

# FCC ENFORCEMENT UPDATE

April 11, 2008

## Highlights

### USF Enforcement

### DTV Transition Enforcement

### Telephone Consumer Protection Enforcement

### Indecency Enforcement

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### Broadcast Renewal Enforcement

### Network Outage Reporting Enforcement

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*This edition summarizes notable FCC-related enforcement matters from January 5, 2008 through April 10, 2008. Questions or comments may be addressed to David H. Solomon at 202-383-3369 or [dsolomon@wbklaw.com](mailto:dsolomon@wbklaw.com).*

## Highlights

- **USF Enforcement.** *Over \$11 million in proposed forfeitures.*
- **DTV Enforcement.** *Over \$10 million in enforcement.*
- **Telephone Consumer Protection Enforcement.** *Over \$6 million in proposed forfeitures regarding unsolicited faxes, slamming, failure to respond to informal consumer complaints, hearing aid compatibility and do-not-call.*
- **Indecency.** *Forfeitures against “NYPD Blue” (\$1.2 million) and “Married by America” (\$91,000) programs; Supreme Court to review the Second Circuit’s “fleeting expletives” decision.*
- **GAO Report on FCC Enforcement.** *GAO report criticizes FCC enforcement process regarding consumer complaints.*

## USF Enforcement

- The Commission issued a record-breaking Notice of Apparent Liability (“NAL”) of \$10.5 million for failure to make full and timely payments into the Universal Service Fund (“USF”) and other FCC-related payments. This is approximately 10 times higher than any previous USF-related enforcement action and about the same amount as all prior USF enforcement combined. The Commission is now taking the legally questionable view that failure to make USF and related payments are continuing violations such that the higher forfeiture amounts for continuing violations apply and the one-year statute of limitations for a forfeiture does not begin to run for any non-payment until the payment is made.
- The Commission also issued a USF-related NAL for approximately \$829,000, similarly treating failure to pay, as well as failure to file USF worksheets on a timely basis, as continuing violations.
- In addition, the Enforcement Bureau debarred two individuals and suspended three others for USF-related fraud.

## DTV Transition Enforcement

- On April 10, 2008, the Commission took over \$10 million in enforcement against 18 companies involving compliance with the Commission’s digital television (“DTV”) rules. Specifically, the Commission adopted: (1) seven NALs totaling \$3.9 million against retailers for violations of labeling requirements for analog-only television receivers; (2) a Forfeiture Order and NAL against one company, and an NAL against another company, totaling \$1.6 million regarding importation and shipment of televisions without digital tuners; and (3) two NALs and seven consent decrees totaling \$4.5 million regarding non-compliance by manufacturers with digital V-Chip rules.

- The Enforcement Bureau also issued more than 35 citations for failure to provide appropriate labeling on analog-only television receivers.

### **Telephone Consumer Protection Enforcement**

- **Unsolicited Faxes.** The Commission or the Enforcement Bureau issued 11 NALs proposing forfeitures totaling \$613,500 for the transmission of unsolicited faxes. In addition, the Commission issued a Forfeiture Order for \$2.6 million.
- **Slamming.** The Commission issued a \$5 million slamming NAL.
- **Informal Complaints.** The Commission issued 16 NALs totaling \$260,000 against common carriers that failed to respond to notices of informal complaints sent by the Consumer and Governmental Affairs Bureau.
- **Hearing Aid Compatibility.** The Enforcement Bureau issued seven NALs totaling \$172,500 against wireless carriers for not having the required number of hearing aid compatible (“HAC”) handsets. The Bureau also negotiated a consent decree in the amount of \$33,000 regarding HAC compliance issues.
- **Do-Not-Call.** The Enforcement Bureau issued a \$10,000 NAL involving violations of the Do-Not-Call rules.
- **CPNI.** The Enforcement Bureau entered into a \$100,000 consent decree regarding the adequacy of a carrier’s customer proprietary network information (“CPNI”) certification.

### **Indecency Enforcement**

- The Supreme Court granted certiorari of the Second Circuit’s decision overturning the Commission’s recent aggressive approach to fleeting expletives. A decision will likely not be forthcoming until 2009. When issued, it will be the Supreme Court’s first decision on broadcast indecency since the *Pacifical* “Seven Dirty Words” case in 1978 and will likely provide important guidance for years to come.
- The Third Circuit still has not issued a decision on the appeal of the Super Bowl/Janet Jackson forfeiture. It heard oral argument nearly seven months ago, so a decision should be issued soon.
- The Commission issued an NAL proposing \$1.4 million in forfeitures against 51 stations that aired before 10 p.m. an “NYPD Blue” scene showing a woman’s naked buttocks. The amount assessed was \$27,500 per station, the statutory maximum at the time of the violation. Less than a month later, the Commission ordered a forfeiture of \$1.2 million against 45 of the stations, cancelling the remainder for procedural reasons. ABC/Disney paid the forfeiture and it and its affiliates have appealed the decision.
- The Commission imposed \$91,000 in forfeitures against 13 television stations for the broadcast of pixilated nudity during a “Married by America” program. The Commission limited its enforcement action to stations about which it had received complaints. The forfeitures were for \$7,000 per station as proposed in the NAL; the Commission indicated that if it were deciding the case now for the first time it would impose a higher amount against each station. Fox and its affiliates filed a petition for reconsideration with the Commission, which the Enforcement Bureau returned without consideration for exceeding the page limit set forth in the Commission’s rules. Four of the 13 stations paid the forfeiture. The Department of Justice has filed collection actions in U.S. District Court against eight of the remaining nine stations. (It reportedly did not proceed against the ninth station because no complaint had ever been filed against that station at the FCC.) Those who paid can now appeal the decision to the Court of Appeals, while those who are the subject of the District Court actions can also choose to pay and appeal. One or more court decisions will thus eventually be forthcoming.

- The Wireless Telecommunications Bureau issued a hearing designation order on an amateur radio renewal application and included as one of the issues whether the licensee had violated the amateur radio rule against obscene, indecent or profane language. The order did not describe the specific language at issue.
- The FCC's response to the recent Government Accountability Office ("GAO") report on FCC enforcement includes data underscoring the degree to which the Commission is moving slowly in the indecency area — while the Commission reports that it has met its complaint processing guidelines in 99.75 percent of its cases overall, it reports that it has met its nine-month processing guideline in indecency cases less than 20 percent of the time, with over 2500 indecency cases pending at the end of 2007. (This figure apparently represents the number of programs with indecency complaints pending, not the number of indecency complaints.) Until the Supreme Court issues its decision in the "fleeting expletives" case, it is likely that the Commission will continue to take action in indecency cases only when faced with expiration of the five-year statute of limitations or for some other special reason.

### **GAO Report on FCC Enforcement**

- The GAO issued a report regarding the FCC's informal consumer complaint process. The report focused largely on processing and tracking issues, not substantive enforcement. GAO recommended that the FCC (1) improve its data collection and analysis to help it better manage its enforcement efforts and (2) implement performance goals and outcome measures. The FCC responded by saying that it has already implemented measures addressing GAO's concerns and also indicated that the GAO report contains many errors.

### **Broadcast Renewal Enforcement**

- The Media Bureau issued over \$175,000 in proposed forfeitures and consent decrees in connection with its review of broadcast renewal applications. The largest NAL was for \$16,500. The enforcement actions covered such matters as failure to file a timely renewal application and related unauthorized operation, issues/programs lists, children's television commercial limits and related record-keeping, and failure to publicize children's television reports.

### **Network Outage Reporting Enforcement**

- The Enforcement Bureau entered into a \$250,000 consent decree with a wireless carrier regarding the network outage reporting rules.

### **Other Notable Actions**

- **Pirate Radio.** The Enforcement Bureau issued four NALs totaling \$40,000, five Forfeiture Orders totaling \$31,600 and over 50 warnings against pirate radio broadcasters.
- **EAS.** The Enforcement Bureau issued three Forfeiture Orders totaling \$15,400 and one NAL for \$8,000 for non-compliance by broadcasters with the Commission's Emergency Alert System ("EAS") rules.
- **Air Safety.** The Enforcement Bureau issued six Forfeiture Orders and one consent decree totaling about \$65,000, and three NALs totaling \$19,000 for non-compliance with the Commission's tower lighting and related rules.
- **Equipment.** The Enforcement Bureau issued \$33,000 in NALs, \$7,000 in forfeitures, three citations, and one admonishment for equipment and labeling-related violations unrelated to the DTV transition.