

## FCC ENFORCEMENT UPDATE

October 22, 2008

### Highlights

XM/Sirius Consent Decrees

DTV Transition Enforcement

Telephone Consumer Protection Act Enforcement

Indecency

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*This edition summarizes notable FCC-related enforcement matters from July 15, 2008 through October 21, 2008. Questions or comments may be addressed to David H. Solomon at 202-383-3369 or [dsolomon@wbklaw.com](mailto:dsolomon@wbklaw.com).*

### Highlights

- **XM/Sirius Consent Decrees.** Over \$19.5 million to settle unauthorized construction/operation and unauthorized equipment issues.
- **DTV Transition Enforcement.** Over \$436,000 in new enforcement, including the first action involving a failure to notify customers of the DTV transition, with the Chairman announcing another \$12.3 million in the works regarding customer notifications.
- **Telephone Consumer Protection Act Enforcement.** \$1.95 million in proposed forfeitures.
- **Indecency.** The Third Circuit vacated the Commission's \$550,000 forfeiture regarding the Janet Jackson/Super Bowl incident.
- **Internet Network Management.** The Commission found that certain Comcast network management practices were unreasonable and violated "Federal Internet policy."

### XM/Sirius Consent Decrees

- Concurrently with its approval of the XM/Sirius satellite radio merger, the Commission entered into Consent Decrees with XM for \$17.4 million and Sirius for \$2.2 million relating to violations of FCC rules regarding satellite radio receivers and construction and operation of terrestrial repeaters without authorization.
- The "voluntary payment" by XM is the second highest enforcement action in Commission history. The highest, a \$24 million Consent Decree last year relating to children's television programming, also occurred in the context of a pending transfer of control application.
- The orders adopting the Consent Decrees were unusual in that the Commission said it did not "easily" come to the conclusion that the Consent Decrees were in the public interest due to the "apparently intentional" nature of some of the violations and the "very troubling" apparent involvement of certain (presumably senior) company officials. In deciding to enter the Consent Decrees, the Commission noted the public interest in the "continued availability and viability" of the services as well as, among other things, "the rigorous oversight and reporting obligations and substantial voluntary contribution[s]" at issue. In the order granting the merger application, the Commission promised "prompt and effective" enforcement action if the merged entity violates the requirements of the Consent Decrees.

### DTV Transition Enforcement

- **Customer Notifications.** The Enforcement Bureau issued a \$51,000 Notice of Apparent Liability to a local exchange company/Eligible Telecommunications Company for failure to send required bill notices to some of its Lifeline and Link-Up customers about the DTV transition. This was the first enforcement action involving the DTV customer notification rules adopted last spring for ETCs, cable companies and satellite operators.

- The Bureau established a forfeiture formula in this area of \$1 per customer for the first month that each customer that did not receive proper notice of the DTV transition, \$2 per customer for the second month, \$3 per customer for the third month, etc. This formula, to the extent it is applied in other cases involving larger numbers of customers, could lead to very large forfeitures.
- Shortly after the Bureau's action, the Chairman announced in congressional testimony that the Commission had before it on circulation an omnibus NAL against eight companies totaling \$12.3 million for DTV customer billing notification rule violations. The Chairman also indicated that the Commission was looking at potential violations by broadcasters.
  - The Commission's aggressive approach to enforcement in this area, and DTV enforcement more generally, appears to be based to a significant extent on broader political considerations regarding the DTV transition.
  - To the extent any companies eventually challenge forfeitures imposed against them for violations of the customer notification rules (as well as the retailer Consumer Alert rules), there are serious questions about whether the Commission's authority under the Communications Act and the First Amendment will be upheld.
- **Equipment Violations.** The Commission issued a \$324,000 NAL against a company for importing and shipping new television broadcast receivers without the required digital tuner. The Enforcement Bureau also entered into three Consent Decrees in this area totaling over \$80,000, and issued a \$12,500 NAL.
- **Retailer Consumer Alerts.** The Enforcement Bureau issued a \$16,000 NAL and a Citation for violations related to failure by retailers to place the required Consumer Alert labels for television receiving equipment that contains an analog-only tuner.

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

- **Unsolicited Faxes.** The Commission or the Enforcement Bureau issued 15 NALs proposing forfeitures totaling more than \$1.8 million for the transmission of unsolicited faxes.
- **Do-Not-Call.** The Enforcement Bureau issued a \$10,000 NAL involving a violation of the Do-Not-Call rules.

### **Indecency**

- The Third Circuit vacated the Commission's \$550,000 forfeiture regarding the Janet Jackson/Super Bowl incident. The court held that the Commission acted arbitrarily and capriciously because it failed to acknowledge that it had changed its former "restrained" policy with regard to "fleeting images" policy and thus, by definition, failed to provide the required "reasoned explanation" of the policy change. The court also said that it "would appear" that the FCC improperly held CBS liable for the performance by Janet Jackson and Justin Timberlake. The court said that the First Amendment precludes the FCC from punishing CBS for the "expressive conduct" of its independent contractors without offering proof of scienter (e.g., specific intent or recklessness) as an element of liability.
- The Supreme Court will hear oral argument in the "fleeting expletives" case on November 4, 2008. Whatever the Court decides, it will have a major impact on the future of FCC indecency enforcement in the new Administration and beyond.

### **Internet Network Management Enforcement**

- In response to a complaint and a petition for declaratory ruling alleging that Comcast had violated the Commission's *Internet Policy Statement*, the Commission found that certain Comcast network management practices that were not protocol-agnostic did not constitute reasonable network management and ran "afoul of federal Internet policy." The Commission asserted ancillary jurisdiction in this area based on policies set forth in Section 230 of the Communications Act, as well as various other provisions of the Act. Among other remedial steps, the Commission ordered Comcast to file information regarding its current and future network management practices within 30 days. The Commission said "interim injunctive relief automatically will take effect requiring Comcast to suspend the network management practices" at issue if Comcast did not file the required information, and also if Comcast "does not follow through on its commitment to end its discriminatory network management practices" by the end of the year. Comcast made the required filings.
- The Commission's decision, which has been appealed, may have significant implications for the future of Internet regulation as well as the scope of the Commission's enforcement authority. Broadband Internet providers are now subject to potential enforcement action for violating "federal Internet policy" under standards set forth in the order that are far from clear, with the potential for "automatic" injunctive relief ordering them to change their practices from the status quo.

### **EEO Enforcement**

- The Media Bureau entered into a \$150,000 Consent Decree with a Direct Broadcast Satellite provider concerning compliance with the FCC's EEO rules. This was the largest EEO enforcement action in Commission history.

### **Broadcast Renewal Enforcement**

- The Media Bureau issued NALs totaling \$88,000 in connection with its review of broadcast renewal applications. The largest NAL was for \$20,000. The enforcement actions 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, and children's television reports. The Media Bureau also issued renewal-related Forfeiture Orders totaling nearly \$150,000.

### **Disabilities Enforcement**

- The Enforcement Bureau issued a \$30,000 NAL against a wireless carrier for not having the required number of hearing aid compatible handsets. The Bureau also entered into two Consent Decrees totaling \$65,000 regarding HAC compliance issues. It also issued a \$25,000 Forfeiture Order to a TV station for failing to make wildfire emergency information accessible to persons with hearing disabilities.

### **Cable Navigation Devices Enforcement**

- In its first enforcement actions in this area, the Enforcement Bureau issued three \$20,000 NALs against cable operators regarding the ability of subscribers with CableCard-equipped digital cable products to use their navigation devices to access channels on a switched digital platform. Citing to statutory provisions that make no mention of FCC refund authority in this area, the Bureau also ordered the companies to pay refunds to certain subscribers.

## Other Notable Actions

- **VoIP E911.** In the first-ever enforcement action involving the E911 rules for a VoIP provider, the Enforcement Bureau issued a \$25,000 NAL involving the provider's failure to offer fully compliant E911 service to residents of a condominium complex wired with this provider's service. The Bureau said that the \$25,000 proposed forfeiture was "proportionally higher" than recent wireless E911 cases because this case apparently involves a total failure to provide any 911 service, where previous enforcement concerned failed Phase I or Phase II E911 compliance. The Bureau also issued a second \$25,000 NAL against the company for the provision of incorrect factual information to the Commission in connection with the investigation without a reasonable basis for believing that the information was correct and accurate.
- **Cable Program Carriage Rules.** The Media Bureau designated for hearing before an administrative law judge six complaints against four cable operators regarding compliance with requirements relating to carriage of programming from unaffiliated programming vendors.
- **Unauthorized Transfer of Control.** The Enforcement Bureau entered into a \$100,000 Consent Decree regarding the unauthorized transfer of control of six Broadband Radio Service licenses and five incumbent station licenses. The Bureau also entered into a \$35,000 Consent Decree regarding unauthorized transfer of control of Private Operational Fixed Microwave Service licenses, a \$12,000 Consent Decree regarding premature transfer of control of Section 214 common carrier authority, and a \$5,000 Consent Decree regarding unauthorized transfer of control of an AM station.
- **Auction Collusion.** The Enforcement Bureau entered into a \$65,000 consent decree with an FM broadcast applicant regarding compliance with the auction anti-collusion rule.
- **Broadcast of Telephone Conversations.** The Enforcement Bureau issued three NALs totaling \$35,000 for violations of the rule requiring permission prior to broadcast of a telephone call.
- **Pirate Radio.** The Enforcement Bureau issued three Forfeiture Orders totaling \$30,000 and over 30 warnings against pirate radio broadcasters.
- **Sponsorship ID.** The Enforcement Bureau entered into a \$12,000 sponsorship identification/pay-for-play consent decree with a radio licensee.
- **USF E-Rate Fraud.** The Enforcement Bureau debarred four individuals and suspended one other for adjudicated fraud relating to the Schools and Libraries USF program.
- **EAS.** The Enforcement Bureau issued two NALs totaling \$13,000, and an \$8,000 forfeiture, regarding compliance with the Emergency Alert System rules.
- **Air Safety.** The Enforcement Bureau issued two NALs totaling \$12,000 for non-compliance with tower lighting and related rules and a \$1,600 forfeiture.
- **Equipment.** The Enforcement Bureau issued \$39,000 in NALs, \$7,000 in forfeitures, and four Citations about equipment compliance unrelated to the DTV transition. The Bureau also negotiated a Consent Decree totaling \$28,000 regarding compliance issues with RFID devices.