

FCC ENFORCEMENT UPDATE

March 23, 2006

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This edition summarizes notable FCC-related enforcement matters from mid-December 2005 through mid-March 2006. Questions or comments may be addressed to David H. Solomon at 202-383-3369 or dsolomon@wbklaw.com.

Highlights

- **CPNI.** *In the face of significant public and congressional attention regarding the brokering of customer data contained in carrier records, the Commission began investigations into the practices of numerous landline and wireless carriers regarding the protection of Customer Proprietary Network Information (CPNI). The Commission issued Notices of Apparent Liability for Forfeiture (NALs) against two major carriers for \$100,000 each in connection with the rule requiring annual certifications of compliance with CPNI rules. Several investigations are pending and further enforcement action may be forthcoming.*
- **Indecency.** *After a year of inaction regarding indecency and profanity, on a single day this month the FCC decided indecency and profanity cases involving 51 different program episodes or advertisements and a record \$4.5 million in enforcement action. While the Commission sought to provide more meaningful guidance in this area, it is far from clear that it succeeded. It did make clear, however, that the broadcast of the word "bullshit" is almost always unlawful.*
- **Equipment.** *The Commission issued a \$1 million NAL for violation of its equipment marketing rules. This was the highest enforcement action in this area in Commission history by a factor of nearly 10. It also took several other equipment enforcement actions.*
- **E911.** *Numerous wireless and VoIP E911 waiver requests remain pending. If the waivers are not granted, the Commission may move into an enforcement mode.*
- **Payola.** *There are several pending broadcast payola/sponsorship identification investigations and decisions on some of these may well be forthcoming in the next few months.*

CPNI Enforcement

- **Commission Investigations.** *Following significant public and political attention, the Commission began numerous investigations regarding the sale of consumers' private phone records, so-called CPNI, by data brokers. In order to determine how data brokers are obtaining CPNI from carriers and thus whether carriers may be acting in violation of section 222 of the Communications Act or related FCC rules, the Enforcement Bureau issued subpoenas to more than 30 data brokers. The Bureau also opened investigations regarding the practices of various wireless and landline carriers, sending them Letters of Inquiry (LOIs) asking numerous questions about their CPNI-related practices.*
- **Enforcement Action Against Data Brokers.** *While the Commission has no rules regarding the use of CPNI by data brokers, it does claim authority to obtain information from data brokers in connection with the Commission's investigations. When two data brokers did*

not respond (or respond fully) to the Enforcement Bureau’s subpoenas, it issued formal Citations against these data brokers, a required preliminary enforcement step against most entities not regulated by the FCC. If the data brokers do not provide the subpoenaed information, the Commission could proceed to issue NALs against them for failure to comply with the Bureau’s subpoena.

- **Enforcement Action Against Carriers.** Even before it opened its investigations into carrier compliance with CPNI requirements, the Enforcement Bureau requested that major wireless and landline carriers provide a copy of their most recent certification of compliance with the Commission’s CPNI rules, something that the rules require carriers to execute annually. Shortly thereafter, the Bureau issued NALs for \$100,000 against two carriers, one that did not have a certification and one that submitted a certification that the Bureau concluded to be insufficient under the rules. The Enforcement Bureau then ordered all carriers to provide a copy of their most recent CPNI compliance certification.
- **Potential Further Enforcement Action Against Carriers.** To the extent some carriers do not have a current CPNI certification or submitted a defective one in response to the Bureau order, the Bureau may issue additional NALs regarding certifications. The CPNI investigations remain pending. No doubt the Bureau is looking in the first instance to see if it can find any violations of specific rules. To the extent the carriers have complied with the rules and have in place policies and procedures to protect CPNI, it may be very difficult as a legal matter for the Commission to try to prove that any such policies and procedures are deficient and, therefore, constitute a violation of the general obligation to protect customer information set forth in section 222(a) of the Communications Act. Under D.C. Circuit case law, the Commission cannot issue a forfeiture unless the underlying requirement was “ascertainably clear.”
- **Possible Changes in FCC Rules and the Communications Act.** The FCC issued a Notice of Proposed Rulemaking regarding carrier protection of CPNI in response to a petition filed by the Electronic Privacy Information Center. Congress is also actively considering amendments to the Communications Act to limit the ability of data brokers to obtain and sell CPNI and to strengthen carrier protection of CPNI. Depending on the details, imposition of additional regulations on carriers (as opposed to data brokers) may have unintended consequences by making it more difficult for carriers to provide requested information to their customers in a user-friendly manner.
 - As part of his congressional testimony on CPNI and data brokers, Chairman Martin proposed increasing the maximum forfeiture penalty, eliminating the requirement of a Citation against a non-common carrier before issuance of an NAL and extending the one-year statute of limitations for non-broadcast NALs. He also supported legislation to make it unlawful to sell CPNI and to overrule a court decision that required the FCC to allow carriers to use or make available CPNI in certain circumstances unless their customers specifically opted out from such approval.

Indecency Enforcement

- **“Without a Trace.”** The Commission proposed forfeitures totaling more than \$3.6 million against CBS owned and operated and affiliated stations that broadcast an episode of “Without a Trace” that involved a depiction (with no nudity) of “teenage boys and girls participating in a sexual orgy” that the Commission found to be “highly sexually charged and explicit.” The \$3.6 million figure is higher than any other indecency enforcement action — or any broadcast enforcement action — in the history of the Commission. The fact that the broadcast did not include nudity or any expletives was not dispositive.
- **Janet Jackson/Super Bowl Incident.** The Commission imposed a \$550,000 forfeiture against CBS for its broadcast (on owned and operated stations) of the Super Bowl halftime show involving the brief exposure of Janet Jackson’s naked breast, including her nipple. This is the same amount proposed by the Commission in its 2004 NAL. The Commission found that CBS’s broadcast of Ms. Jackson’s naked breast was “willful” even if CBS had not intended to broadcast nudity because, according to the Commission, CBS consciously and

deliberately broadcast the show, consciously and deliberately failed to take reasonable precautions to prevent the material from airing and was responsible for the actions of Ms. Jackson, Justin Timberlake and Ms. Jackson's choreographer because they were acting as CBS's agents.

- **Omnibus Order.** The Commission issued a single order addressing 49 other program episodes or advertisements. The Order contained: (1) six NALs regarding nine program episodes totaling \$350,000; (2) decisions that 12 program episodes were indecent and profane for using the "F-Word" or "S-Word" or variations thereof, such as "bullshit," but not actionable because they occurred before the Commission tightened the law regarding fleeting use of expletives in its 2004 *Golden Globe* decision; and (3) decisions that 28 other program episodes or advertisements were not indecent or profane.
 - **Expletives.** The Commission determined that the "F-Word" and "S-Word" are presumptively profane and held their use indecent and profane in every instance before it, except one where the word was barely visible on a passing bus in the scene and the Commission concluded that an average viewer wouldn't notice it. Perhaps the most notable conclusions that language was indecent and profane involved (1) a single instance of an interviewee on a news interview show referring to someone as a "bullshitter," (2) the single use of "bullshit" by Detective Sipowitz on various episodes of "NYPD Blue," and (3) multiple uses of the "F-Word" and "S-Word" in a PBS documentary on the history of the Blues produced by Martin Scorsese. The Commission attempted to distinguish these decisions from its prior decision that repeated use of the "F-Word" and "S-Word" in *Saving Private Ryan* was permissible and from its stated special sensitivity to First Amendment issues in the context of news and public affairs programming.
 - The Commission held that a variety of other words or phrases were not indecent or profane in context, including, for example, "poop," "ass," "suck," "crap," "dick," "dickhead," "hell," "damn," "bitch," "pissed off," "for Christ's sake," and "wiping his ass."
- **Judicial Challenges.** Of the various decisions, it appears that the Super Bowl forfeiture order is the most likely to lead to an immediate court challenge. CBS has the option of paying and filing a petition for review in the court of appeals. It also has the option of not paying and waiting until the Department of Justice seeks to enforce the forfeiture, in which case it is entitled to a trial *de novo*. The NALs cannot be challenged in court until after a forfeiture order. While the decisions finding certain material indecent and profane but not imposing a forfeiture could in theory be appealed now, as a practical matter, the companies involved will likely first have to file petitions for reconsideration in order to give the Commission an opportunity to address their legal arguments in the first instance.

Equipment Enforcement

- **Highest Equipment NAL Ever.** The Commission issued a \$1 million NAL for the importation and marketing of unauthorized digital audio equipment. The \$1 million figure is nearly 10 times the highest enforcement action in this area in the history of the Commission. The Commission found the facts to be particularly egregious in that the company continued its importation and marketing during the course of the investigation and sold over 100,000 unlawful devices for a total of \$28.5 million in sales during the post-investigation period. While such egregious situations may be unusual, issuance of an NAL for such a large amount demonstrates that the Commission continues to get more serious about equipment enforcement.
- **Other Cases.** The Enforcement Bureau issued five other NALs totaling \$137,600 (including one for \$75,000), three forfeiture orders totaling \$86,000 and five Citations involving marketing of unauthorized equipment.

Broadcast Renewal Enforcement

- **Children's Television Commercial Limits.** The Media Bureau issued three NALs for violations of the children's television commercial limits as part of its review of renewal applications: (1) an NAL for \$20,000 involving 59 violations; (2) an NAL for \$17,500 involving seven violations, six of which were program-length commercials; and (3) an NAL for \$8,000 involving six violations, two of which were program-length commercials. In contrast to these more serious cases, the Bureau issued admonishments in cases involving four violations and one violation (a program-length commercial). In some cases involving *de minimis* overages, it took no enforcement action at all.
- **EEO.** The Media Bureau issued NALs for \$20,000 and \$8,000 involving compliance with the broadcast EEO rules. In the \$20,000 case, the licensee had failed to recruit at all for 21 of 54 vacancies during the license term, failed to recruit adequately for another 27 vacancies and failed to engage in adequate self-assessment. In the \$8,000 NAL, the Bureau found that the licensee had failed to engage in at least one outreach effort and had failed to engage in adequate self-assessment.
- **Public Inspection File.** The Media Bureau issued 12 NALs, ranging from \$4,000 to \$10,000 and totaling \$77,000, for violations of the public inspection file rules. The three \$10,000 NALs all involved omissions regarding children's television commercial limits. The Media Bureau also issued some admonishments in this area. In addition, unrelated to the renewal process, the Enforcement Bureau issued one \$4,000 public file NAL.
- **Children's Programming Reports.** The Media Bureau issued eight NALs, ranging from \$3,000 to \$10,000 and totaling \$53,000, for failure to publicize the existence and location of children's programming reports. The three \$10,000 NALs all involved failure during the entire license term. The Bureau also issued some admonishments in this area. It also issued admonishments for violation of the rule requiring stations to provide information to publishers of programming guides about their children's educational and informational programming.
- **Failure to File Broadcast Ownership Report.** The Media Bureau issued three \$3,000 NALs for failure to file an ownership report.
- **Late-Filed Renewal Application.** The Media Bureau issued two \$1,500 NALs for late-filed renewal applications.

Other Notable Actions

- **Telephone Consumer Protection Act.** The Commission issued a \$775,500 NAL against a company that sent at least 98 unsolicited fax advertisements after the Enforcement Bureau issued a Citation. It also issued a \$22,500 forfeiture order against another company for five violations and nine new Citations against other companies for unauthorized faxes. It also issued a Citation regarding prerecorded telephone solicitations and related rules.
- **Misrepresentation.** The Enforcement Bureau entered into a \$75,000 consent decree with a company that has private radio licenses used only for its own internal purposes. The company reported on various applications that it had not been convicted of any felonies when it had been.
- **Emergency Information for Persons with Disabilities.** The Enforcement Bureau entered into a \$12,000 consent decree with a broadcast licensee regarding the provision of emergency information to persons with disabilities. The NAL had been for \$16,000.

- **Failure to Comply with Bureau Orders.** The Enforcement Bureau issued a \$20,000 NAL and, in another case, a \$4,000 forfeiture order, for failure to respond to Bureau Letters of Inquiry. It also issued a \$7,000 NAL against a wireless licensee that refused to conduct an on/off test to determine whether its system was the source of interference.
- **Pirate Radio.** The Enforcement Bureau issued three \$10,000 NALs, four \$10,000 forfeiture orders and 37 warning notices regarding unlicensed broadcast operations.
- **Towers.** The Enforcement Bureau issued five NALs totaling \$42,000 and four forfeiture orders totaling \$19,000 regarding tower lighting, painting and registration rules. It also issued one \$7,000 NAL and two \$7,000 forfeiture orders regarding enclosure of an AM tower.
- **Universal Service.** After being very active in prior months, the only enforcement activity regarding universal service was an Enforcement Bureau order suspending a corporation from participating in the Schools and Libraries program due to a fraud conviction.
- **Ex Parte Rules.** In a rare decision regarding enforcement of the *ex parte* rules, the Office of General Counsel (OGC) admonished a broadcast applicant that petitioned to deny another broadcaster's application. OGC found that the petitioner solicited impermissible *ex parte* presentations from Congress and the public in connection with a restricted application proceeding. The petitioner did not inform the Congressman or the public of the need to serve the applicant with any presentations to the Commission regarding the merits of the proceeding.
- **Cable Pole Attachments.** The Enforcement Bureau designated for hearing before an ALJ a pole attachment complaint case involving "exceptionally voluminous pleadings" regarding tens of thousands of pole attachment disputes dating, in many cases, back to the 1980s. The Bureau rejected a jurisdictional challenge by the defendant utility company that the Commission lacked jurisdiction to address claims regarding whether the utility's engineering standards were just, reasonable and non-discriminatory.
- **EAS Rules.** The Enforcement Bureau issued three \$8,000 NALs relating to the broadcast Emergency Alert System rules.
- **Unauthorized Construction.** In connection with the grant of a modification application, the Media Bureau issued a \$10,000 NAL for unauthorized construction; the licensee moved its site before getting Bureau approval.

What's Ahead?

- **E911.** As of December 31, 2005, carriers using "handset-based" technology to comply with the E911 rules were required to ensure that 95 percent of their subscribers have handsets capable of providing adequate subscriber location information to emergency call centers. While the Commission has granted, at least in part, waiver requests from smaller "Tier III" carriers, it has not yet acted on waiver requests from larger carriers. Similarly, the Commission has not acted on several requests for waivers of the November 28, 2005 deadline for interconnected Voice over the Internet Protocol (VoIP) providers to comply with E911 requirements. Depending on how the Commission acts on these wireless and VoIP E911 waiver requests, enforcement action may ensue. The Chairman was recently quoted as saying that "you will see the Commission take action" against VoIP providers not making emergency information available.
- **Payola/Sponsorship Identification.** Following up on two settlements with record companies totaling \$15 million, New York Attorney General Eliot Spitzer filed a lawsuit against Entercom Communications Corp. alleging that the company illegally traded air time for payments from record companies. According to the complaint, at least in some of the cited instances, the payments were not disclosed over the air. Mr. Spitzer also again called upon the FCC to act in this area.

- The FCC has before it various pending investigations regarding payola and sponsorship identification that it has begun in the last 15 months. There continue to be newspaper articles and complaints raising additional potential issues in this area, most recently regarding appearances on television newscasts of employees of station advertisers that co-sponsor station charities and television sports programming that a team pays the station to broadcast, both potentially without requisite sponsorship identification. Commissioner Adelstein continues to issue strong statements urging the Commission to act more aggressively in this area.