

FCC ENFORCEMENT UPDATE

December 15, 2005

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

Highlights

- *The Commission aggressively enforced Universal Service Fund (USF) contribution requirements. There has been more than \$5 million in USF enforcement during Chairman Martin's tenure, higher than in all other areas combined.*
- *The Commission continued not to issue any indecency enforcement decisions. The 12 months since the Commission's last indecency enforcement action is the longest period of time without such action in a decade. The logjam may break soon.*
- *E911 remains a "hot" issue, both in the Voice over Internet Protocol (VoIP) and wireless contexts. Numerous waiver requests are pending.*

Universal Service Enforcement

- **Failure to Pay.** The Commission issued two Notices of Apparent Liability (NALs) and two consent decrees totaling over \$1 million involving failure to contribute to USF and related matters. These actions follow over \$4 million in USF enforcement actions in the previous six months, for a total of over \$5 million in enforcement in this area under Chairman Martin, higher than in all other areas combined.
 - It is likely that USF enforcement will remain a high priority. Resellers of telecommunications, including Mobile Virtual Network Operators (MVNOs) remain particularly at risk, depending on the nature of their service.
- **Lifeline/Linkup Outreach to Indian Tribes.** The Commission entered into a \$75,000 Consent Decree regarding the rule requiring outreach to Indian tribes about Lifeline and Linkup service. The Consent Decree also involved a commitment by the carrier to extensive outreach efforts as part of a compliance plan.
 - This action follows enforcement action involving three other carriers since early 2004. Carriers serving tribal areas should work with such tribes to coordinate appropriate outreach to avoid the tribes raising concerns with the FCC.

Indecency Enforcement

- **Nothing Yet.** It is well-known that Chairman Martin is a supporter of stepped-up indecency enforcement. It is thus somewhat surprising that the Commission has not taken any indecency enforcement action during his tenure as Chairman. The Commission took its most recent indecency enforcement action in December 2004 and the 12-month gap in activity is the longest in this area since 1995/96. While action may well be forthcoming shortly, if no action is taken in the next two weeks, 2005 will be the first calendar year with no indecency enforcement action (admonishment, NAL, forfeiture or consent decree) since 1986.

- **Action on the Horizon.** Two “mega” indecency enforcement packages are apparently in the works – one that deals with several long-pending television cases and one that deals with several long-pending radio cases. Each order will apparently propose forfeitures in some instances and deny complaints in other instances. The television order, or perhaps at least a scaled-down version of it, may well be released in the next few days.
 - The goal of deciding several indecency cases together in a single order is to provide more coherent and consistent guidance in a very murky area. Achieving that goal will be a difficult challenge. Chairman Martin will likely also use these orders to strengthen indecency enforcement, for example, by proposing higher forfeitures based on multiple “utterances.”
- **Legal Challenges.** The contemplated “mega” orders reportedly do not include decisions in any of the high-profile cases that, once decided, will likely lead to a court appeal – the petitions for reconsideration in the Golden Globe/“F-Word” case, and responses to proposed forfeitures in the Super Bowl/Janet Jackson, Married by America/pixelated nudity and the KRON-TV/“Puppetry of the Penis” cases.
 - All of these cases have been ripe for decision for a year or more.
- **Complaint Trends.** FCC statistics show that 189,362 indecency complaints were filed from January through September 2005, covering 720 programs. While the number of complaints is much lower than the Super Bowl-driven number of 1.4 million for 2004, it is notable that the number of programs about which the Commission has received complaints has skyrocketed from 314 for all of 2004 to 720 for the first nine months of 2005.
 - The Commission’s indecency web site, recently revised and expanded, reports that the Commission aims to act on indecency complaints within nine months. Given the current pace of Commission decision-making in this area, it seems likely that many of these 720 cases from the first nine months of 2005 (and perhaps many older cases as well) will not be decided in this time frame.
- **License Renewals Delayed.** Because of pending indecency cases, numerous renewal applications have been held by the Commission, particularly those involving network television stations. For licensees who have a pressing need for timely renewal (e.g., due to a pending transfer of control), the Enforcement Bureau has been willing to negotiate tolling agreements that allow for renewal but protect the Commission’s rights to issue an NAL without regard to the statute of limitations.
- **Potential Hill Action.** Congress continues to consider legislation that would increase the maximum forfeitures for indecency and strengthen broadcast indecency enforcement in other ways. The Senate has also been actively discussing indecency on cable and satellite and the possibility of a la carte channel offerings or a “family-friendly” tier. Chairman Martin has supported these efforts and urged the cable industry to act voluntarily. In response, some cable operators recently announced their plans to develop a family programming tier.

Public Safety Enforcement

- **VoIP E911.** In two public notices, the Enforcement Bureau forbore from enforcement of the requirement that providers obtain acknowledgments from 100 percent of their customers regarding the limitations of VoIP E911 service. Then, in a third public notice, the Enforcement Bureau effectively grandfathered existing VoIP customers by making clear that providers need not cut off service to existing customers in areas without E911 service.
 - This last public notice also stated that the Bureau “expect[ed]” VoIP providers not to market or provide service to new customers in areas without E911 service. Several waiver requests are pending.

- **Wireless E911.** Wireless carriers employing “handset-based” technology to comply with the E911 rules (typically via GPS-equipped handsets) must ensure that, by December 31, 2005, 95 percent of their subscribers have handsets capable of providing accurate subscriber location information to emergency call centers. Numerous waiver requests of this deadline remain pending, including requests by two national carriers and at least three mid-size carriers. Depending on how the Commission acts on these requests in the next couple of weeks, additional wireless E911 enforcement action may ensue.
 - Waiver denials or enforcement action in this context could potentially be reversed in court, particularly for carriers that can demonstrate they have made substantial progress and that the failure to meet the December 31 deadline is due to factors beyond their control.
 - The Commission has granted at least in part some waiver requests by smaller “Tier III” carriers. Because the Commission applied the Tier III-specific waiver standard provided in the ENHANCE 911 Act, the Commission’s actions on these requests have limited precedential value for requests by nationwide and mid-sized carriers.
- **Tower Safety.** The Enforcement Bureau issued three \$10,000 NALs regarding the tower lighting, painting and registration rules and a \$7,000 NAL regarding failure to keep an AM tower enclosed to avoid harm to the public.
- **EAS.** The Enforcement Bureau issued three \$8,000 NALs and one \$8,000 forfeiture order for failure to comply with the Emergency Alert System rules.
 - In a rulemaking order, the Commission expanded the scope of these rules from broadcast and cable to several additional services: Direct Broadcast Satellite (DBS), Satellite Digital Audio Radio Service (SDARS), Digital Television (DTV) and digital radio. The Commission has also proposed applying the rules to other digital technologies, including wireless.

Consumer Protection Enforcement

- **Do-Not-Call.** The Enforcement Bureau entered into a \$100,000 consent decree with a nationwide wireless carrier regarding compliance with the National Do-Not-Call rules. This case differed from prior cases in that the company had a policy against any telemarketing that apparently was not being followed by some of its agents, which were telemarketing without regard to the rules.
 - The Federal Trade Commission (which shares enforcement jurisdiction in this area with the FCC) entered into a \$5.3 million settlement with DIRECTV in a case reportedly involving thousands of violations of the National Do-Not Call rules.
- **Junk Faxes.** The Enforcement Bureau issued seven citations for violations of the rules prohibiting unsolicited faxes. The Commission proposed rules to implement a recent statute that would permit unsolicited faxes from entities with an “Established Business Relationship” with a recipient. The proposed rules would also require entities sending faxes to make it easier for recipients to opt out of receiving them.

Other Actions

- **Broadcast Public File Rule.** As part of the renewal process, the Video Division of the Media Bureau issued 12 NALs ranging from \$4,000 to \$15,000 for public inspection file omissions relating to issues-programs lists, children’s television programming or commercial limits information, or Equal Employment Opportunity reports. In addition, the Media Bureau’s Audio Division reportedly sent directly to licensees some renewal-

based public file NALs; they were apparently in the \$4,000 to \$9,000 range. The Audio Division also issued a \$500 renewal-based public file forfeiture order, lowering the NAL from \$3,000. Finally, outside the renewal context, the Enforcement Bureau issued five public file NALs totaling \$16,000 and two forfeiture orders totaling \$2,500.

- **Malicious Interference.** A federal district court jury in California convicted someone on six counts relating to intentionally interfering with various safety/homeland security-related radio communications, including communications from a US Coast Guard Auxiliary officer trying to contact a ship in distress, from the Red Cross relating to flood evacuation and within the Federal Government in connection with a homeland security exercise.
 - The U.S. Attorney's office brought this case at the request of the FCC. Such criminal enforcement of the Communications Act is rare.
 - The Enforcement Bureau also issued two related forfeiture orders totaling \$42,000 against the same person.
- **Spectrum Leasing.** In the Commission's first enforcement action involving the new spectrum leasing rules, the Enforcement Bureau entered into a \$20,000 consent decree that also included an admission of a violation.
- **Revocation Hearing.** The Enforcement Bureau issued an order to show cause to revoke the license of an amateur radio operator who had been convicted of felony burglary.
- **Equipment.** The Enforcement Bureau issued a \$17,000 forfeiture order and two citations for manufacturing and/or importing uncertified equipment.
- **Unauthorized Operation.** The Enforcement Bureau issued two NALs totaling \$24,200 relating to the unauthorized operation of satellite earth stations due to late-filed renewal applications. The Bureau also issued eight NALs totaling \$64,000 regarding unauthorized microwave or private land mobile operations and a \$10,000 forfeiture order for unauthorized Citizens Band radio operations. Finally, the Bureau issued 13 pirate radio warnings.
- **Digital Television.** The Media Bureau issued 13 forfeiture orders totaling \$39,000 against co-owned companies for non-compliance with the digital transmission standard.
- **Non-Duplication Rules.** The Media Bureau issued a \$20,000 NAL against a cable operator for violation of the network non-duplication rules. This is particularly noteworthy as television stations engage in retransmission consent negotiations with cable systems.
- **Dealing with the Enforcement Bureau.** The Enforcement Bureau issued two NALs for \$4,000 each for failure to respond to a Bureau inquiry and a \$7,000 forfeiture order for failure to permit inspection of a station. The Bureau also departed from its usual practice of issuing non-public orders dealing with confidentiality issues during the course of an investigation. Instead it issued a public order in one case, which had the result of publicly identifying the target of the investigation. The Bureau's motive appears to have been to send a strong public signal against confidentiality requests that are not properly supported.

What's Ahead?

- **Indecency Enforcement.** Given the large number of cases building up, the Commission will likely be taking a lot of indecency action in the next several months.

- **Broadcast Payola/Sponsorship ID.** New York Attorney General Eliot Spitzer entered into a second consent decree with a record company regarding “pay for play” issues in the radio industry, this one for \$5 million with Warner Music Group. The FCC has several investigations pending in this area, including investigations into whether the facts before the New York Attorney General involve violations by broadcast licensees. Commissioner Adelstein continues to be a strong advocate of FCC enforcement in this area. Some of the FCC’s investigations have been pending for almost a year, so action may be forthcoming fairly soon.
- **Closed Captioning.** Tougher television closed captioning rules go into effect on January 1, 2006. Subject to limited exceptions, all English-language analog programming first shown on or after January 1, 1998, and all English-language digital programming first shown on or after January 1, 2002, must be captioned as of January 1, 2006.
 - The fact that the rule will now generally apply to 100 percent of programming rather than a lesser percentage makes it much easier for viewers to file complaints. So far, the Commission has not shown a lot of sympathy to broadcasters and programmers in this area. The Enforcement Bureau has issued several NALs in the emergency information context, and the Media Bureau has denied most exemption requests. The Commission recently transferred responsibility for exemption requests to the Consumer and Governmental Affairs Bureau which, through its Disabilities Rights Office, is unlikely to change course regarding exemptions.
- **Children’s Advertising Limits.** Tougher children’s television advertising rules go into effect January 1, 2006. Specifically, the following will now count as “commercial matter” in calculating compliance with the limit on the number of commercial minutes in children’s television programming: (1) promotions of television programs or video programming services other than children’s educational or informational programming; and (2) time during which the program shows a web address for a web site that includes commercial material.
 - These rules have been challenged in court and a stay request is pending with the Sixth Circuit.
- **Merger Enforcement.** The Commission imposed conditions on the SBC/AT&T and Verizon/MCI mergers, based on the carriers’ “voluntary commitments.” These conditions relate to unbundled network elements, Internet backbone services, service to Alaska, digital subscriber line service and net neutrality. The carriers must file annual certifications attesting substantial compliance with the conditions in all material respects.
 - To the extent potential violations are brought to the Commission’s attention, enforcement action could result.
- **New FCC Commissioner.** As a Tennessee Regulatory Authority Director, Deborah T. Tate has been a strong advocate of VoIP E911 service. She has also been a strong supporter of consumer protection efforts at the state level. She has joined her Tennessee colleagues in taking enforcement action in such consumer areas as do-not-call, slamming and cramming.