

## FCC ENFORCEMENT UPDATE

January 6, 2011

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*This edition summarizes notable FCC-related enforcement matters from July 1, 2010 to December 31, 2010. Questions or comments may be addressed to David H. Solomon at 202-383-3369 or [dsolomon@wbklaw.com](mailto:dsolomon@wbklaw.com).*

### Open Internet Enforcement

- The Commission made clear that enforcement will lie at the core of its implementation of the newly adopted open Internet rules. The rules provide for a three-pronged approach to enforcement:
  - *Informal Complaints:* Parties may submit informal complaints. While such informal complaints typically will not result in orders, the Enforcement Bureau will monitor such complaints for patterns to help identify potential targets for investigation and enforcement action.
  - *Formal Complaints:* The open Internet formal complaint process is modeled on the Part 76 cable access complaint rules, but formal complaints will be handled by the Enforcement Bureau's Market Disputes Resolution Division, which currently deals with formal Section 208 complaints against common carriers and Section 224 pole attachment complaints against utilities. A complainant must plead fully and with specificity facts sufficient to establish a prima facie case, after which a broadband provider must demonstrate the reasonableness of the challenged practice. The complainant will then be afforded an opportunity to demonstrate that the practice is not reasonable. To expedite the formal complaint process, the Order provides that open Internet formal complaints will be resolved, where possible, at the Enforcement Bureau level (rather than the Commission level). The rules allow for requests for expedited treatment of complaints under the Enforcement Bureau Accelerated Docket ("rocket docket") process.
  - *FCC-Initiated Action.* In addition to relying on formal or informal complaints, the Commission has the authority to initiate enforcement action on its own motion. If it finds violations of the open Internet rules, the Commission will take appropriate enforcement action, including the issuance of forfeitures.

### Disabilities Enforcement

#### Legislation

- The Twenty-First Century Communications and Video Accessibility Act of 2010, signed into law on October 8, 2010, includes several enforcement-related provisions regarding existing Section 255 of the Communications Act (access to telecommunications service and equipment for persons with disabilities), new Section 716 (access to advanced communications services such as VoIP and messaging for persons with disabilities), and new Section 718 (access to mobile Internet browsers), including the following:
  - Effective no later than October 2011, the Commission must investigate informal complaints and issue an order concluding such investigations and determining whether a violation occurred within 180 days. After such an investigation, it may direct the company to bring the service, or next generation of the equipment or device, into compliance within a reasonable time.

- The maximum forfeiture for violations of these provisions of the Act is set at \$100,000 for each violation or each day of a continuing violation, up to a maximum of \$1 million for a continuing violation. This is a substantial increase for manufacturers and VoIP (or other application) providers from the existing \$16,000/\$112,000 maximum amounts contained in the Commission's Rules, although the initial citation requirement for certain entities without FCC authorizations will continue to apply. It is a reduction for common carriers from the existing \$150,000/\$1.5 million maximum amounts.
- Providers and manufacturers will have to submit an annual certification to the Commission that they are maintaining required disabilities access-related records. As with annual Customer Proprietary Network Information ("CPNI") and Hearing Aid Compatibility ("HAC") certifications, failure to submit a certification (or a sufficient certification) could lead to enforcement action.
- The Commission, after an opportunity for public comment, will have to submit a biennial report to Congress regarding industry's level of compliance with these provisions of the Act that will include information on complaints and Commission action taken. Also, the Government Accountability Office's Inspector General must submit a report to Congress by October 8, 2015 regarding the Commission's compliance with the enforcement provisions of the new legislation. These reports may further serve to prod the FCC's enforcement activities in this area.

#### HAC Enforcement

- The Enforcement Bureau issued 14 Notices of Apparent Liability ("NALs") totaling \$254,000 regarding failure of wireless carriers to offer the required number or percentage of Hearing Aid Compatible handsets, and/or to comply with HAC reporting and website posting requirements. The Bureau followed its prior practice of treating HAC reporting violations as continuing until such reports are filed. It also entered into a \$7,000 Consent Decree.
- In calculating HAC forfeiture amounts regarding failure to offer the required number of HAC handsets, the Bureau begins with a \$15,000 per model base amount, at least for Tier III carriers. In the one prior case involving a Tier II carrier, the Bureau upped the amount to \$40,000. In recent cases (all involving Tier III carriers), it began increasing the amount depending on how long the violations occurred – a 30 percent increase for situations where the carrier was out of compliance for seven or nine months, and a 50 percent increase for an 18-month violation.

#### TRS Enforcement

- The Enforcement Bureau entered into a Consent Decree with a Telecommunications Relay Service ("TRS Fund") provider in which the provider agreed to pay back to the TRS Fund \$18.5 million that the Commission claimed the provider had overbilled (plus, according to the accompanying News Release, an additional \$3.1 million in interest and penalties into the TRS Fund). The company also agreed to make a voluntary contribution of \$550,000 to the U.S. Treasury.

### **Consumer Protection Enforcement**

- The Enforcement Bureau and a major wireless carrier entered into a \$25 million Consent Decree regarding mistaken billing for data usage charges.
  - This is the highest voluntary payment in FCC history. It appears to reflect a stepped-up emphasis by the Commission on consumer protection issues.

- The Consent Decree states that the investigation related to potential violations of Section 201(b) of the Act (which prohibits unjust and unreasonable practices by common carriers) and the Commission’s truth-in-billing rules. The Consent Decree appeared to recognize that questions exist about the Commission’s jurisdiction under these provisions to regulate data usage charges – it did not include a paragraph included in most Consent Decrees in which the parties accept the Commission’s jurisdiction over the matter, and it included special language saying the Consent Decree does not address “the applicability” of these provisions.
- The Consent Decree included a detailed compliance plan regarding training, treatment of consumer complaints, and related matters.
- The Commission issued NALs regarding unsolicited (“junk”) faxes for \$528,000, \$345,000, and \$55,000.
- The Commission issued a \$67,500 NAL regarding pre-recorded telephone solicitation messages.

### **Network Outage Enforcement**

- After entering into several network outage Consent Decrees over the past few years, the Enforcement Bureau issued its first network outage NALs.
- In one NAL, it set base amounts in this area for the first time -- \$40,000 for a late-filed Notification of an outage and \$20,000 for a late-filed Initial Outage Report or Final Outage Report. It then issued a \$60,000 NAL for one late-filed Notification and one late-filed Initial Outage Report.
- In the other NAL, without setting a base amount for such violation, it issued a \$25,000 NAL for filing an allegedly incomplete and inaccurate Final Outage Report.
- The Bureau also entered into a \$67,000 network outage reporting Consent Decree.

### **Sponsorship ID/Payola Enforcement**

- The Enforcement Bureau and Media Bureau entered into a Consent Decree with a radio licensee regarding sponsorship identification and payola issues in the play-for-pay context. The Consent Decree included a \$500,000 voluntary payment (after credit for a related \$500,000 payment to the Department of Justice) and a compliance plan similar to those in prior recent Consent Decrees in this area.
- The Enforcement Bureau entered into a \$21,000 Consent Decree with a television licensee regarding allegations that the station had solicited paying sponsors for promotional segments that were featured in the stations’ news coverage.

### **Indecency Enforcement**

- On remand from the Supreme Court’s decision in the *Fox* case, which had decided that the Commission’s recent, tougher approach to fleeting expletives was not arbitrary and capricious, the U.S. Court of Appeals for the Second Circuit ruled that the Commission’s overall indecency policy, as reflected in its 2001 Policy Statement, is unconstitutionally vague under the First Amendment. The opinion also included dicta regarding the court’s view that the more lenient *Red Lion* First Amendment scrutiny applicable to broadcasters is no longer justified. The Second Circuit subsequently denied the FCC’s request for rehearing en banc in *Fox* and a separate Second Circuit panel applied that decision to vacate an FCC forfeiture involving nudity on “NYPD Blue.”

- Unless and until the Supreme Court reverses the Second Circuit *Fox* remand decision, or the Commission develops a new indecency policy, FCC enforcement of the indecency statute is prohibited, at least within the boundaries of the Second Circuit.

### **Universal Service Enforcement**

- The Department of Justice entered into a civil settlement with a major equipment company regarding alleged E-rate fraud, following an investigation by the FCC and DOJ. As part of the settlement, the company agreed to pay the government \$16.25 million, most of which will be returned to the E-rate program. (The settlement did not include the kind of “voluntary payment” to the Treasury contained in most FCC Consent Decrees.) The settlement also included an extensive compliance agreement to be overseen by the FCC, which the General Counsel approved for the FCC.
- As part of a \$23,500 Consent Decree with the Enforcement Bureau (payable in installments) regarding, among other things, compliance with the rule that USF line-item charges may not exceed the interstate telecommunications portion of the customers’ bills multiplied by the relevant contribution factor, a company agreed to a new type of compliance provision. Specifically, the company must post a notice on its website notifying customers that it may have collected USF charges from them that were higher than the company was required to pay, and indicating that customers could contact the company at its website to the extent they would like the company to check their account. To the extent the company issues refunds to customers or former customers as part of this process and provides sufficient documentation to the Bureau, the amount of the voluntary contribution still due would be reduced by that amount.

### **CPNI Enforcement**

- The Enforcement Bureau entered into a \$200,000 Consent Decree regarding three situations in which a carrier reported failures of the company’s opt-out consent mechanisms regarding CPNI.
- The Enforcement Bureau continues to enter into Consent Decrees with small companies, ranging from a few hundred to a few thousand dollars, relating to violations of the annual CPNI certification rule.

### **Other Notable Actions**

- ***Unauthorized Operation.*** In addition to more routine unauthorized operation/unauthorized transfer of control enforcement actions, the Enforcement Bureau entered into a \$275,000 Consent Decree regarding operation of satellites inconsistent with the relevant authorizations. In another case, involving a large chemical company, the Enforcement Bureau indicated that it might step up enforcement against companies that do not timely renew their private radio licenses.
- ***Local Number Portability.*** The Enforcement Bureau entered into a \$90,000 Consent Decree regarding compliance with the wireless-to-wireless local number portability rules.
- ***Auction Collusion.*** The Enforcement Bureau entered in an \$80,000 Consent Decree regarding the auction collusion rules.
- ***Digital Television.*** The Enforcement Bureau entered into a \$15,000 Consent Decree with a manufacturer of personal computer digital television tuners regarding the requirements that television tuners have the ability to block programs from viewing based on rating and the ability to adapt to new ratings systems. As part of the compliance program, the company agreed to advise customers of corrective software and to make such software available free of charge.

- **Section 1.65.** The Media Bureau issued a \$20,000 NAL against an applicant for a noncommercial FM radio station for failure to update the application to report changes in the principals of the company, as required by Section 1.65 of the Commission's Rules.
- **Illegal Jamming Equipment.** The Enforcement Bureau issued Citations against two Chinese companies for marketing cell phone and GPS jammers through their websites and selling and shipping a jamming device to an Enforcement Bureau agent in the United States.
- **Broadcast EEO.** The Media Bureau issued two broadcast EEO NALs, one for \$20,000 and one for \$10,000.