

FCC ENFORCEMENT UPDATE

October 9, 2007

Highlights

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This edition summarizes notable FCC-related enforcement matters from July 5, 2007 through October 5, 2007. Questions or comments may be addressed to David H. Solomon at 202-383-3369 or dsolomon@wbklaw.com.

Highlights

- **Unsolicited Faxes.** Fifteen proposed forfeitures totaling \$5.2 million.
- **Wireless E911.** Three proposed forfeitures totaling \$2.8 million.
- **USF.** Three proposed forfeitures totaling \$1.5 million.
- **Network Outage Reports.** A \$1.4 million consent decree.
- **CPNI.** \$850,000 in proposed forfeitures or consent decrees.
- **Sponsorship Identification.** First-ever proposed forfeitures relating to Video News Releases.

Unsolicited Fax Enforcement

- The Commission issued 15 Notices of Apparently Liability for Forfeiture (“NALs”) proposing \$5.2 million in forfeitures against companies that sent unsolicited faxes.
- The number of NALs issued during the quarter exceeds the total number of NALs previously issued by the Commission in this area. The amount of the NALs ranged from \$4,500 to \$2.1 million.
- Telephone Consumer Protection Act enforcement involving unsolicited faxes (and do-not-call violations) has become one of the Commission’s top enforcement priorities. The Enforcement Bureau is now devoting a substantial percentage of its overall resources to these cases. It has apparently moved from a strategy of giving higher priority to the more serious cases to responding to all consumer complaints and giving equal priority to all cases.

Wireless E911 Enforcement

- The Commission issued NALs for \$1.3 million, \$1 million and \$500,000 against wireless carriers using a “handset-based” E911 solution that did not comply with the Commission’s deadline for ensuring that 95 percent of their customers had E911-compliant handsets. In addition, the Enforcement Bureau entered into a \$25,000 consent decree with a smaller carrier regarding both E911 and hearing aid compatibility issues.

Universal Service Fund Enforcement

- The Commission issued a \$1 million NAL against a carrier that had been over-collecting from the Universal Service Fund (“USF”) for Lifeline and Linkup services. The over-collections resulted from incorrect information filed by the carrier.

- This case is significant in two respects: (1) it is the first enforcement case involving over-collection from, rather than underpayment into, the USF; and (2) the Commission overruled prior precedent and concluded that untimely or inaccurate USF forms are “continuing” violations until such time as the violation is “corrected,” thereby subjecting carriers to a longer statute of limitations and a higher statutory forfeiture limit. This decision – while highly questionable on legal grounds – could have even more significant impact if extended to other areas.
- The Commission also issued two other NALs in this area totaling \$500,000.
- A recent report by the FCC Inspector General regarding more than 450 audits of USF contributors and recipients found significant problems in almost every aspect of the USF programs. This is likely to result in more emphasis on audits, with the potential for far greater enforcement activity in this area.

Network Outage Reports Enforcement

- The Commission entered into a \$1.4 million consent decree regarding its network outage reporting rules.
- The amount of this consent decree – particularly for violation of a reporting requirement – is strikingly high. It appears that the Commission is now treating this as a high-priority public safety/homeland security issue. The Enforcement Bureau is apparently now periodically checking the network outage report database to identify late-filed reports, with reports filed as little as one day late apparently being deemed significant violations.
- This consent decree is also significant in that it includes a requirement that the carrier file an annual report – under penalty of perjury – attesting to compliance with the provisions of the consent decree. Such a report has been included in at least one subsequent consent decree on another subject. To the extent such a provision is made routine in future consent decrees, companies may be less willing to agree to very specific compliance terms.

CPNI Enforcement

- The Enforcement Bureau issued five more \$100,000 NALs against carriers that had not executed certifications of compliance with the Customer Proprietary Network Information (“CPNI”) rules in a form fully consistent with the Commission’s rules.
- The Commission expanded the compliance certification requirement in its new CPNI rules, scheduled to go into effect later this year, and the new annual certifications will be required to be filed with the Commission rather than simply kept in the carrier’s records. The Enforcement Bureau is likely to review these certifications carefully and take enforcement action in cases where the certifications are not timely filed or do not comply fully with the rules.
- The Enforcement Bureau also entered into a \$350,000 consent decree with a carrier regarding self-reported problems with its CPNI “opt-out” procedures. This case underscores the fact that CPNI compliance continues to be an important enforcement priority for the Commission.

Sponsorship Identification Enforcement

- The Commission took its first sponsorship identification enforcement actions relating to video news releases (“VNRs”), issuing two NALs totaling \$20,000 against a cable company for five alleged violations.

- The Commission has numerous VNR investigations pending, so it is possible that further enforcement action may be forthcoming.
- The Commission's entry into this new enforcement arena raises a host of complex statutory and constitutional issues. The Commission may also address these issues in one or more rulemaking proceedings. The Chairman has announced his intent to proceed with a rulemaking regarding product placement issues and there has also been consideration of a rulemaking regarding VNR issues.

DTV Transition Enforcement

- The Enforcement Bureau issued nine additional citations against retailers for violation of the "Consumer Alert" requirements regarding televisions with analog tuners.
- The Commission is reportedly considering seven NALs or consent decrees totaling \$7 million against retailers who, after receiving citations, continued to market analog tuner televisions without the requisite "Consumer Alert" notifications.
- The Chairman has publicly emphasized the importance of enforcement regarding DTV transition issues and this is expected to be a high priority in the coming year.

Indecency Enforcement

- The U.S. Court of Appeals for the Third Circuit heard oral argument on the Janet Jackson/Super Bowl incident. The court seemed most concerned with the question of whether the Commission had properly held CBS responsible for the actions of the performers. A decision is likely later this year or early next year.
- The Solicitor General announced that the Government will seek Supreme Court review of the Second Circuit decision reversing the Commission's new, more aggressive approach to fleeting expletives.
- It appears unlikely that the Commission will take additional indecency enforcement action until matters are clarified in the courts.

Broadcast Renewal Enforcement

- The Media Bureau issued approximately \$300,000 in additional proposed forfeitures in connection with its review of broadcast renewal applications. The forfeitures 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, children's television reports, EEO reports, and alien ownership.
- The highest NAL was for \$20,000 and involved failure to place in the public inspection file issues/program lists, records concerning compliance with children's commercial limits, children's television reports, and EEO reports. The next-highest NALs were for \$15,000, for violations of the children's commercial television limits.

Other Notable Actions

- ***Traffic Pumping.*** The Commission granted in part a formal complaint by an interexchange carrier against a rural incumbent local exchange carrier ("ILEC") that had engaged in "access stimulation" (or "traffic pumping") to increase its terminating access demand and thus its access revenues. The Commission found that the rural ILEC had unlawfully exceeded the prescribed rate of return. The Commission declined to award damages, however, due to the "deemed lawful" provision of section 204 of the Communications Act. The Commission also issued a Notice of Proposed Rulemaking to address the issue more generally.

- **HAC Requirements.** In a report on implementation of the Commission's hearing aid compatibility ("HAC") requirements, the Wireless Telecommunications Bureau indicated that it had referred to the Enforcement Bureau for further investigation wireless carriers that have been identified as not filing a November 2006 compliance report. In addition, it recommended that the Enforcement Bureau consider enforcement action against carriers that have not complied with the requirement to offer handsets with inductive coupling, to the extent the carriers are covered by the rule and have not requested a waiver.
- **Revocation Hearings.** The Commission designated a common carrier for a section 214 revocation hearing based on wide-scale non-compliance with a consent decree (failure to make voluntary payment, failure to pay into the USF and TRS funds, failure to comply with discontinuance of service rules) and various other violations. It also designated an 800 MHz SMR licensee for a revocation hearing based on felony convictions, misrepresentation, lack of candor and other violations.
- **Dealing with the FCC.** The Commission issued \$80,000 in NALs against companies for failing to respond to FCC inquiries, false statements or failure to allow FCC inspection.
- **Unauthorized Operation.** The Enforcement Bureau issued one NAL for \$17,000 and 40 warnings against pirate radio broadcasters. The Bureau issued over \$100,000 in NALs or consent decrees regarding unauthorized operation in a variety of other contexts.