Massive FCC Sponsorship ID Fine An Omen For Broadcasters?

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The Enforcement Bureau of the Federal Communications Commission has entered into a consent decree with Cumulus Radio Corporation, concluding its investigation into whether a Cumulus radio station in New Hampshire aired advertisements without adequate sponsorship disclosure, in violation of the FCC's sponsorship identification rule. In the consent decree, Cumulus admitted that it "violated the sponsorship identification laws" and agreed to pay a $540,000 civil penalty to the United States Treasury. The FCC issued a press release emphasizing the Cumulus penalty amount and reminded parties of the importance of disclosing the true sponsor of promotional advertising.

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The gaudy $540,000 Cumulus penalty is the largest payment in FCC history for a single-station violation of the sponsorship ID rule. In addition to the fine, the consent decree requires Cumulus to institute a stringent companywide compliance plan to help ensure that its stations do not violate the sponsorship ID rule in the future. This case is but the latest in a recent series of FCC enforcement actions imposing or threatening significant penalties on broadcasters, including enforcement actions that have focused on a lack of full identification for "paid for" advertisements.

According to the consent decree, the Cumulus station had broadcast 178 announcements that promoted a hydroelectric energy project without properly identifying the sponsor of the announcements, in this case Northern Pass Transmission LLC, a company with a financial interest in the project. The company would apparently be positioned to own "[a]ll of the Northern Pass transmission lines and facilities in New Hampshire" if the $1 billion dollar Northern Pass energy project were ultimately approved. The commission found that the announcements supporting the energy project did not expressly include the required language "paid for" or "sponsored by" Northern Pass Transmission LLC, violating the sponsorship ID rule.

The FCC's sponsorship ID rule (47 C.F.R. § 73.1212) requires that broadcasters identify whomever is paying for the broadcast of any commercial content, except when the sponsor of the advertisement is obvious (e.g., an advertisement for a name brand product). FCC rules, predicated on statute, establish the general obligation of a broadcast station to air sponsorship ID announcements whenever any "money, service or other valuable consideration" is paid or promised to a station for the broadcast of program material (whether it is an advertisement, embedded advertisement, or video news release) in exchange for payment or other consideration.

For content that is "political" or that discusses a "controversial issue of public importance" (which was not the stated basis of the Enforcement Bureau's consent decree in the Cumulus case), broadcasters must not only follow the requirements for commercial content described above, but also must comply with further enhanced disclosure obligations, such as identifying parties associated with the entity paying for an advertisement. Importantly, any promotion that the FCC sees as political or controversial content must have a sponsorship announcement, even if the content was provided for free. Additionally, all political advertising for federal elections must satisfy specific Federal Election Commission regulations.

In this case, Cumulus argued that its employees were aware of the sponsorship ID rule, and that use of the term "Northern Pass Project" made it apparent to the public who was behind the advertisements. The Enforcement Bureau disagreed, and concluded that despite references to the "Northern Pass Project" and/or the “Northern Pass” in the announcements, the advertisements violated the sponsorship ID rules because they did not specifically and clearly identify “Northern Pass Transmission LLC” as the entity sponsoring the announcements. According to the FCC’s press release announcing the $540,000 fine, broadcasters “that are paid to air any announcements or other content are required to clearly disclose the payer’s identity,” and “failure to disclose these identities generally misleads the public, [and] it is particularly concerning when consumers are duped into supporting controversial environmental projects.”

The Cumulus case and other recent enforcement actions by the FCC, provide a number of takeaways for broadcast companies going forward.

First, we are likely to see the trend of record-breaking fines from the FCC continue. Recent FCC enforcement actions have included numerous multimillion-dollar fines. FCC Commissioner Michael O’Rielly, who often disagrees with the fines, has characterized the FCC’s enforcement actions as aimed at “obtaining newspaper headlines trumpeting accusations and eye-popping fines” and noted that “self-aggrandizing fanfare is a major objective and often appears to be more important than case foundation, correcting the violation or establishing a reasonable deterrent.” Despite this admonishment, the trend of elevated fines levied by the FCC has continued and shows no signs of slowing down anytime soon.

Second, we can expect to see the FCC continue to rely on consent decrees, the enforcement tool employed in the Cumulus case, and one that has long been used as a means to settle investigations. Today, this tool might best be described as a “hammer,” because parties that settle with the FCC pursuant to a consent decree can no longer pay what the FCC once called a “voluntary contribution to the United States Treasury.” Instead, the cash settlements between companies and the FCC are now characterized as a “civil penalty paid to the United States Treasury.” While past consent decrees did not specifically determine whether a targeted company was guilty of a violation, a company today is typically given no choice but to expressly admit that it violated the FCC’s rules in order to settle the enforcement action. As a consequence, targeted companies must now consider the potential impact of a federal “civil penalty” (not to mention the prospect of a long-term FCC compliance plan) on their businesses going forward.

Third, as this is a presidential election year, we can anticipate that the FCC will become especially vigilant in policing “paid for” political and issue advertisements during broadcast programming. The sheer volume and large dollar amounts paid for political ads by candidates and political action committees is expected to skyrocket this year. Significantly, there is a pending complaint at the FCC claiming that multiple television stations in several TV markets violated the sponsorship ID rule by only identifying the PAC responsible for an issue ad, while not identifying former New York City Mayor Michael Bloomberg as the “true identity of the sponsor of the ad.”

The bottom line for broadcast companies is that they should ensure that their sponsorship ID policies are in order now, and not wait until after a potentially costly FCC enforcement action. To ensure compliance, all broadcast stations should make sure that ads clearly identify: (1) that the content aired is “paid for” and (2) “who paid” for the content. Also, remember that it is not enough simply to air the announcements. Broadcasters need to educate and monitor their employees concerning each employee’s obligation to fully disclose any payment or consideration received to air promotional advertisements. Broadcasters need to be in a position to show that they made a reasonable and thorough effort to determine the source of payments from program suppliers.

FCC Commissioner O’Rielly’s articulated concerns about the large fines being levied by the FCC for violations are no doubt shared by many in the broadcast industry. Yet these arguments are little consolation for Cumulus (to the tune of $540,000) and others who have been recent targets of the FCC’s Enforcement Bureau activity. Recent FCC precedent, including the Cumulus case, should serve as sufficient warning to broadcasters to have processes in place to review all program content and to fully identify the sponsor of “paid for” ads in order to make sure that they are not the next target of the FCC.

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