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Commission Conks Non-Comms for Commercial Content Agency amerces ad airings

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The FCC has spanked three noncommercial radio licensees for violating the statutory prohibition on promoting commercial products and services for consideration – in common parlance, they ran commercials.

What precisely constitutes a “commercial” for the FCC’s purposes is not always easily determined. As we observed in the May, 2008, *Memo to Clients*, NCE stations cannot accept payment in return for the on-air promotion of commercial activities. But they may accept “underwriting” contributions and may, in turn, acknowledge the generosity of the contributing underwriter by giving an on-air shout-out mentioning the underwriter. The essential question, then, is: when does such an announcement cross the line from mere acceptable acknowledgement to punishable promotion?

According to the Commission, the announcements that got the three licensees into hot water included qualitative statements, price-related information and prohibited calls to action. Phrases like “flexible financing”, “Bud and Bud Lite are discounted”, “our aim is excellence and our goal is perfection”, and “let me suggest a visit...” all apparently pinned the needle on the FCC’s commercial-o-meter over into the red zone. Pricing information – e.g., a reference to a “10% discount” – was a no-no. Also panned was the description of an underwriter as the “longest continuous builder in Northeast Florida”. It is not unusual for stations to mention the year when a business was founded, but it appears that the FCC believes that a statement comparing the age of one business to the age of others goes beyond a permitted factual statement and veers too far into the forbidden “qualitative” zone.

The FCC also raised its eyebrows over the 60-second length of an underwriting announcement. It did not explicitly prohibit 60-second announcements or set some other time limit, but it suggested that the longer the announcement, the more likely that prohibited content will creep into the copy.

Another point was that the mere furnishing of a program to a station constitutes consideration. In one of the three cases, the offending announcements had occurred in the course of a program that was produced by a person not affiliated with the licensee but who provided the programming to the licensee for free. The licensee pointed out that, even if the program producer had received consideration in return for including the announcements in his show, the licensee had *not* received *any* such consideration, so no violation could be said to have occurred. The Commission, however, was not favorably impressed by that argument.

According to the Commission, the Communications Act bars any payment in return for mentions on NCE stations, even if the licensee is not itself the recipient of the payment. Moreover, the FCC found that the station in this case *did* receive some consideration in the form of the program itself. Thus the fact that payment by an underwriter goes to a program supplier who is unaffiliated with the station licensee does *not* necessarily insulate the licensee: the fact that the producer received consideration for promotion of a commercial product or service may be enough to trigger the FCC's enforcement process.

And while the Commission has in several past cases seemed to cut some slack when third-party programmers were involved, it wasn't so inclined here. That was probably because the announcements at issue in the latest action were numerous, lengthy and involved the same advertisers and the same program producer that had gotten the same licensee into trouble for similar violations in 2003. At that time the licensee escaped with a letter of admonition. No such luck this time around – instead, the licensee got stung with a \$5,000 fine.

The other two licensees got off easier, each with a \$2,500 fine. One involved a number of “commercial” announcements which were made during the course of play-by-play coverage of a local non-profit baseball team. The other involved a total of 12 announcements (for two local businesses) which, in the Commission's view, crossed the line into “commercial” territory.

The offenses in these cases date back as far as 2005. We are seeing an effort by the FCC's Enforcement Bureau to flex its muscle and look tough, including taking rigid positions in compliance negotiations, possibly in an effort not to appear soft-hearted to the incoming Chairman (whoever he or she may be). Targeted licensees are likely to have some rough sledding for a while.