

FCC ENFORCEMENT UPDATE

July 9, 2007

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This edition summarizes notable FCC-related enforcement matters from April 2007 through July 3, 2007. Questions or comments may be addressed to David H. Solomon at 202-383-3369 or dsolomon@wbkllaw.com.

Highlights

- **Payola-Related Sponsorship ID.** Four consent decrees totaling \$12.5 million.
- **DTV Transition.** Two forfeitures totaling approximately \$3 million against television importers and more than 250 Citations against television retailers.
- **Universal Service Non-Payment.** More than \$2 million in forfeitures or consent decrees.
- **Indecency.** Court reversal of the Commission's recent, tougher approach to the use of "fleeting expletives."

Sponsorship ID Enforcement

- The Commission entered into consent decrees of \$4 million, \$3.5 million, \$3 million and \$2 million with four major radio groups for payola-related sponsorship identification issues that grew out of investigations originally begun by the New York Attorney General. The radio groups agreed to detailed compliance plans regarding payola and sponsorship identification.
- Because the cases were decided by consent decrees, they do not establish any precedent or formal guidance. Other radio licensees may find elements of the compliance plans helpful as they address their own compliance in this area.
- Other sponsorship identification investigations involving payola as well as video news releases remain pending. Numerous renewal applications are being held as a result of these investigations.

DTV Transition Enforcement

- The Commission issued two Notices of Apparent Liability ("NALs") proposing forfeitures against television importers/distributors for not complying with the requirement (effective March 1, 2006 for televisions 25 inches or larger) that televisions include digital television ("DTV") tuners – one for \$2.9 million and one for \$63,500. The \$2.9 million NAL is the largest equipment enforcement action in Commission history; indeed, it is nearly three times the previous high of \$1 million.
- The Enforcement Bureau issued more than 250 Citations against retailers for failure to comply with requirements that they have "Consumer Alert" disclosures at the point of sale informing consumers that they will need a converter box to use analog televisions for over-the-air service beginning in February 2009. Most of the Citations were a result of inspections of retail stores by Enforcement Bureau field agents; the rest were based on inspections of retailer websites. To the extent any of the cited retailers do not comply in the future, they will likely receive an NAL.

- It is apparent from these actions that DTV enforcement is now a high priority of Chairman Martin as an integral part of his overall DTV transition efforts, which also include stepped-up informational and labeling efforts.

Universal Service Enforcement

- The Commission issued two forfeitures totaling more than \$1 million and entered into three consent decrees also totaling more than \$1 million, all relating to non-payment or under-payment into the Universal Service Fund (“USF”) or related violations.
- While most of these actions concluded previously initiated enforcement actions, USF enforcement continues to be an important Commission priority.

Indecency Enforcement

- The Second Circuit Court of Appeals vacated the Commission’s recent policy finding that fleeting use of expletives such as “fuck” and “shit” and variations were indecent and profane. The court found that the Commission had not adequately explained its departure from prior precedent and concluded that the Commission’s decisions were arbitrary and capricious under the Administrative Procedure Act (“APA”). It remanded the case back to the Commission to allow the Commission to try to explain its approach more persuasively if it so chooses.
 - Although the *Golden Globes* case, in which the Commission found Bono’s “fucking brilliant” statement to be indecent and profane, was not formally before the court, the court vacated the policy underlying that decision.
- While the court did not reach any First Amendment issues because it decided the case on APA grounds, it included extensive *dicta* making clear the court’s view that it would be extremely difficult, if not impossible, for the Commission to justify under the First Amendment any renewed finding that fleeting expletives are indecent.
- The court’s *dicta* may be helpful in persuading the Third Circuit to overturn the Commission’s decision that the fleeting exposure of Janet Jackson’s breast during a Super Bowl halftime show was indecent. Oral argument in that case is scheduled for September 11.
- The court’s decision may also be helpful in efforts to oppose legislation giving the FCC authority to regulate television violence.
- Chairman Martin may try to persuade the Solicitor General to appeal the case to the Supreme Court.
- The Commission continues not to act on numerous longstanding (and legally questionable) indecency cases, thereby preventing them from reaching court in a timely fashion and allowing their “chilling effect” to continue. For example, the so-called “puppetry of the penis” NAL, which involved the fleeting view of a penis during a news interview show, has been pending for three and a half years. The “Married by America” NAL, which found for the first time that pixelated nudity was indecent, has been pending for nearly three years. The Commission has also not acted on any of the seven NALs it issued more than a year ago as part of its “Omnibus Indecency Order,” including one finding a Martin Scorsese/PBS special on the history of the blues to be indecent.
- After a delay of a year, the Commission made the statutory increase to \$325,000 in the maximum indecency forfeiture effective July 20, 2007.

- One minor indecency case did result in a publicly released decision – as part of a radio renewal order, the Media Bureau ruled that repeating the name Kate Hunt several times and jokingly noting that one must be cautious in pronouncing it (i.e., not reversing the first letters of the first and last name) was not indecent.
- Although there have been few publicly released indecency decisions, the Enforcement Bureau continues to issue numerous letters of inquiry regarding indecency complaints, even where the complainant does not set out a particularly strong case. The Commission’s delay in acting on pending indecency complaints has resulted in numerous broadcast renewal applications remaining pending for several years.

Broadcast Renewal Enforcement

- The Media Bureau issued approximately \$400,000 in NALs relating to violations identified during the license renewal process. The most common violations related to public inspection file requirements (19 NALs totaling \$138,000), children’s television commercial limits (11 NALs totaling \$117,000), publicizing the existence and location of children’s television reports (eight NALs totaling \$73,000) and failure to file a timely renewal application (16 NALs totaling \$62,500).
 - Separate and apart from the renewal process, the Enforcement Bureau issued \$42,000 in public inspection file NALs against nine stations.

Equipment Enforcement

- In addition to the DTV equipment cases discussed above, the Commission issued an equipment forfeiture order for \$1 million and took other equipment enforcement action totaling over \$200,000.

Telemarketing Enforcement

- The Commission issued a forfeiture order for approximately \$750,000 regarding violations of the national do-not-call rules.
- The Commission issued three NALs totaling \$41,500 regarding violations of the junk fax rules.
- The Enforcement Bureau is apparently devoting more resources to complaints regarding violations of the do-not-call and junk fax rules than any other area within its jurisdiction. It has been issuing numerous Citations (although no longer contemporaneously releasing them) and further NALs are likely, particularly relating to junk faxes.

Disabilities Enforcement

- In the Commission’s first telecommunications-related disability enforcement actions, the Enforcement Bureau issued two \$16,000 NALs against wireless carriers for non-compliance with labeling requirements relating to digital hearing aid compatible (“HAC”) telephones. Each case involved two different models.
- Based on a recent Commission HAC waiver order, these cases interpreted the HAC labeling requirements as applying to carriers as well as manufacturers, which appears inconsistent with the underlying Commission orders. Petitions for reconsideration of the HAC waiver order’s interpretation are pending.

Unauthorized Operation Enforcement

- In the largest enforcement action of its kind, the Enforcement Bureau entered into a \$215,000 consent decree with a satellite licensee relating to unauthorized operation of more than 40 satellite earth stations. The Bureau also entered into a \$50,000 consent decree with another licensee regarding unauthorized satellite earth station operation.

- The Enforcement Bureau issued four pirate broadcast radio forfeiture orders totaling more than \$30,000, two pirate radio NALs for \$10,000 each and 41 pirate radio warnings.
- The Bureau entered into a \$20,000 consent decree with a cruise company relating to its unauthorized operation of a personal communications service system.
- The Bureau issued seven NALs totaling over \$50,000 relating to unauthorized operation in connection with late-filed private land mobile radio service (“PLMRS”) renewal applications and two NALs regarding unauthorized operation of car service radio systems. It also issued a \$5,200 forfeiture order for unauthorized PLMRS operation and a \$10,000 forfeiture order for unauthorized CB radio operation.

Other Notable Actions

- **Wireless E911**. The Commission entered into a \$700,000 consent decree that settled a prior \$750,000 NAL.
- **CPNI**. The Commission appears to have been winding down its major investigations regarding carrier compliance with FCC rules governing treatment of Customer Proprietary Network Information (“CPNI”). The Commission issued six \$4,000 NALs and a \$4,000 forfeiture order relating to smaller carriers’ failure to respond to Enforcement Bureau inquiry letters and two Citations against data brokers that did not respond to Enforcement Bureau subpoenas.
- **Misrepresentation/Due Diligence**. The Commission entered into consent decrees of \$75,000 and \$10,000 regarding misrepresentation and issued a \$7,000 NAL for failure to allow an inspection.
- **Formal Complaint Jurisdiction**. In a case involving the Commission’s payphone compensation rules, the Supreme Court made clear that violations of certain Commission rules can constitute an unjust and unreasonable practice under section 201(b) of the Communications Act and thus serve as a basis for FCC or federal district court jurisdiction for a section 208 complaint.