

FCC ENFORCEMENT UPDATE

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This edition summarizes notable FCC-related enforcement matters during the first half of 2011. Questions or comments may be addressed to David H. Solomon at 202-383-3369 or dsolomon@wbklaw.com.

Consumer Protection Enforcement

- **Cramming**: The Commission simultaneously issued four NALs totaling \$11.7 million against dial-around long distance companies that “crammed” unauthorized charges for their services onto local exchange carrier bills. On the same day, the Commission issued an Enforcement Advisory on cramming that, among other things, “strongly urge[d]” billing carriers “to take steps to ensure that they bill only for those companies that obtain reasonable authorization from consumers before placing charges on their phone bills.”
- **Telephone Consumer Protection Act**: The Commission issued a \$342,000 NAL regarding unsolicited, pre-recorded advertising messages (also known as “robocalls”). It also issued \$315,000 and \$295,000 NALs regarding unsolicited (“junk”) faxes, in which it increased the proposed forfeiture amount because of prior violations by the same entities.
- **Truth-in-Caller ID Act Rules**: The Commission’s new rules implementing the Truth-in-Caller ID Act provide that a penalty for violation of the Truth in Caller ID Act shall not exceed \$10,000 for each violation, or three times that amount for each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$1,000,000 for any single act or failure to act. The rules adopt a two-year statute of limitations and, unlike the case with most FCC forfeitures, do not require that a violation be willful or repeated to be the subject of a forfeiture. The rules also provide that, contrary to the usual case, entities that do not hold FCC licenses or other authorizations will be subject to penalties for violations without the need for a preliminary citation.

Disabilities Enforcement

Closed Captioning

- The Enforcement Bureau entered into a \$500,000 consent decree with a cable operator regarding five situations in which particular manufacturers’ equipment failed to deliver closed captioning data intact.

HAC

- The Enforcement Bureau issued an “Enforcement Advisory” reminding wireless providers of the annual hearing aid compatibility (“HAC”) compliance report. It also referenced that the Bureau had proposed \$361,000 in monetary penalties during 2010 relating to HAC reporting, web posting, and handset deployment issues and noted that: “The Bureau’s heightened enforcement posture recognizes that the hearing aid compatibility rules have been in place for a number of years and that carriers should now have implemented robust programs to ensure compliance with these rules.” This suggests HAC enforcement will continue to be an active area for the Enforcement Bureau.
- The Enforcement Bureau entered into \$50,000, \$30,000 and \$8,500 consent decrees regarding HAC reporting and website reporting requirements.

Internet-Based Telecommunications Relay Service Emergency Calling Requirements

- The Enforcement Bureau issued another “Enforcement Advisory,” to IP Relay and Video Relay Service providers about 911 emergency call handling rules. This suggests enforcement action could be forthcoming in this disabilities/public safety area.

Emergency Video Information Services to Persons with Disabilities

- The Consumer and Governmental Affairs Bureau issued a public notice reminding video programming distributors of their obligation to make emergency information available to persons with hearing and vision disabilities. The public notice indicated that the Commission will monitor complaints in this area closely for possible enforcement action.

Traffic Pumping Complaints

- The Commission granted two formal section 208 complaints relating to “traffic pumping” (also known as “access stimulation”), which involves a situation in which a rural local exchange carrier (“LEC”) enters into a revenue sharing agreement with “free” conference calling companies to artificially increase the volume of traffic flowing to the LEC and then attempts to collect inflated access charges from interexchange carriers (“IXCs”). In the first case, the Commission reiterated that an IXC’s failure to pay access charges does not violate the Communications Act, regardless of whether the IXC files a complaint about the charges. In the second case, it held that, under the Commission’s access charge rules, a LEC cannot impose access charges on an IXC for delivering calls to conference calling companies that do not purchase any telecommunications service from the LEC.
- In addition, in another formal section 208 case also affecting access charges and relying largely on traffic pumping precedent, the Commission found that an over-the-top VoIP provider’s assessment of access charges under tariff terms typically employed by incumbent LECs violated sections 201(b) and 203(c) of the Act, because the entity did not perform the functions described in the tariff. Rejecting an argument that has also been made in several traffic pumping matters, the Commission held that the tariff’s provisions applying access charges for service delivered to “end users” could not properly be read to refer to the IXC’s end users.

Network Outage Reporting Enforcement

- The Enforcement Bureau entered into three consent decrees regarding network outage reporting – for \$1.8 million, \$52,000, and \$45,000. Because of the confidential nature of network outage reports, consent decrees in this area do not provide information regarding the facts that permit an understanding of different payment amounts.

Ex Parte Enforcement

- As part of amendments to the ex parte rules, the Commission indicated that it would engage in “stricter” enforcement of the ex parte rules. While the Office of General Counsel will retain its authority to issue rulings about compliance with the ex parte rules, the Commission amended its rules to provide for referral to the Enforcement Bureau of cases in which a forfeiture or citation may be warranted for violations of the ex parte rules. The Commission rejected the suggestion that ex parte violations should lead to routine disqualification from proceedings.

- The Commission denied an application for review of an Office of General Counsel decision declining to impose sanctions in situations involving “at most, slight deviations from the requirements of the rules (a summary of an ex parte meeting was filed a day late and an attachment to an ex parte summary was inadvertently omitted in the first instance and filed two dates late). The Commission noted that “prejudice is a material factor in evaluating the seriousness of an ex parte violation,” and that “not every deviation” from the ex parte rules “warrants being treated as a serious violation worthy of sanctions.” The Commission also found some credence in the OGC’s concern that the complainant was trying to create a “secondary battle zone” in the underlying proceeding. It also agreed with OGC that summary disposal of ex parte complaints is appropriate for complaints that “raise at most minor compliance issues.” While this decision was under the pre-existing rules, it does suggest that the Commission’s stepped-up enforcement of the ex parte rules is likely to focus on significant or prejudicial violations.

Sponsorship Identification Enforcement

- The Enforcement Bureau issued two \$4,000 NALs for sponsorship identification violations relating to Video News Releases (“VNRs”). (It also subsequently issued a Forfeiture Order in one of the cases, and the station in the other case reportedly paid the NAL.) The NALs arose from VNR-related complaints against numerous entities by Free Press and Center for Media and Democracy in 2006. The Enforcement Bureau had previously issued two NALs arising from those complaints in September 2007 but had not initiated any subsequent enforcement actions relating to the complaints.
 - In both cases, the stations had received the VNRs for free. The Enforcement Bureau nevertheless found that sponsorship identification was required because the broadcast of the VNR material included identification of the companies for which the VNR was produced that “exceeded an identification that was reasonably related to the subject matter of the programming at issue.” It bears noting that in one of the cases, the Bureau rejected the argument that broadcast of a VNR should be permissible because the legislative history of section 317 of the Communications Act indicated that sponsorship identification was not required for press releases. The Bureau also rejected arguments that the enforcement action violated the First Amendment or section 326 (the no-censorship provision) of the Communications Act.
- The staff report on “The Information Needs of Communities” (what had previously been known as the Future of Media project) discussed VNRs and sponsorship ID issues. It noted that “the penalties have not been updated in years, the FCC does not make it sufficiently easy for whistleblowers to report infractions and, most important, stations are not required to post the [sponsorship] information on-line.” This could lead to further enforcement attention to this area.

Cell Phone Jamming Enforcement Action

- The Enforcement Bureau took a series of coordinated actions that a News Release referred to as “a new outreach phase of the Bureau’s continuing effort to halt the distribution and proliferation of illegal jamming devices in the United States.” The News Release quotes Enforcement Bureau Chief Michele Ellison as stating: “In the coming weeks and months, we’ll be intensifying our efforts through partnerships with law enforcement agencies to crack down on those who continue to violate the law.” In addition, she cautions that “While people who use jammers may think they are only silencing disruptive conversations or disabling unwanted GPS capabilities, they could also be preventing a scared teenager from calling 9-1-1, an elderly person from placing an urgent call to a doctor, or a rescue team from homing in on the location of a severely injured person. The price for one person’s moment of peace or privacy, could be the safety and well-being of others.”

- The actions included the following:
 - Retailer/Manufacturer Enforcement Advisory. In an Enforcement Advisory directed toward retailers, importers and equipment manufacturers, the Bureau emphasized that jamming technologies “jeopardize critical public safety communications, such as 9-1-1 calls, and could compromise law enforcement efforts” and therefore “the Enforcement Bureau is committed to strict enforcement in this area.” The Bureau further states that “[j]ammers, by definition, can never be authorized because they are designed to interfere with authorized radio communications” and thus “cannot be marketed in the United States (except in the very limited context of authorized use by the U.S. government).” The Bureau also provides specific compliance guidance to these entities: (1) “Immediately stop marketing within the United States any equipment that is designed to block, jam, or otherwise interfere with authorized radio communications.” (2) “Decline to sell or ship such jamming devices to addresses in the United States and its territories (except in the case of permitted sales to the U.S. government).” (3) “Ensure that any jamming devices manufactured in the United States are available solely for export and are not for sale domestically except to the U.S. government.” The Bureau emphasized that disclaimers and warnings to end users do not absolve the manufacturer of liability, and that a violation of law occurs “both by offering the device for sale to U.S. customers and completing the sale transaction.”
 - Consumer Enforcement Advisory. The Bureau issued a shorter, one-page advisory (as well as a poster) aimed at consumers, reminding them “that it is a violation of federal law to use devices that intentionally block, jam, or interfere with authorized radio communications such as cell phones, police radar, GPS, and Wi-Fi.” The advisory warns that “[o]peration of a jammer in the United States is illegal and may subject you to substantial monetary penalties, seizure of the unlawful equipment, and criminal sanctions including imprisonment” and “emphasizes the importance of strict compliance with the legal prohibition against jammers.”
 - Equipment Authorization Revocation. The Bureau also issued an Order to Show Cause against a manufacturer of a jamming device designed for operation in a motor vehicle, to determine whether the company’s FCC-issued equipment authorization should be revoked and whether a Forfeiture Order in an amount up to \$112,500 should be issued. The focus of the Show Cause Order is not limited to the sale and marketing of the equipment in question, but also with respect to violations of the Part 2 equipment authorization rules, including: potentially “false statements or representations” made in the application process; failure to “conform to the pertinent technical requirements or to the representations made in the original application”; and unauthorized changes to the equipment.
 - Citations. Following up on prior citations against companies that do not hold equipment authorizations, the Bureau issued three citations for unlawful marketing of jamming devices.

Pole Attachment Enforcement

- In adopting revised pole attachment rules, the Commission also made some changes in its pole attachment enforcement procedures. Most significantly, it expanded the period for which refunds are available from the date on which the complaint was filed to the entire period within the statute of limitations. Among other things, the Commission also allowed pole owners to impose stiffer penalties for unauthorized attachments.
- In addition, the Commission affirmed an ALJ decision to grant a pole attachment complaint, holding, among other things: that (1) a pole is not at full capacity if a new attacher can be accommodated by rearranging existing attachments or with conventional attachment techniques used by the utility itself; and (2) a utility cannot meet its burden of proof merely by claiming that existing attachments must be moved or that safety codes preclude the new attachment.

Other Notable Actions

- **Cable Program Carriage.** The Commission adopted a Recommended Decision of the Chief Administrative Law Judge denying program carriage complaints against four cable operators filed by WealthTV.
- **Equipment Enforcement.** The Enforcement Bureau entered into a \$125,000 consent decree regarding equipment marketing rules. This is a higher payment than is typical in most consent decrees and NALs in this area.
- **Nondiscrimination in Broadcast Advertising.** The Enforcement Bureau issued an Enforcement Advisory reminding broadcasters that they must certify in their renewal applications that: (1) their advertising sales contracts do not discriminate on the basis of race or ethnicity; and (2) such contracts contain nondiscrimination clauses. The Bureau also reminded broadcasters that they must have “a good faith basis for an affirmative certification and a reasonable basis for believing that factual information provided to the Commission is truthful and accurate.” As an example, the Bureau stated: “a licensee that uses a third party to arrange advertising sales is responsible for exercising due diligence to ensure that the advertising agreement contains the nondiscrimination clause and does not discriminate on the basis of race or ethnicity.” In a related news release, Chairman Genachowski said the FCC will “vigorously enforce its rules against discrimination in advertising sales contracts.”
- **Unauthorized Operation/Interference to Airport Facilities.** The Enforcement Bureau issued two \$25,000 NALs against operators of Unlicensed National Information Infrastructure transmission systems for unlawful operations and equipment that caused interference to airport weather radar facilities.
- **CPNI.** The Commission issued an Omnibus NAL proposing forfeitures of \$29,000 each against nine carriers that failed to submit their March 1, 2010 customer proprietary information (“CPNI”) compliance certification and also failed to respond to Enforcement Bureau inquiries regarding their failure to submit the March 1, 2009 CPNI certification. The Bureau raised the standard \$20,000 forfeiture amount for this violation to \$25,000 because the companies had failed to file in a prior year as well, and added \$4,000 to the amount for each company for its failure to respond to Bureau inquiries.
- **Unauthorized Broadcast of Telephone Conversations.** The Bureau issued a \$25,000 NAL for violation of the rule prohibiting the broadcast of telephone conversations without prior notice to the involved individuals. The Bureau proposed a higher than usual amount in light of the history of violations of this rule by the company involved, and threatened potential license revocation proceedings for future violations. The Bureau also entered into a \$20,000 consent decree with another broadcaster.
- **Universal Service.** The Enforcement Bureau entered into a \$20,000 consent decree regarding issues relating to universal service fund (“USF”) non-payment. It also imposed a forfeiture in a pending case that underscored its aggressiveness in this area. As part of a forfeiture of more than \$650,000 for failure to make USF and other fund payments, failure to file USF worksheets, failure to register as a carrier, and failure to obtain international section 214 authorization, the Commission imposed a forfeiture of more than \$200,000 for a USF delinquency of just under \$11,000, and a forfeiture of \$20,000 for a North American Number Plan Administrator delinquency of about \$300.
- **Revocation Hearing.** The Commission initiated a hearing regarding whether to revoke maritime licenses obtained at auction for failure to disclose real-party-in interest and attribution information, misrepresentation and lack of candor, and related issues.

- ***Cable Customer Notifications.*** The Enforcement Bureau issued an order declining to issue forfeitures against numerous cable operators that had been proposed on the last day of Chairman Martin's tenure. The Bureau concluded that cable operators had in fact provided the requisite advanced notice to customers prior to changes in rates, programming services, or channel positions.
- ***Alien Ownership.*** The Enforcement Bureau issued a \$16,000 NAL for violation of common carrier alien ownership restrictions. As it has been doing with increasing frequency, the Bureau increased the amount of the proposed forfeiture in light of the fact that a large company was involved.