

FCC ENFORCEMENT UPDATE

September 15, 2005

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Wilkinson Barker Knauer, LLP is pleased to offer the first of our periodic FCC Enforcement Updates to inform our clients of notable FCC enforcement actions and trends. This report covers the first six months of Kevin J. Martin's tenure as FCC Chairman. Questions or comments may be addressed to David H. Solomon at 202-383-3369 or dsolomon@wbklaw.com.

Chairman Martin's Enforcement Priorities

- In a July 26 speech to the National Association of Regulatory Utility Commissioners ("NARUC"), Chairman Martin said that while the government should play a "lesser role" in the broadband market, the FCC (along with state regulators) "must vigilantly ensure that public safety, law enforcement, and consumer protection needs continue to be met."
- The Chairman specifically mentioned in his NARUC speech the ability of law enforcement agencies to conduct electronic surveillance over broadband Internet access providers and Voice over Internet Protocol ("VoIP") providers. He also mentioned enforcement of the Commission's VoIP Enhanced 911 ("E911") rules and announced a joint federal-state task force to address this issue.
 - Shortly after the Chairman's speech, at its August 5 meeting, the Commission announced that the Communications Assistance for Law Enforcement Act ("CALEA") applies to broadband Internet access providers and VoIP providers.
- In her remarks on NARUC panels in late July, Enforcement Bureau Chief Kris Monteith stressed the same themes. In addition to VoIP E911, she specifically mentioned enforcement of wireless E911 rules and hearing aid compatibility requirements for cell phones. She also mentioned the importance of universal service enforcement.
- The three areas mentioned by the Chairman regarding broadband – *public safety, law enforcement and consumer protection* – will likely be key enforcement priorities of the Commission under Chairman Martin in other areas as well.
- Although the Commission has not taken any indecency enforcement action under Chairman Martin's leadership, given his strong statements in the past, a new round of indecency enforcement is likely to be forthcoming later this year. Such enforcement could include higher proposed forfeitures based on finding multiple indecent "utterances" within a particular program and could also include revocation or renewal hearings.
- The level of enforcement activity during the first months of Chairman Martin's leadership (much of which is discussed below) suggests that the Commission will retain an active enforcement program during his tenure.

Public Safety Enforcement

- **VoIP E911.** In early June, the Commission set aggressive targets for compliance with its new VoIP E911 requirements and made clear that it anticipated strong enforcement in this area. Consumer notification rules went into effect July 29; the core substantive rules are scheduled to go into effect November 28. As noted, the Commission followed the Report and Order by announcing a joint federal/state enforcement task force.

- On July 26, the Enforcement Bureau effectively extended the deadline for compliance with a rule requiring confirmation that existing subscribers had received an advisory that E911 service may not be available. At the same time, it issued a strong warning that if such confirmations were not received by the end of August, the Bureau “expected” VoIP providers to cut off service to such customers. On August 26, the Bureau effectively extended the deadline again and said it would not take enforcement action before September 28 against those VoIP providers that submit reports required by the Bureau and continue to “use all means available to them” to obtain the required confirmations from their customers.
- It is an extraordinarily strong signal for the Commission to suggest companies cut off service to their customers.
- To the extent VoIP customers’ service is eventually cut off because they haven’t acknowledged, as required by the FCC, that they understand that E911 service may be unavailable, the result may be that for a period of time such customers end up without any telephone service at all. Such a result certainly would not seem to serve the public safety goals underlying the FCC’s rules in this area.
- **Wireless E911.** The Enforcement Bureau entered into a \$35,000 consent decree regarding a cellular carrier’s response to E911 requests by two Public Safety Answering Points.
 - The next Wireless E911 compliance deadline is December 31. The Commission issued strong statements regarding compliance with this deadline in the context of the Alltel/Western Wireless and Sprint/Nextel merger orders. This is another area where strong enforcement action can reasonably be anticipated.
- **Tower Safety.** The Enforcement Bureau issued five Notices of Apparent Liability (“NALs”) proposing forfeitures totaling \$46,000 and five forfeiture orders totaling \$60,000 regarding failure to comply with antenna tower lighting and related requirements designed to avoid airplane crashes. It issued an NAL for \$7,000 followed by a forfeiture order for \$5,600 for failure to comply with rules requiring AM antennas to be enclosed to avoid electrocution risks.
- **Emergency Alert System (“EAS”).** The Enforcement Bureau issued two NALs for \$8,000 each and two forfeitures of \$8,000 each against broadcast stations that did not comply with the EAS rules.
 - The Commission has an outstanding Notice of Proposed Rulemaking to revamp the EAS. The Department of Homeland Security is also exploring emergency alert issues more generally. In the meantime, the Commission continues to insist on strict compliance by broadcasters with existing EAS rules.

Universal Service Enforcement

- **Failure to Pay.** The Commission released seven NALs proposing total forfeitures of approximately \$4.3 million against entities that failed to pay into the Universal Service Fund (“USF”) and engaged in related violations such as failure to register as a telecommunications carrier, failure to submit USF Worksheets, failure to pay into the Telecommunications Relay Service Fund and failure to pay FCC regulatory fees.
 - One of the NALs, for over \$1.1 million, constitutes the highest proposed forfeiture in this area in Commission history. The \$4.3 million total is more than all enforcement action during the prior history of the program.
 - The Commission has been focusing particularly on resellers, Mobile Virtual Network Operators and

others who are not facilities-based providers but may still be subject to participation in the program. Such entities should ensure that they are in compliance with these requirements in order to minimize their enforcement risks.

- **Debarment for Fraud.** The Enforcement Bureau debarred four individuals from participation in the Schools and Libraries program as a result of USF fraud convictions.
 - How the Commission acts on two pending requests for relief from the debarment provisions based on arguments regarding the companies' cooperation with Department of Justice investigations will send an important signal for the future.
- **Failure to Cooperate in a USF Investigation.** The Enforcement Bureau issued a \$20,000 NAL and forfeiture order for failure to respond to the Bureau's inquiries in one case, and the Commission issued an \$8,000 NAL for an incomplete response to Bureau inquiries in another case.
 - In these and other cases, the Commission continues to make clear that stonewalling an investigation is not a wise strategy.

Consumer Protection Enforcement

- **Television Emergency Information.** The Enforcement Bureau issued NALs totaling \$39,000 against three Washington, D.C. television stations for failure to provide closed captioning or other visual information for the hearing impaired in certain instances in connection with a thunderstorm/tornado, and NALs totaling \$48,000 against two Florida stations for similar violations in connection with a hurricane.
 - These actions followed three similar actions near the end of Chairman Powell's tenure that were strongly criticized by some broadcasters as unfairly penalizing stations that served the public by providing extensive emergency coverage. They collectively send a signal that the Commission is not likely to retreat from active captioning enforcement. As a related matter, the Media Bureau has denied several requests for waiver of the captioning rules.
 - In further demonstration of its commitment to strong protection in this area, in July, the Commission issued a Notice of Proposed Rulemaking to strengthen its closed captioning rules even beyond the requirements that become effective this coming January 1.
 - In a public notice issued after Hurricane Katrina, the Consumer and Governmental Affairs Bureau reminded broadcasters and other video programming distributors of the need to make emergency information regarding Hurricane Katrina evacuation and relief efforts accessible to persons with hearing or vision disabilities. The Bureau stressed that these obligations extend to areas throughout the country where survivors are being temporarily relocated.
- **Broadcast Payola/Sponsorship Identification**
 - In response to the continued robust political debate in this area, in April, the Commission issued a public notice reminding television stations and others of their obligations to identify the sponsors of Video News Releases ("VNRs") in certain circumstances. It threatened enforcement action for violations.
 - In late July, New York Attorney General Eliot Spitzer announced a \$10 million settlement with Sony BMG Music Entertainment regarding "pay for play" practices in the radio industry. Shortly

thereafter, Chairman Martin directed the Enforcement Bureau to conduct a follow-up investigation and indicated that, if violations occurred, the Commission will take “swift” action.

- Commissioner Jonathan Adelstein has continued to speak out for strong enforcement in this area, calling for viewers and listeners to file payola and sponsorship identification complaints under what he deemed a “Neighborhood Watch” approach to enforcement and saying that the facts underlying the New York settlement “may represent the most widespread and flagrant violation of any FCC rules in the history of American broadcasting.”
- With all the attention on payola and sponsorship identification, FCC enforcement action may well be forthcoming. Broadcasters should review their compliance plans to ensure they are sufficiently strong to protect them in this era of renewed emphasis on payola and sponsorship identification.
- **Telephone Consumer Protection Act.** The Enforcement Bureau issued 10 citations for violations of the unsolicited fax rules and one citation each for violation of the rules regarding do-not-call rules, pre-recorded telephone messages and automatic telephone dialing systems.
 - Citations are a statutory pre-requisite to any forfeiture proceeding for entities not generally subject to FCC regulation. Additional violations after citations could lead to NALs.
 - The Commission has not hesitated to issue significant NALs and consent decrees on these kind of consumer protection issues, so carriers and others should have strong compliance plans in effect.
- **Truth-in-Billing Rules.** In denying a formal complaint alleging that a cellular carrier’s corporate surcharge was misleading or otherwise unjust and unreasonable under section 201(b) of the Communications Act, the Commission stressed that the outcome might have been different had the behavior occurred after the Commission extended its truth-in-billing rules to wireless carriers earlier this year.

Other Matters of Note

- **Broadcast EEO.** In late August, the Media Bureau issued an \$18,000 NAL for apparent violations of the EEO recruitment, recordkeeping, public file and self-assessment rules. Among other things, the licensee failed to recruit for 11 of its 51 vacancies. The Bureau also imposed reporting conditions that require the station to file additional EEO-related information for three years.
 - This is the first publicly reported enforcement action taken by the Commission in connection with its on-going EEO audit program. This is also the first proposed EEO forfeiture since the Commission’s former EEO rules were ruled unconstitutional in 1998.
- **Broadcast Main Studio and Public Inspection File Rules.** The Enforcement Bureau issued two NALs totaling \$19,000 and three forfeiture orders totaling \$21,000 for violations of the main studio and/or public inspection file rules.
- **Advertising by a Noncommercial Broadcast Station.** The Enforcement Bureau issued an \$8,000 forfeiture order for violation of the rule prohibiting noncommercial stations from advertising.
- **Broadcast Contest Rule.** The Enforcement Bureau issued a \$4,000 NAL for apparent violation of the rule requiring that the material terms of broadcast contests be accurately disclosed.
- **Broadcast of Telephone Conversations.** The Enforcement Bureau issued an \$8,000 NAL for two broadcasts of telephone conversations without prior approval. The Bureau reiterated that the broadcast of a person’s answering machine greeting is covered by the rule.

- **Pirate Broadcasters.** The Enforcement Bureau issued one \$10,000 NAL, two forfeiture orders totaling \$12,500 and 23 warning notices against pirate radio operators.
- **Formal Section 208 Complaints.** The Commission dismissed a petition for reconsideration filed by a carrier challenging a formal section 208 complaint decision that invalidated one of a Bell Operating Company's special access discount plans. The Commission based its decision on the fact that the petitioner didn't participate in the proceeding earlier. This decision underscores the fact that if carriers wish to participate in formal section 208 complaint proceedings involving other companies they should seek to intervene or file an *amicus curiae* brief prior to issuance of a decision in the case.
- **Equipment Enforcement.** As part of its enforcement of the Part 2 equipment authorization rules, the Enforcement Bureau revoked one authorization, issued four NALs totaling \$50,000 and also issued 33 citations. The Bureau also issued two citations for interference caused by unlicensed Part 15 devices.
- **Digital Television Rules.** The Media Bureau simultaneously issued NALs in the amount of \$3,000 each against 15 commonly owned television stations for non-compliance with the Program and System Information Protocol ("PSIP") digital television transmission standard.
- **Analog Cellular Service.** The Enforcement Bureau entered into a \$20,000 consent decree with a cellular carrier regarding compliance with the Commission's rule requiring the provision of analog service.