

We close out our year-end Eye on Enforcement memo with a bit of good cheer, and a reminder that if your station is ever caught in an unfortunate FCC inquiry or enforcement trap, there is no substitute for sound legal counsel. By recent [letter decision](https://docs.fcc.gov/public/attachments/DA-22-1216A1.pdf) (the “Letter”), the FCC granted several assignment applications (the “Applications”) over the objection of one individual claiming the assignments violated the FCC’s Reversionary Interest Rule and failed to disclose aspects of the parties’ Asset Purchase Agreement (the “APA”) underlying the Applications. In granting the Applications, the FCC affirmed the scope of the reversionary interest rule and reaffirmed the historic Commission position regarding several aspects of assigning broadcast licenses.

*Background*. The Applications sought approval for the transfer of several radio station licenses. As part of the APA governing the transaction, the parties agreed to execute a series of local marketing agreements (“LMAs”) at closing, and the assignor agreed to provide programming and content to one or more of the stations pursuant to local programming agreements.

 One individual (the “Objector”) filed objections to the Applications, arguing that (1) the transaction violated the Reversionary Interest Rule because the assignor of the licenses would retain some interest in the licenses after the assignment via the LMAs; and (2) the Applications were incomplete because the LMA and programming agreements were not included as exhibits to the APA and attached to the Applications. Upon review, the FCC rejected these arguments for the reasons described below.

*The Reversionary Interest Rule.* The Reversionary Interest Rule bars a former licensee from maintaining any right to retake ownership of the license—a so-called “right of reversion”—or reserving any right to use the station after the license is transferred. Also, such a right to use the station cannot be a condition to, or consideration for, assignment of the license. Here, the APA contemplated that after closing the parties would enter into LMAs and programming agreements in which the assigning company (now former licensee) would operate some stations and/or provide programming for a period of time, while the assignee maintained full control. The Objector argued that those LMAs violated the Reversionary Rule by giving the former licensee the right to continue using the stations after assignment. However, the FCC disagreed, confirming that LMAs are common and acceptable arrangements for management of a station so long as the current licensee maintains ultimate control over the station and license, as was the case here. Notably, the original APA called for the parties’ agreement to the LMAs as a condition of closing, which would have violated the Reversionary Interest Rule; however, the parties filed a certification that the condition had been waived.

*Omitted Proprietary Material.* The Objector also claimed the Applications were incomplete because the APA omitted various schedules and exhibits, including the text of the parties’ proposed LMAs and programming agreements. However, so long as parties to an assignment application make satisfactory disclosures, the FCC has historically accepted assignment applications where contracts omit schedules and exhibits containing confidential or proprietary information that is not material to the staff’s review of the assignment. In this case, consistent with prior FCC guidance, the parties included an exhibit to the Applications describing the excluded material, explaining the basis for their omission, and offering to provide them upon Commission request. The FCC’s Letter affirmed this as proper and acceptable practice in these situations.

*The Takeaway*. This Letter provides useful reminders for broadcasters seeking to assign or acquire broadcast licenses. First, any assignment agreement cannot provide a reversionary interest to the prior owner of the license, though LMAs and similar agreements are generally permitted so long as they are not a condition to or consideration for the assignment. Further, applications may omit schedules and exhibits to the transaction documents if they contain confidential or proprietary information not relevant to the assignment of the license, and so long as the applicants include an exhibit to the application explaining the omissions and offering to provide the material to the Commission upon request.

 More generally, the successful resolution of the Letter for the applicants—i.e., without the Applications being denied or any enforcement actions—shows the importance of understanding and adhering to FCC rules in a proactive manner, and consulting with Communications Counsel in the event of any uncertainty.

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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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