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Focus on FCC Fines

R.J. Quianzon
quianzon@fhhlaw.com
703-812-0424

More underwriting fines – In our March *Memo to Clients*, we provided a detailed explanation of the factors that the FCC considers when fining non-commercial stations for using the wrong words in sponsorship identification. To recap the March article, NCE licensees are prohibited from broadcasting any program material which (a) is in exchange for remuneration and (b) promotes any service, facility, or product of any for-profit entity. The March discussion reported on a Texas low power station that faced a \$20,000 fine for airing announcements whose language – at least in the Commission’s view – crossed the line over into the impermissibly promotional. This month the FCC made that fine official, although it reduced the fine to a mere \$6,000 – not because it had second thoughts about the underlying policy, but rather because the licensee’s pleas of poverty convinced the Commission that the licensee would be unable to pay the full \$20K.

In addition to the Texas station, this month the FCC also targeted non-commercial FM stations in Ohio and New York with fines for similar transgressions. The Ohio station – licensed to a non-profit educational foundation – was tackled with a \$7,500 fine for announcements made during local college football games. The New York station – licensed to a community college – was tagged with a \$2,000 fine for its errors during a broadcast of a local minor league baseball game. These two fines should remind non-commercial stations that turning the microphone over to someone for color commentary during sporting events may expose you to liability for what the announcer says.

In the Ohio case, the station’s coverage of local college football games was underwritten by local restaurants, insurance agents, car dealerships and flower shops. A listener – perhaps a supporter of a rival school – complained to the FCC about the seemingly commercial or promotional nature of the underwriter acknowledgements being broadcast. The FCC determined that at least some of the announcements were unduly comparative. For instance, the references to “best hotel choices,” “memorable quality,” “low prices,” “better results,” and “luxury” – that kind of thing. The station was also punished for encouraging its listeners to patronize sponsors, like when announcements urged listeners to “be sure to ‘go’ with the winner,” “‘visit’ our store” and “‘stop in’ at one of our

offices.”

In the New York case, the underwriting payments didn't even go to the station. The station in that case broadcast games played by the local minor league baseball team. Team sponsors contributed \$100 per season to the team – not to the station – to help defray the team's travel costs. The FCC decided that the team's consent to allow the station to air the games – which gave the station, in effect, free programming – constituted consideration to the station. In turn, the station identified the team's sponsors on air and used language which the Commission decided was inappropriately promotional. Final score: a \$2,000 fine from Uncle Sam. The station did not dispute that some of its announcements, which used terms including “good,” “discounted,” and “excellence”, may have been too promotional. But the station did put up a fight on others. In particular, it argued that terms such as “flexible financing,” “cold refreshing beer” and “banking the old fashion way” should not result in a fine. The station got shut out on those arguments, however, as the FCC found that each of those terms provided an impermissible comparative and qualitative description.

Station admonished for temporarily unlocked gate – On a March afternoon, FCC agents from Denver drove 60 miles north to Greeley, Colorado, and conducted an AM station inspection. On their arrival, the agents found a fenced enclosure with a gate protecting the tower. The agents even found a lock on the gate. That was the good news. The bad news was that the lock wasn't engaged. The agents tested the lock and determined that it was somehow messed up and could not be engaged. An hour later, the agents went to the main studio and reported to the licensee that the lock was broken. Within two hours, the very diligent licensee had installed a new lock on the gate; he even called the FCC agents to report the corrective action.

Four days later, the agents drove the 60 miles north again to verify that the lock had been fixed. Sure enough, the lock had been repaired. The agents then called three different contact engineers who worked for the station to see if anyone had encountered the broken lock prior to the inspection. None of the engineers recalled the lock having been broken. After driving twice to the station, inspecting its towers and studio and interviewing the different engineers, the FCC issued a notice of apparent liability, spanking the licensee to the tune of \$7,000 for the broken lock. In response, the station argued that that was too hefty a punishment for such a minor – and short-lived – violation.

In a rare reversal, the FCC staff agreed that \$7,000 was an excessive fine. In fact, it decided that any fine was excessive in this case, so it cancelled the forfeiture and instead merely admonished the station. The staff based this conclusion on the fact that there was no evidence as to how long (if at all) the lock had been broken prior to the arrival of the agents. The only thing that the FCC knew for certain was that the lock was broken when

they arrived at the tower and that it had been repaired within a couple of hours after that. Despite the FCC's inquiries to the station's engineers, nobody could state when the lock became broken. The FCC advised that the broken lock was not a minor matter but that they had no proof that the lock was broken for more than three hours.

The computer really did eat my report – In another case of a cancelled fine, the FCC back-pedaled when it realized it could not punish a company for failing to sign a report when the company did, in fact, sign the report. In February, the FCC issued a six-page notice assessing a \$3,000 fine to a company for failing to sign a paper report regarding its telephone protection measures. On the very same day that the fine was proposed, the company sent an e-mail to the FCC advising them that the report had been properly signed and filed. Five months later, the FCC admitted its error. According to the Commission's terse order, while the company had filed a properly-executed report, the "certification was scanned imperfectly into the Commission's Electronic Comment Filing System ("ECFS") and thus appeared to the Bureau to be missing certain information." Not much of a mea culpa, but at least the Commission did cancel the fine.

This decision provides a couple of take-home messages. First, it establishes the principle that electronic equipment (or, at least, the operation of said equipment) is not always infallible, and that stuff does occasionally happen that leads to inadvertent, purely unintended results. When such things happen on the licensee's side, the Commission is generally loathe to let the licensee off the hook. Rather, the Commission tends to take the position that it's the licensee's obligation to make sure that everything has worked as it should, and any lapse is subject to penalty. But here, the shoe was on the other foot, and it was the lapse of the FCC's gear (or operation thereof) that fell short. Perhaps this will lead the FCC to be a bit more magnanimous in the future. (Well, we can dream, can't we?)

This case also underscores the wisdom of obtaining, and holding onto, stamped "receipt" copies of materials you file with the Commission. Presumably the company in question here had done just that – and thus was able to demonstrate, conclusively and immediately, that the Commission's determination that led to the initial fine was simply wrong. That ability saved these folks \$3,000.