

FCC ENFORCEMENT UPDATE

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This edition summarizes notable FCC-related enforcement matters during Chairman Genachowski's first year, from June 29, 2009 to June 30, 2010. Questions or comments may be addressed to David H. Solomon at 202-383-3369 or dsolomon@wbkllaw.com.

Enforcement Priorities

- Although neither Chairman Genachowski nor new Enforcement Bureau Chief Michele Ellison has publicly announced their enforcement priorities, some indication can be gleaned from the Enforcement Bureau's new "Enforcement Advisories" initiative. In a News Release, the Enforcement Bureau Chief indicated that "consumer protection is at the core of the Bureau's mission" and that it will periodically issue Enforcement Advisories, "which are designed to educate businesses about and alert consumers to what's required by FCC rules, the purpose of those rules and why they're important to consumers, as well as the consequences of failure to comply."
- The Enforcement Bureau has issued four such Enforcement Advisories in three areas: (1) announcing enforcement actions regarding required reports regarding compliance with wireless Hearing Aid Compatibility ("HAC") rules and reminding manufacturers and service providers of the HAC rules; (2) reminding telecommunications carriers and interconnected VoIP providers of the requirement for annual reports certifying compliance with the Commission's Customer Proprietary Network Information ("CPNI") rules; and (3) (a) reminding retailers that they must remove from display (including online display) wireless microphones that operate in the 700 MHz band, and reminding manufacturers, dealers, distributors, and other entities that sell wireless microphones using the TV band, that they must display a Consumer Alert disclosing use restrictions of such wireless microphones; and (b) informing users of wireless microphones in the 700 MHz band that such use is now unlawful and could result in monetary penalties or seizure of the equipment.

Network Neutrality Enforcement

- The U.S. Court of Appeals for the D.C. Circuit reversed the Commission's effort to enforce the network neutrality principles of the *Internet Policy Statement*. The court found that the Commission had not justified its exercise of ancillary jurisdiction over network management practices of an Internet Service Provider. This has led to a Notice of Inquiry regarding the Commission's legal authority to regulate broadband Internet access, including the Chairman's "Third Way" proposal to regulate the transmission component of broadband Internet access as a common carrier service but forbear from application of numerous sections of Title II of the Communications Act. Until further Commission action, there will not be any enforcement in the network neutrality area.

HAC Enforcement

- Consistent with the HAC Enforcement Advisory mentioned above, the Enforcement Bureau issued a group of Notices of Apparent Liability ("NALs") proposing a total of \$87,000 in forfeitures against seven companies for violating the HAC reporting (and, in some cases, web site posting) requirements.

- The Enforcement Bureau also issued several Citations for violation of the reporting and posting requirements. If those companies violate the HAC rules again, they can be subject to an NAL.
- The Enforcement Bureau also proposed a \$15,000 NAL and entered into a \$14,000 consent decree for failure to make available a sufficient quantity of HAC-compatible wireless phones.

CPNI Enforcement

- Consistent with the CPNI Enforcement Advisory mentioned above, the Enforcement Bureau issued two “Omnibus” NALs that proposed forfeitures of \$25,000 each against 13 carriers for failure to file their annual CPNI certifications. The Bureau also issued its first Citations against VoIP providers who failed to comply with the certification rule. If those VoIP providers violate the rule again, they can be subject to an NAL.
- The Enforcement Bureau also entered into a \$90,000 consent decree relating to CPNI opt-out issues.

USF Enforcement

- The Commission issued three NALs proposing forfeitures totaling \$1.75 million for failure to pay full amounts owed into the Universal Service Fund (“USF”) and related violations. The Enforcement Bureau entered into a \$200,000 consent decree with another carrier relating largely to such issues. In addition, the Bureau issued its first Citations against VoIP providers who did not register with the Commission and make USF and Telecommunications Relay Service Fund payments. The cited VoIP providers may now be the subject of monetary forfeitures for future violations.

Slamming/Marketing Enforcement

- The Commission issued a \$1,480,000 NAL against a long distance carrier for slamming (unauthorized switch of a customer’s carrier) and related unjust and unreasonable practices in violation of section 201(b) of the Communications Act (misrepresentations to consumers in connection with the slamming-related marketing efforts).
 - Forfeitures for violations of section 201(b) have been fairly rare given that it is often difficult for a forfeiture under the “unjust and unreasonable” standard of section 201(b) to comply with the advance notice requirements for a penalty under the Due Process Clause of the Constitution. It remains to be seen whether this case is a rarity based on the egregious nature of the behavior or a sign that the Commission may now be more willing to issue forfeitures under the general language of section 201(b).

Merger Compliance Enforcement

- The buyer in a wireless merger entered into a consent decree regarding compliance with a merger condition on the sharing of information relating to assets to be divested. While the consent decree was for \$2,050,000, when adjusted for an offset for a settlement payment to the Department of Justice addressing the same issues, the amount to be paid to the FCC was \$375,000.

Children’s Television Enforcement

- As a follow-up to numerous Media Bureau NALs during the current renewal cycle, the Commission issued seven NALs totaling \$270,000 relating to the children’s television commercial limits. The largest NAL was for \$70,000, and involved 86 program-length commercial overages, which the Commission characterized as “an extremely high number of violations.”

Indecency Enforcement

- Indecency enforcement has generally been on hold for about four years in light of pending litigation, including, among others, appellate cases relating to fleeting expletives and the Janet Jackson/Super Bowl incident. The Commission reportedly has more than 1.4 million complaints pending, relating to about 13,000 specific broadcasts.
 - In an exception to the hold, the Enforcement Bureau entered into a \$25,000 indecency consent decree to settle one case involving a former TV licensee.
 - The Enforcement Bureau continues to send inquiry letters regarding indecency complaints. In one case, the Bureau issued an NAL for \$25,000 against a network for twice declining to answer the Bureau's inquiries. The Bureau had asked for information regarding all affiliates that had aired the program and had provided one "representative" complaint. The network referred the matter to the station that was the subject of that complaint. That station responded with respect to itself but indicated that the Bureau could not inquire about other stations without providing copies of complaints to all relevant individual stations. In the NAL, the Bureau "emphatically" rejected the argument that the Commission must provide to each station individually any complaint for which it seeks a response. Citing prior Commission and Bureau precedent, the Bureau stated that "parties must comply with Bureau orders even if they believe them to be outside the Commission's authority." The Bureau also indicated that, while its initial inquiry to the network was not "misdirected," in light of the network's failure to respond, it was sending inquiry letters to all stations that air the network's programming.

Other Notable Actions

- **Network Outage Reporting.** The Enforcement Bureau entered into consent decrees for \$50,000 and \$40,000 relating to the timeliness of network outage reports filed with the Commission.
- **Payphone Compensation.** The Enforcement Bureau entered into a \$75,000 consent decree with an interexchange carrier regarding payphone compensation.
- **911.** The Enforcement Bureau entered into a \$60,000 consent decree with a manufacturer of cell phones regarding compliance with the 911 processing rules.
- **Cell phone Jammers.** The Enforcement Bureau issued a \$25,000 NAL against a manufacturer of cell phone jammers. It also issued a Citation against a retailer for selling cell phone jammers.
- **Unauthorized Transfer of Control/Truthful Statements to the Commission.** A non-communications company (railroad) entered into a \$110,000 consent decree with the Enforcement Bureau relating to unauthorized transfer of control of various licenses and failure to report on license application forms that it had pled guilty to a felony.
- **Program Carriage.** An administrative law judge ("ALJ") ruled that four major cable companies had not discriminated against an independent programmer in violation of the Commission's program carriage rules. Another program carriage complaint, filed by a regional sports network, settled after the Enforcement Bureau filed post-hearing comments supporting a conclusion that the defendant had not engaged in unlawful discrimination.

- **Traffic Pumping/Access Stimulation.** The Commission ruled that a local exchange carrier's ("LEC") transmission of traffic from long-distance providers to certain free conference calling companies with which it shared access revenues to stimulate increased traffic was not access service under the terms of its tariff and that the LEC had therefore acted unlawfully in attempting to collect access charges from an interexchange carrier for such traffic. Several other "traffic pumping" or "access stimulation" cases have been referred to the Commission from the federal district courts. The National Broadband Plan, issued in March, described access stimulation as an arbitrage scheme that distorts investment to "free conference calling schemes ... rather than to other, more productive endeavors."
- **Reliance on Commission Staff Guidance.** The Commission rejected arguments in applications for review by a company that claimed it relied on advice of a Deputy Bureau Chief that there would not be enforcement action for certain cross-border unlicensed operations. Among other things, the Commission indicated that the staff has no authority to waive the licensing requirement of section 301 of the Communications Act and thus any staff statements regarding a lack of enforcement could not be relied upon.
- **Historic Preservation.** The Enforcement Bureau entered into consent decrees for \$8,000 and \$25,000 relating to compliance with Historic Preservation Act procedures.