

## FCC ENFORCEMENT UPDATE

January 23, 2009

### Highlights

Enforcement Under Chairman Martin

Potential Enforcement Priorities Under Acting Chairman Copps

AT&T Consent Decrees

Telephone Consumer Protection Act Enforcement

Digital Cable Migration/Switched Digital Enforcement

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Other Notable Actions

*This edition summarizes notable FCC-related enforcement matters from October 22, 2008 through January 20, 2009. Questions or comments may be addressed to David H. Solomon at 202-383-3369 or [dsolomon@wbklaw.com](mailto:dsolomon@wbklaw.com).*

### Highlights

- **Enforcement Under Chairman Martin.** *More than \$163 million in enforcement in just under four years – more enforcement than under any prior Chairman.*
- **Potential Enforcement Priorities Under Acting Chairman Copps.** *More focus possible on broadcast content/public interest enforcement.*
- **AT&T Consent Decrees.** *Two consent decrees totaling over \$12 million relating to CPNI, USF recovery, and merger conditions.*
- **Telephone Consumer Protection Act Enforcement.** *Nearly \$3 million in proposed forfeitures.*
- **Digital Cable Migration/Switched Digital Video Enforcement.** *Proposed forfeitures of nearly \$450,000 regarding migration of channels from analog to digital tier and use of switched digital video platforms.*
- **Broadcast EEO Enforcement.** *Six proposed forfeitures totaling \$71,000.*

### Enforcement Under Chairman Martin

- During the nearly four years of Chairman Martin's leadership, the Commission took new enforcement action totaling more than \$163 million. This is substantially more enforcement than under any prior Chairman.
- Enforcement actions under Chairman Martin included the three highest enforcement actions in Commission history – a \$24 million consent decree involving children's television programming, a \$17.4 million consent decree involving unauthorized construction, operation and equipment marketing, and a \$10 million consent decree involving customer proprietary network information ("CPNI") and compliance with Universal Service Fund ("USF") recovery rules.
  - Notably, the two highest of these actions occurred in the context of transfer of control proceedings, where the Commission's bargaining power is at its highest.
- Major enforcement areas during Chairman Martin's tenure included USF and related matters, digital television, telemarketing, sponsorship identification, broadcast indecency, wireless E911, and CPNI.

### Potential Enforcement Priorities Under Acting Chairman Copps

- To the extent Acting Chairman Copps has an opportunity to refocus Commission enforcement priorities, there may be more attention on broadcast content and public interest enforcement in such areas as broadcast EEO, television closed captioning, children's television commercial limits, children's educational and informational programming, sponsorship identification and broadcast public interest renewal review. There may also be more priority on enforcement of merger conditions.

### **AT&T Consent Decrees**

- The Enforcement Bureau entered into two separate consent decrees with AT&T – one for \$10.08 million and a second for \$2.38 million.
- The larger consent decree resolved three separate investigations into AT&T’s CPNI opt-out procedures relating to marketing campaigns. This consent decree also resolved issues regarding AT&T’s recovery of federal USF contribution costs from end-user customers in excess of the amounts permitted under the Commission’s rules, including recovery of USF contributions from Lifeline customers.
- The smaller (but still quite sizable) \$2.38 million dollar consent decree resolved an investigation by the Enforcement Bureau into alleged violations of agreements that AT&T made with each entity in the context of a merger. Both the Department of Justice and the FCC received information indicating that AT&T employees may have, among other things, accessed and used confidential and competitively-sensitive sales files in violation of a condition in the DOJ stipulation allowing the merger and a condition in the FCC merger order. AT&T separately settled with DOJ for \$2.05 million dollars, with the DOJ amount to be credited against the FCC amount if paid promptly in full.
- Although there is no monetary limit on the Enforcement Bureau’s delegated authority to enter into consent decrees, before these two actions the Enforcement Bureau had never issued a consent decree for more than \$1 million. These cases may thus provide a basis for future sizable consent decrees to be issued by the Enforcement Bureau rather than the full Commission.

### **Telephone Consumer Protection Act Enforcement**

- The Commission or the Enforcement Bureau issued 10 Notices of Apparent Liability (“NALs”) proposing forfeitures totaling more than \$2.9 million for the transmission of unsolicited faxes. The largest NAL was for more than \$1.5 million dollars.

### **Digital Cable Migration/Switched Digital Enforcement**

- Late on Inauguration Eve (also a federal holiday – Martin Luther King, Jr. Day), the Enforcement Bureau issued a total of 27 NALs totaling \$442,500 against nine cable operators for issues relating to migration of channels from analog to digital tiers or use of switched digital video (“SDV”) platforms. Specifically, the Bureau issued nine NALs totaling \$225,000 against cable operators that allegedly did not fully respond to Bureau Letters of Inquiry regarding digital migration issues. It also issued 15 NALs totaling \$142,500 against cable operators for allegedly not providing advanced notice to customers regarding migration of channels. Finally, it issued three NALs totaling \$75,000 against cable operators for not providing the methodology for Bureau-ordered refunds in connection with prior NALs regarding use of SDV platforms. (The cable operators had filed petitions for reconsideration and motions for stay of the refund requirements but the Enforcement Bureau has not acted on those requests.)
- At the same time, the Enforcement Bureau issued three forfeiture orders for \$20,000 each relating to cable operators’ use of SDV platforms, which the Bureau found violated rules regarding cable navigational devices and virtual channel listings.

### **Broadcast EEO Enforcement**

- The Commission proposed forfeitures totaling \$71,000 against six broadcasters for various recordkeeping violations of the Commission's broadcast EEO rules. The Commission cited violations including failure to properly maintain records regarding interviewees, recruitment source information, EEO self-assessments, and failure to properly update public files. None of the broadcasters were alleged to have engaged in discrimination. While the amounts were not particularly high, it was notable that the cases were decided by the full Commission rather than the Media Bureau.
- Commissioners Cops and Adelstein issued a joint statement accompanying the NALs. In the statement, the Commissioners emphasized the importance of diversity of employment in American broadcasting, and decried the dramatic decline of the Commission's EEO enforcement.

### **Other Notable Actions**

- **Cable Program Carriage Rules.** In October, the Media Bureau had designated for hearing six complaints against four cable operators regarding compliance with requirements relating to carriage of programming from unaffiliated programming vendors. The Bureau set a 60-day time period for resolution by the ALJ. The ALJ concluded that due process required discovery and a longer time frame. The Media Bureau (on Christmas Eve and New Year's Eve) then issued orders purporting to remove jurisdiction from the ALJ after the 60-day time period had passed. The ALJ, while questioning the legality of the Media Bureau's action, stayed the hearing pending action on an emergency application for review and emergency stay motion filed by the defendants.
- **International Service Filings.** The Enforcement Bureau entered into a \$400,000 consent decree regarding international service filing and approval issues, settling a *Commission-level* NAL of \$1.3 million. This is the first time the Enforcement Bureau has ever settled a Commission-level NAL.
- **USF.** The Enforcement Bureau issued an approximately \$675,000 NAL for USF and related violations. The Enforcement Bureau also debarred one individual for adjudicated fraud relating to the Schools and Libraries USF program.
- **Indecency.** The Enforcement and Media Bureaus jointly entered into an \$85,000 consent decree that resolved issues relating to indecency, as well as the airing of advertisements for Internet gambling websites, broadcast of discussions concerning wagering or betting, and conduct of an Internet contest.