

FCC ENFORCEMENT UPDATE

September 27, 2006

Highlights

Universal Service Enforcement

CPNI Enforcement

Telemarketing Enforcement

Equipment Enforcement

Misrepresentation and Due Diligence

Cable Sports Programming

Indecency Enforcement

Other Notable Actions

What's Ahead?

This edition summarizes notable FCC-related enforcement matters from late June 2006 to late September 2006. Questions or comments may be addressed to David H. Solomon at 202-383-3369 or dsolomon@wbklaw.com.

Highlights

- **Universal Service.** *The Commission took nearly \$2.5 million in universal service enforcement action.*
- **CPNI.** *The Commission took nearly \$750,000 in CPNI enforcement action. Numerous investigations remain pending.*

Universal Service Enforcement

- The Commission continued aggressively to enforce against companies that didn't pay into the Universal Service Fund ("USF") and committed related violations. It issued forfeiture orders for \$1.1 million and \$238,000, a Notice of Apparent Liability ("NAL") proposing a \$529,000 forfeiture, and consent decrees for \$150,000, \$170,000 and \$250,000.
 - Two of the consent decrees followed NALs and involved discounts of 46 percent and 68 percent from the proposed forfeiture amount, exemplifying the benefits that settling can provide in appropriate cases.
 - The \$529,000 NAL underscores the need for a carefully constructed enforcement strategy in dealing with the FCC. A small carrier voluntarily reported that it owed about \$59,000 because its revenues had recently exceeded the threshold for payments. Because, however, it apparently did not move as quickly as it could have to come into compliance after such disclosure, the Commission did not give it any credit for its voluntary disclosure.
 - The \$529,000 NAL also exemplifies what appears to be a Commission practice of inflexibly applying its standard USF forfeiture calculation in contexts where it may not be equitable. A proposed penalty that is nearly nine times the amount owed seems excessive, to say the least.
- The Commission issued orders debaring from the Schools and Libraries program two companies that had pled guilty to fraud relating to their participation in the program. The Commission debarred the companies for less than the three years provided in its rules because of submissions from the Department of Justice ("DOJ") regarding the companies' cooperation in DOJ investigations. As a practical matter, however, because the Commission did not act on the cases for quite some time, the companies were effectively debarred for longer than provided in the orders.

CPNI Enforcement

- The Commission entered into a \$550,000 consent decree with a Bell Operating Company that settled (1) a previously issued \$100,000 NAL regarding the company's annual Customer Proprietary Network Information ("CPNI") certification and (2) a separate investigation regarding problems the company reported with respect to its "opt-out" procedures for customers to decline to allow their CPNI to be used for certain marketing purposes.
- The Commission also entered into a \$100,000 consent decree settling another CPNI certification case and issued a \$97,500 NAL against a data broker for not complying with a subpoena regarding its pretexting practices even after a citation. In addition, the Enforcement Bureau issued four citations against data brokers for not responding to subpoenas.
- Numerous investigations regarding CPNI practices of various wireline and wireless carriers remain pending.

Telemarketing Enforcement

- The Commission issued a \$153,000 NAL regarding unsolicited ("junk") faxes and the Enforcement Bureau issued 11 junk fax citations.
- The Bureau also issued four citations regarding unsolicited prerecorded messages to residential telephones.

Equipment Enforcement

- The Enforcement Bureau began investigations into non-compliant FM modulator equipment being used in connection with XM Radio and Sirius satellite digital audio radio service and other FM modulator devices used with MP3 players and iPods. The Bureau has not taken any public action and the investigations remain pending.
- The Enforcement Bureau entered into two consent decrees totaling \$115,000 (one involving RFID equipment and one involving personal emergency response equipment), issued a \$25,000 NAL (involving wireless access point equipment), a \$7,000 forfeiture order, and two citations, all relating to the marketing of unauthorized equipment.

Misrepresentation and Due Diligence

- The Commission issued an order to show cause/hearing designation order to consider whether to revoke or not renew a broadcast license because of misrepresentation and lack of candor in filings with the Commission (and other violations). It also ordered a revocation hearing on similar grounds for two related private land mobile radio licensees.
- The Enforcement Bureau issued an \$11,000 NAL against a non-common carrier satellite company (the statutory maximum) for failing to exercise due diligence in certifying that an application was consistent with outstanding frequency coordination/collocation agreements.
 - This case is significant in that the Bureau held that simply asking the most knowledgeable employee did not constitute due diligence; the Bureau said the licensee should have reviewed all relevant written agreements before certifying. While the Bureau may have applied such a stringent standard because the context involved relocating satellites, the case underscores the fact that the Bureau takes seriously the due diligence requirement of section 1.17 of the rules.

Cable Sports Programming

- In a successful effort to get a cable sports programming discrimination case to settle, the Commission designated the complaint for hearing. The case settled a few days later.
- In response to a complaint that a cable operator had dropped NFL programming without the requisite 30 days notice to subscribers, the Media Bureau ordered the cable operator to reinstate the NFL programming until expiration of the 30-day period. The Media Bureau relied on the Commission's general authority under section 4(i) for its order.
 - This constituted a very aggressive use of section 4(i), presumably undertaken because of the special sensitivity surrounding the issue of NFL programming. Nevertheless, the case now stands as precedent for the Commission's authority not just to maintain the status quo while a complaint is pending, but to restore temporarily the former status quo.

Indecency Enforcement

- At the FCC's request, the Second Circuit remanded back to the FCC for 60 days the petitions for review of the *Omnibus Indecency Order's* findings that the fleeting use of "bullshit," "shit," and "fuck" were indecent and profane. The Commission said it wanted an opportunity to allow interested parties to comment, and it has now done so. If the Commission does not issue a decision by early November, the court case will move forward. In any event, the Second Circuit set an expedited briefing schedule starting in November.
 - In a sentence whose scope is not entirely clear, the court ordered that "enforcement of Section III.B of the Omnibus Order, which applies the standards announced in the Golden Globe Order, is hereby STAYED pending further order of this court." Regardless of how the stay is interpreted, it now seems unlikely that the FCC will take any enforcement action for fleeting expletives until such time as the court lifts the stay.
- It appears that the FCC is not issuing any indecency decisions in light of the Second Circuit litigation and litigation in the Third Circuit involving CBS's petition for review of the Janet Jackson/Super Bowl forfeiture. Thus, except for the anticipated decision in early November in response to the voluntary remand of the *Omnibus Indecency Order*, it appears that the next action in the indecency arena will be court decisions in these two proceedings, perhaps in the first half of 2007.
 - Assuming the Commission doesn't change its mind on remand of the *Omnibus Indecency Order*, in light of the fleeting nudity and fleeting expletives involved in these cases and the departure from prior law, there appears to be a strong chance that the Commission will lose one or both cases on the basis that the decisions are inconsistent with the indecency statute, arbitrary and capricious under the Administrative Procedure Act, and/or unconstitutional under the First Amendment.
- Whatever the courts decide, hopefully they will add some clarity to the law in this area.
 - The lack of clarity was recently underscored by reports that two Commissioners indicated at an NAB Radio Show panel that they couldn't figure out the indecency standards.
- The Commission has not yet adopted rules implementing the 10-fold statutory increase in the maximum forfeiture for indecency to \$325,000 per utterance. In a pleading to the Second Circuit, the Commission indicated that the increased forfeiture amount would not take affect until 30 days after it adopts such rules.

Other Notable Actions

- **Sponsorship Identification.** The Enforcement Bureau issued numerous Letters of Inquiries to television stations regarding allegations that they may have violated the sponsorship identification rules in connection with the broadcast of Video News Releases.
- **Broadcast Public Inspection File.** As part of the renewal process, the Media Bureau issued five NALs totaling \$44,000 relating to the broadcast public inspection file. It also issued forfeiture orders for \$3,200 and \$1,000 as a follow-up to previously issued NALs for \$4,000 and \$10,000, respectively. In addition, the Enforcement Bureau issued four public file NALs for \$4,000 each and one for \$10,000.
- **Pirate Radio.** The Enforcement Bureau issued three NALs totaling \$37,000 for operation of pirate radio broadcast stations (\$7,000 of one of them was for the related violation of failure to allow an inspection). The Bureau also issued a \$7,000 forfeiture order and 22 citations.
- **Unauthorized Microwave Operation.** The Enforcement Bureau issued seven forfeiture orders totaling \$58,000.
- **Tower Painting and Lighting.** The Enforcement Bureau issued two \$10,000 NALs. In addition, at a PCIA panel, the Bureau stated that, over the past five years, it had inspected 9,500 towers and issued over 2,000 notices of violations and 185 NALs totaling over \$1.5 million.
- **Emergency Alert System.** The Enforcement Bureau issued an \$8,000 forfeiture order and two \$8,000 NALs for violations by broadcasters of the Emergency Alert System (“EAS”) rules.
- **Satellite Cases.** In addition to the due diligence case mentioned above, the Enforcement Bureau issued a \$20,000 NAL regarding unauthorized modifications to a satellite system and a \$5,200 NAL and a \$4,000 forfeiture order (in different cases) for failure to timely file a satellite earth station renewal application and operation without a license as a result.
- **Cable Signal Leakage.** The Enforcement Bureau issued two \$8,000 NALs.
- **Payphone Compensation.** The Wireline Competition Bureau issued a public notice reminding facilities-based carriers of their obligations under the payphone compensation rules and of the fact that enforcement action could follow any non-compliance. In a recent section 208 formal complaint decision, the Commission reaffirmed its position that violation of the payphone compensation rules is an unjust and unreasonable practice under section 201(b) of the Act and thus may serve as the subject of a private cause of action in the nature of a section 208 complaint.
 - The Supreme Court has granted *certiorari* on this issue (in the context of complaints filed in federal district court) and the Court’s decision may provide useful guidance regarding not only the Commission’s jurisdiction to enforce the payphone compensation rules through the section 208 formal complaint process but, more generally, other rules as well. To the extent the Court takes a narrow view of what rule violations constitute an unjust and unreasonable practice under section 201 (b), carriers may be insulated from damage actions for violations of FCC rules.

What's Ahead?

- **E911.** Several wireless and Voice over Internet Protocol (“VoIP”) E911 waiver requests remain pending. Some of these could lead to enforcement actions.
- **HAC.** Several wireless carriers have recently filed waiver requests regarding the requirement that wireless carriers make available by September 18, 2006 two hearing aid compatible (“HAC”) handsets with t-coil coupling per air interface. Some of these could lead to enforcement actions.