

FCC ENFORCEMENT UPDATE

June 26, 2006

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

Highlights

- **E911.** *The Commission issued two Notices of Apparent Liability (“NALs”) regarding the wireless E911 rules, including one for \$750,000.*
- **Indecency.** *The Commission reaffirmed its \$550,000 forfeiture for the Super Bowl/Janet Jackson incident. The television networks sought judicial review of some decisions issued earlier this year and CBS may seek judicial review of the Super Bowl case as well, potentially leading to the first court decisions in this area in more than a decade. Meanwhile, Congress increased the maximum forfeiture for indecency 10-fold.*
- **Universal Service.** *The Commission took over \$1 million in enforcement actions involving failure to pay into the Universal Service Fund (“USF”) and related violations.*

FCC Enforcement Priorities

- At a Federal Communications Bar Association seminar in late May, FCC Enforcement Bureau Chief Kris Monteith indicated that Chairman Martin's top enforcement priorities were homeland security/public safety, indecency and universal service. At the same event, Colleen Heitkamp, Chief of the Enforcement Bureau's Telecommunications Consumers Division, said that the pending Customer Proprietary Network Information (“CPNI”) investigations remain at the forefront of that division's work.

E911 Enforcement

- The Commission issued a \$750,000 NAL against a carrier for failure to respond in a timely fashion to E911 deployment requests from 50 Public Safety Answering Points (“PSAPs”). The Enforcement Bureau issued a \$12,000 NAL against a different carrier for failing to respond in a timely fashion to one PSAP request.
- Requests for waiver of the E911 rules by several wireless carriers and interconnected Voice over Internet Protocol (“VoIP”) providers remain pending. Some of these cases reportedly may be referred to the Enforcement Bureau for potential enforcement action.

Indecency Enforcement

- **Network Appeals.** ABC, CBS and Fox all filed for judicial review of the March 2006 *Omnibus Indecency Order*. (NBC moved to intervene in the CBS/Fox case.) The networks are challenging Commission decisions finding use of the “F-Word” and “S-Word,” including “bullshit,” to be indecent and profane. The Commission did not issue any NALs in these cases because, at the time of the broadcasts, it had not made clear that the fleeting use of such words was illegal. Thus, instead of having to respond to an NAL, the networks went directly to court.

- These petitions for review (or any petition for review filed regarding the Janet Jackson/Super Bowl incident – see below) may result in the first court decision on indecency in over a decade and may provide the first judicial reaction to the Commission’s recent indecency crackdown.
- **Super Bowl Case.** In late May, the Commission denied CBS’s petition for reconsideration of the \$550,000 forfeiture imposed on CBS for the broadcast on its network owned and operated stations of the Janet Jackson/Super Bowl incident.
 - CBS now has two options for challenging the forfeiture. It can pay the forfeiture and file a petition for review with a court of appeals or it can do nothing and wait until the Department of Justice brings an enforcement action against it in Federal District Court. In the latter case, CBS is entitled to a trial *de novo*, in which the burden of proof will be on the Government.
 - The Commission released its order reaffirming the CBS Super Bowl forfeiture six weeks after CBS filed a petition for reconsideration. This demonstrates that the Commission can act quickly in the indecency area. In contrast, a number of other high-profile indecency cases have been pending for some time. For example, the Commission has not acted on a petition for reconsideration of the *Golden Globes* decision involving Bono’s fleeting use of the “F-Word” that NBC filed about two years ago, or on responses by Fox and its affiliates to the NAL in the *Married by America* case filed more than a year and a half ago. It may be that the Commission believes it has a stronger position in the Super Bowl case and thus is more willing to facilitate judicial review in that case.
- **Legislation.** In June, Congress enacted, and the President signed, legislation that increased the maximum forfeiture for broadcast indecency, profanity, or obscenity from \$32,500 to \$325,000 per utterance. The legislation includes a limit of \$3 million for a continuing violation, although it appears that this limit will not have any practical effect given the one-time nature of indecency violations.
 - The 10-fold increase in the maximum penalty for an indecency violation underscores the importance of broadcast licensees ensuring that they have appropriate standards and procedures in place to avoid what could be very substantial forfeitures for any violations, even unintentional ones.

Universal Service Enforcement

- **Failure to Pay.** The Commission issued a \$715,000 forfeiture order involving failure to make required payments into the USF and related violations, including failure to file complete and accurate revenue reports and failure to make required payments into the Telecommunications Relay Service (“TRS”) fund. The Enforcement Bureau entered into a \$290,000 consent decree involving similar matters, as well as failure to register with the FCC as a telecommunications carrier, failure to make required payments to the North American Numbering Plan Administration, and failure to pay required FCC regulatory fees. The Bureau also entered into a \$28,000 consent decree, of which approximately \$13,000 was for failure to pay into the TRS fund. (The remainder was for failure to respond to a Bureau Letter of Inquiry (“LOI”) in a timely fashion.)
- **Suspension/Debarment.** The Bureau issued one notice of suspension/initiation of debarment regarding participation in the Schools and Libraries program by an entity that pled guilty to Schools and Libraries-related wire fraud.

CPNI Enforcement

- The Bureau issued its third \$100,000 NAL by a carrier regarding failure to file a proper certification regarding compliance with the CPNI rules.
- The Commission is reportedly planning to issue an NAL against a data broker at the July meeting, presumably for failure to respond to a subpoena even after receiving a Citation for such failure.
- CPNI investigations against several wireline and wireless carriers remain pending.
- Chairman Martin declined to initiate an investigation into reports of carrier cooperation with information-gathering activities of the National Security Agency.

Telemarketing Enforcement

- The Bureau entered into a consent decree regarding pre-recorded advertisements sent to residential phone lines. The company had recently paid the \$23,500 proposed in the NAL so the consent decree included only a compliance plan and not a separate payment. The Bureau also issued a \$9,000 forfeiture involving these rules and issued a Citation in another case.
- The Bureau issued 18 Citations regarding the sending of unsolicited commercial faxes (“junk faxes”).
 - The Government Accountability Office issued a report criticizing the FCC for insufficient junk fax enforcement, so this may be an area of increased FCC attention in the future.

Equipment Enforcement

- The Commission issued a \$90,000 consent decree, settling a \$125,000 NAL. The Bureau issued five NALs totaling \$63,000, two forfeiture orders totaling \$23,200, and seven Citations.

Sponsorship Identification/Payola

- New York Attorney General Eliot Spitzer entered into two additional settlement agreements with major record companies regarding “pay for play” allegations – one with Universal Music Group for \$12 million and one with EMI for \$3.75 million. He had previously entered into settlement agreements with record companies for \$5 million and \$10 million.
- Following criticism by Attorney General Spitzer, the Commission reportedly rejected a \$1 million consent decree offer from a major radio station group owner regarding “pay for play” allegations growing out of the New York investigation. The Commission instead issued LOIs to four major radio station group owners.
- The Commission also reportedly decided to investigate compliance with sponsorship identification rules in connection with the use of Video News Releases by several dozen broadcast stations that were the subject of a report and complaint by Free Press and the Center for Media and Democracy.
- Numerous other sponsorship identification/payola cases – involving both Video News Releases and payola allegations, and dating back to as early as January 2005 – remain pending at the Commission and could be decided in the near future.

Media Bureau Renewal Cases

- ***Public Inspection File.*** The Media Bureau issued 12 NALs regarding public inspection files violations, ranging from \$4,000 to \$15,000, for a total of \$93,000.

- **Children's Television Commercial Limits.** The Media Bureau issued an \$18,000 NAL against a station that exceeded the commercial limits on 12 occasions, seven of which involved program length commercials.
- **Late-Filed Renewal Application.** The Media Bureau issued nine NALs of up to \$7,000 each (totaling \$46,500) for late-filed renewal and, in some cases, unauthorized operation after expiration of the license term.

Non-Cooperation with Investigations

- The Enforcement Bureau issued two \$20,000 NALs for failure to respond in a full and timely fashion to a Bureau LOI and also issued a \$3,000 forfeiture order for failure to respond to a Bureau warning letter as directed.

Other Notable Actions

- **Pirate Radio.** The Enforcement Bureau issued two \$10,000 NALs and 35 warnings regarding pirate broadcast radio stations.
- **Late-Filed Satellite Earth Station Renewal Applications.** The Enforcement Bureau issued three NALs totaling \$18,000 for late-filed renewal and related unauthorized operation by satellite earth stations.
- **EAS.** The Enforcement Bureau issued a \$24,000 NAL (involving three stations) and an \$8,000 forfeiture for violation of the Emergency Alert System ("EAS") rules.
 - The Commission is reportedly planning to extend its EAS rules to wireless carriers later this summer. The Commission also issued a Notice of Proposed Rulemaking on issues (including EAS issues) raised by its Advisory Committee on Hurricane Katrina-related communications issues.
- **Antenna Lighting and Registration Rules.** The Enforcement Bureau issued a \$13,000 forfeiture order.
- **Broadcast Public Inspection File Rule.** Separate and apart from the Media Bureau renewal-related NALs, the Enforcement Bureau issued five public inspection file NALs, ranging from \$4,000 to \$12,000 and totaling \$37,000. In addition, in a hearing case in which the Administrative Law Judge ("ALJ") ultimately granted a renewal application against charges of misrepresentation, the ALJ imposed a \$10,000 forfeiture for public inspection file violations.
- **Broadcast Main Studio Rule.** The Enforcement Bureau issued two \$7,000 NALs for main studio violations as well as a \$7,000 forfeiture.

What's Ahead?

- **CALEA.** The FCC reaffirmed in May, and the D.C. Circuit affirmed in June, the FCC's prior decision to apply the Communications Assistance for Law Enforcement Act ("CALEA") to interconnected VoIP and broadband Internet access providers. These entities will need to submit CALEA status reports to the FCC later this year and will then be subject to CALEA's standards for making their networks capable of facilitating Government interception activities not later than May 14, 2007. As part of its May decision, the FCC held that relief from CALEA requirements available under Section 107 of CALEA (relief that was temporarily available upon a filing with the FCC) is only available for facilities installed or deployed prior to October 1998. Thus, many carriers that filed for Section 107 relief may soon be subject to CALEA. The FCC also imposed a significantly higher evidentiary burden for those carriers still eligible for Section 107 relief, and affirmed that carriers with post-October 1998 facilities may not obtain relief under the FCC's general waiver

standard and will face a very high evidentiary and substantive burden for obtaining relief under Section 109, a separate section with a tougher standard. Finally, the FCC also asserted its enforcement authority independent of CALEA's provisions for federal district court enforcement, so that failure to comply with reporting or substantive requirements could lead to FCC enforcement action (as well as court imposed penalties for failure to comply with substantive requirements).

- **Indecency.** A number of television renewals remain on hold due to pending indecency cases. (Some renewals involving station transactions have moved forward through the use of a tolling agreement.) In addition, no public decisions have been issued on radio complaints since 2004. More generally, according to Commission statistics, there were over 200,000 indecency complaints filed in 2005, against 1,550 programs. This is a vast increase in the number of programs that were the subject of complaints, which had held steady at between 314 and 389 in the prior three years. The FCC has reported that another 275,000 indecency complaints were filed in the first quarter of 2006. Thus, at whatever point the Commission chooses to issue additional indecency decisions, there are plenty of available cases.