

ALERT

FCC Enters into Consent Decree with LPTV Licensee/Permittee for Improper “Hopping”

March 8, 2022

On March 7, 2022, the Federal Communications Commission (FCC or Commission) announced that it had entered into a Consent Decree with Lowcountry 34 Media, LLC (Lowcountry) for apparently relocating stations in a manner inconsistent with the FCC’s minor modification rule. Under the Consent Decree, Lowcountry agreed to pay a \$250,000 civil penalty, relinquish 10 stations and 85 construction permits, and assign an additional 23 licenses and 12 construction permits to unrelated third parties.

Section 74.787(b) of the FCC’s Rules provides that an application for a change in transmitting antenna location of greater than 30 miles (48 kilometers) or one where the protected contour does not overlap with the contour of the station’s authorized facilities constitutes a major change, for which applications have been frozen since 2010. The Commission has explained that the purpose of the 30-mile restriction is to prevent LPTV stations from “frustrat[ing] the intent of the minor change rule by proposing a modified facility that is a substantial distance from the station’s existing location while showing only a very slight amount of contour overlap.”

In 2017, the FCC entered into a Consent Decree with DTV America Corp. regarding more than 350 authorizations that were originally obtained during the 2009 rural LPTV filing window. The Consent Decree described a “pattern of repeated station moves” as follows:

- (1) filing of a construction permit to relocate the station within 30 miles of its current licensed site, which site often would be located in an empty field, parking lot, or base of an existing tower; (2) upon grant of the construction permit, the Licensees would construct the facilities using equipment that it did not

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intend to leave in place permanently; (3) the Licensees would file a license application; (4) following the grant of the license application, the Licensees would apply for special temporary authority to be silent on the ground that the station could not continue to transmit a broadcast signal "due to reasons beyond the applicants control," at which point the Licensees would remove the equipment from the site and file for a new construction permit at a location up to 30 miles from the location set forth in the recently granted license. Licensees employed these practices repeatedly for many of the Stations, with the ultimate intent of moving each such station more than 30 miles from the station's originally licensed site.

The Commission determined that "many of the facilities were not intended to be permanent" and that DTV America's business plan "may have been to re-locate such facilities within 75 miles of top 100 markets" rather than to construct the facilities as proposed.

In the Lowcountry Consent Decree, the FCC described a similar pattern, explaining that:

(a) Lowcountry would file an application for a minor modification to relocate the station within 30 miles of its licensed site; (b) upon grant of the minor modification application, Lowcountry would construct temporary facilities, with no objective of providing permanent service at the new location; (c) after filing a license to cover application for that temporary location and receiving a grant, Lowcountry would apply for special temporary authority to be silent; and (d) Lowcountry would simultaneously remove the equipment from the site and file for a new minor modification to again relocate the station up to 30 miles away. Lowcountry would then repeat this process until the facility was moved to its desired location.

Although the Commission recognized that some of the stations were constructed with temporary facilities because of supply chain issues, the Consent Decree noted that "at least 30 of Lowcountry's stations were constructed with temporary facilities and only operated for a limited duration (a matter of days) with no apparent intention to provide permanent programming to viewers. Rather, the sole purpose for licensing those facilities appears to have been so that Lowcountry could undertake/continue a pattern of relocating the stations large distances to more populated/urban areas in circumvention of the Commission's major modification rule." The Consent Decree cited an example of a station that used eight successive minor modification applications in four months to move 99 miles from a rural area between Macon and Savannah, GA, to the more densely populated Beaufort, SC, region.

The FCC did clarify in a footnote that applications for minor modifications that can show a legitimate purpose, such as damage to a tower or interference that is beyond the licensee's control, do not raise abuse of process concerns.

Taken together, the DTV America and Lowcountry consent decrees demonstrate that the FCC will closely scrutinize applications to move LPTV and TV translator facilities. Licensees and permittees that are considering filing an application to relocate a station should consider whether they can demonstrate that they are "ready, willing, and able" to construct and operate as proposed in the application. In particular, the FCC has indicated it will examine:

- Whether a facility has used temporary construction;
- How long a facility is on the air or conversely, whether it has been silent for extended periods of time;
- The number and frequency of facility moves; and
- The apparent purpose of the pattern of activity.

The Commission recently began adding a condition to LPTV construction permits and licenses that restricts the further modification of the station for at least 12 months (although at least one licensee is seeking reconsideration of the condition).

Absent a major modification filing window, which has not been made available to LPTV licensees for over twelve years, licensees appear to have limited options to relocate LPTV stations in the near term.

Wiley has extensive experience working with broadcast licensees to navigate the FCC licensing and enforcement processes. For more information, please contact one of the attorneys listed on this client alert or the Wiley attorney who regularly handles your FCC matters.