

FCC ENFORCEMENT UPDATE

January 5, 2007

Highlights

Indecency Enforcement

Truth-in-Billing
Enforcement

Payola/Sponsorship
Identification
Enforcement

Payphone
Compensation
Enforcement

Universal Service
Enforcement

Equipment
Enforcement

Environmental
Enforcement

Public Inspection File
Enforcement

Unauthorized
Operation Enforcement

Other Notable Actions

What's Ahead?

This edition summarizes notable FCC-related enforcement matters from late September 2006 through the end of December 2006. Questions or comments may be addressed to David H. Solomon at 202-383-3369 or dsolomon@wbklaw.com.

Highlights

- **Indecency.** *The outcome of the recently held Second Circuit oral argument on the fleeting use of expletives will likely have a significant impact on the future of FCC indecency enforcement. This holds true for the pending Third Circuit case involving the Janet Jackson/Super Bowl incident as well.*
- **Truth-in-Billing.** *The Commission entered into a \$470,000 consent decree with a long distance carrier regarding line items on the carrier's bills.*
- **Payola.** *New York State Attorney General Eliot Spitzer entered into settlements totaling \$6.25 million with two radio broadcasters regarding "pay-for-play" issues.*

Indecency Enforcement

- On voluntary remand from the Second Circuit Court of Appeals, the Commission backtracked slightly from its hard line on the fleeting use of expletives, apparently as part of a strategy to strengthen its position in court. Specifically, the Commission reversed its prior rulings that the fleeting use of "bullshit" was indecent and profane. It held that (1) complaints against the fleeting use of "bullshit" in "NYPD Blue" were procedurally defective, and (2) the single use of "bullshit" by an interviewee during an "Early Show" segment was not indecent and profane because it found the licensee "plausibly" characterized the segment as a news interview.
 - With respect to news programming, the Commission reaffirmed its "commitment to proceeding with caution in our evaluation of complaints involving news programming," and said "it is imperative that we proceed with the utmost restraint when it comes to news programming." At the same time, it again stated that there is no exemption for news programming. It is not entirely clear how this will play out in practice.
- The Second Circuit held oral argument in December on challenges to other decisions involving the fleeting use of "shit" or "fuck."
 - The court's decision – as well as the pending challenge in the Third Circuit to the Janet Jackson/Super Bowl forfeiture – will have a major impact on the future of indecency enforcement. If the courts reverse the Commission in one or both cases, which seems the more likely outcome, the Commission's recent expansion of the scope of its enforcement will be constrained. On the other hand, if the Commission wins, the Commission's recent ramp-up will be ratified and the Commission may be emboldened to take additional action.

- It appears that the Commission plans not to propose any new indecency enforcement action pending the outcome of these court cases. After issuing Notices of Apparent Liability (“NALs”) against television stations totaling \$3.7 million in March 2006, the Commission has not taken any new television indecency enforcement action. Its most recent indecency NAL against a radio station was in December 2004. Numerous indecency complaints continue to be filed; according to FCC statistics, more than half a million indecency complaints were filed in the first nine months of 2006, involving (through June 2006) approximately 1200 different programs.
- The Commission has not implemented the statutory increase in the maximum indecency forfeiture from \$32,500 to \$325,000, enacted in June. It appears that, here too, the Commission is waiting until the court cases are resolved.
- The Commission did act on, and deny, petitions for reconsideration of \$300,000 and \$3.5 million indecency consent decrees it had entered into in 2004.
 - Petitions for reconsideration of the earlier (March 2004) *Golden Globe* decision remain pending at the Commission, presumably as part of the Commission’s strategy with respect to the pending indecency litigation.

Truth-in-Billing Enforcement

- The Commission entered into a \$470,000 consent decree with a long distance carrier regarding truth-in-billing issues. The carrier agreed to a number of requirements regarding its use of line items on its bills for universal service fund (“USF”) and other charges.
 - This is the first truth-in-billing enforcement action since the Commission adopted the rules in 1999.
 - It is notable that the Commission itself entered into this decree even though numerous consent decrees of a comparable amount involving other issues have been entered into by the Enforcement Bureau (“EB”) on delegated authority. This may be intended to send a signal that this is an area of Commission priority, and thus might be a harbinger of future enforcement action.

Payola/Sponsorship Identification Enforcement

- The New York Attorney General entered into settlements with two radio broadcasters for \$4.25 million and \$2 million, respectively, regarding payola/“pay-for-play” allegations. The radio broadcasters also agreed to a variety of restrictions on their dealings with record companies. Previously, four major record companies had entered into settlements totaling \$30.75 million, and agreed to restrictions on their dealings with radio broadcasters.
- The FCC has numerous sponsorship identification investigations pending, involving both radio “pay-for-play” and television video news release (“VNR”) issues. The Radio-Television News Directors Association weighed in against the VNR investigations, arguing that they violate broadcasters’ First Amendment rights.

Payphone Compensation Enforcement

- The Commission issued a \$466,000 NAL against a switch-based reseller for non-compliance with the payphone compensation rules. In explaining the high amount of the NAL, the Commission referred to its USF non-payment enforcement actions.

- This is the first FCC enforcement of the current payphone rules, which became effective in 2004. (The one previous enforcement action was an \$80,000 consent decree in 2000.) The NAL indicates that, in 2005, the Commission began investigations into compliance with these rules by “a number” of carriers, so more enforcement action may be forthcoming.

Universal Service Enforcement

- EB entered into a \$150,000 consent decree with a telecommunications carrier regarding failure to pay into the USF and related violations.
 - USF-related enforcement has accounted for the highest amount of enforcement during the 21 months of the Martin Commission, with over \$6.5 million in new enforcement.

Equipment Enforcement

- EB issued four NALs regarding the Commission’s equipment authorization and marketing rules totaling \$43,000, a consent decree for \$25,000 and six forfeiture orders totaling \$96,200.
 - Equipment enforcement during Chairman Martin’s tenure has totaled nearly \$1.5 million, making it the third most significant enforcement area, after USF and indecency.

Environmental Enforcement

- EB issued two NALs (totaling \$16,600) regarding construction of facilities without completing environmental review.
 - These are the first environmental NALs in more than three years and may suggest renewed enforcement in this area.
 - The Bureau set a base amount of \$7,000 for environmental violations not involving the RF radiation rules, indicating that such violations were less serious than RF radiation violations, which have a \$10,000 base amount. This suggests that the penalties involved in environmental enforcement may not be as significant as with the Commission’s initial foray into this area – a \$200,000 NAL in 2003 that it eventually cancelled.
- The Commission affirmed four \$10,000 forfeitures involving violations of the RF radiation rules.

Public Inspection File Enforcement

- The Media Bureau (“MB”) issued nine NALs and two consent decrees regarding public inspection file violations totaling \$119,000. In addition, EB issued five NALs in this area, totaling \$30,000.

Unauthorized Operation Enforcement

- EB issued four \$20,000 NALs against major cruise lines for operating unauthorized internal cellular radio systems.
- EB issued five pirate radio NALs totaling \$50,000, seven forfeiture orders totaling \$60,500 and 21 Warnings. It also issued a \$14,000 NAL and a \$6,000 forfeiture for unauthorized operation of a private radio system, a \$10,000 NAL for unauthorized Citizens Band radio operation and a \$10,000 NAL for unauthorized taxicab radio operation.

- MB issued 14 NALs totaling \$70,500 against broadcasters who filed their renewal applications late and, in some cases, operated after expiration of their licenses.
- EB issued two \$4,000 NALs against broadcasters who operated past their renewal expiration without filing a renewal application, a \$6,000 NAL against a similarly situated earth station licensee, and a \$5,200 NAL against a similarly situated private radio licensee.

Other Notable Actions

- **Antenna Lighting**. EB issued four NALs totaling \$39,000 relating to the antenna lighting and related rules, as well as five forfeiture orders totaling \$47,000. In another case, while affirming an EB forfeiture regarding inadequate tower painting, the Commission rejected an argument that the painting requirements are vague and subjective.
- **Slamming**. EB entered into an \$85,000 slamming consent decree.
- **Unauthorized Transfer of Control**. EB entered into a \$40,000 consent decree and issued a \$12,000 NAL regarding unauthorized transfer of control. It also entered into a \$12,000 consent decree that involved, in part, unauthorized transfer of control.
- **Telemarketing**. EB issued an \$18,000 NAL regarding pre-recorded telephone advertisements.
- **Emergency Information for the Disabled**. EB entered into a \$12,000 consent decree regarding the provision of emergency information to the disabled by a television station. An NAL in the case had previously been issued for \$16,000.
- **Broadcast EEO**. MB issued a \$12,000 NAL against an FM station for violation of the EEO rules.
- **EAS**. EB issued four \$8,000 NALs and one \$8,000 forfeiture regarding compliance with the Emergency Alert System rules.
- **Character**. EB revoked the license of an amateur who had been convicted of a felony. The person (incarcerated at the time) did not appear for the hearing.
- **Dealing with the Commission**. EB issued a \$17,500 NAL for the use of a false name in certifications filed with the Commission, a \$7,000 forfeiture order involving failure to permit the inspection of a station and a Citation for failure to respond fully to a letter of inquiry. In addition, \$6,000 of the above-mentioned payphone compensation NAL involved not responding in a timely fashion to an EB letter of inquiry.

What's Ahead?

- **CPNI**. As early as this month, the Commission may revise its rules regarding Customer Proprietary Network Information ("CPNI") to require carriers to take additional steps to prevent unauthorized CPNI disclosure. The Commission has numerous CPNI investigations pending, and it is possible that adoption of new rules may be accompanied by enforcement actions.
- **Wireless E-911**. The Commission is reportedly close to deciding long-pending requests for waiver of the requirement that 95% of the customers of carriers using "handset-based solutions" for wireless E911 have location-capable cell phones by December 31, 2005. These decisions may result in one or more referrals to the Enforcement Bureau, which may in turn lead to enforcement action.

- CALEA. By February 12, 2007, interconnected VoIP providers and facilities-based broadband Internet access providers must file a Monitoring Report on the new FCC Form 445 describing their efforts to comply with the upcoming May 14, 2007 deadline for compliance with the Communications Assistance for Law Enforcement Act (“CALEA”). Among other things, the Form 445 must include information concerning network facilities that are *not* expected to be CALEA-compliant by that date. In addition, by March 12, 2007, such entities must file CALEA system security and integrity plans regarding their procedures and processes for implementation of lawful intercept requests. The Commission could potentially investigate and take enforcement action against companies that do not make either of these filings.