

FCC ENFORCEMENT UPDATE

July 8, 2015

Commissioner O’Rielly
Speech

This edition summarizes notable new FCC-related enforcement matters during the second quarter of 2015. Questions or comments may be addressed to David H. Solomon at 202-383-3369 or dsolomon@wbklaw.com.

[Commissioner O’Rielly Speech](#)

Open Internet
Enforcement

- Commissioner O’Rielly gave a speech to the Federal Communications Bar Association broadly criticizing the FCC’s current approach to enforcement. Describing FCC enforcement as “sizzle over substance,” and focused on “obtaining newspaper headlines trumpeting accusations and eye-popping fines,” he said that “self-aggrandizing fanfare is a major objective and often appears to be more important than case foundation, correcting the violation or establishing a reasonable deterrent.” He indicated that various troubling trends in enforcement will be “exacerbated” by the Enforcement Bureau’s “new-found policymaking role” and the “clear pattern of enforcement actions being used as a means to stretch and reinterpret the Commission’s rules to expand its authority and ensnare more participants in the communications marketplace.” He cited privacy and data security as prime examples. He also expressed concern about forthcoming enforcement of the new open Internet rules, particularly given the Enforcement Bureau’s “unwillingness . . . to work with and engage the subject matter experts” in the Commission’s policymaking Bureaus.

Cramming

Privacy/CPNI

911 Outage/Network
Outage Reporting Rules

- Such an attack on Commission enforcement is unprecedented in the Enforcement Bureau’s 15 ½-year history and underscores broad concerns about the fairness, legality, and appropriateness of the current enforcement regime.

[Open Internet Enforcement](#)

EAS Tones

Universal Service

Class A Television
Station

- The Commission released a \$100 million Notice of Apparent Liability for Forfeiture (“NAL”) against a nationwide wireless carrier for alleged violations of the 2010 Open Internet transparency rule. The Commission alleged that the carrier violated the rule by “using the misleading and inaccurate term ‘unlimited’ to label a data plan that was in fact subject to prolonged speed reductions after a customer used a set amount of data; and (2) failing to disclose the express speed reductions that it applied to ‘unlimited’ data plan customers once they hit a specified data threshold.” Commissioners Pai and O’Rielly both vigorously dissented.
- This was by far the largest enforcement payment proposed or issued in FCC history; it is nearly triple the previous high, an NAL of \$34.9 million issued last year. The Commission also took the unprecedented step of ordering compliance steps in response to the NAL, although it simultaneously said the carrier need not take those steps at this point if it contests them. The NAL also took the unprecedented step of suggesting the Commission could award damages in a forfeiture proceeding.

Equipment Marketing

- The Enforcement Bureau released an Enforcement Advisory providing guidance regarding how the Enforcement Bureau intends to enforce Section 222 against broadband providers under the *Open Internet Order* prior to adoption of implementing rules. (The *Open Internet Order* declined to forbear from applying Section 222 to broadband Internet access service but temporarily forbore from applying the FCC’s rules implementing that section, i.e., the Customer Proprietary Network Information (“CPNI”) rules, to broadband providers.) The Advisory said the Bureau will focus on whether broadband providers are taking reasonable, good-faith steps to comply with Section 222, rather than on “technical details.” Specifically, the Bureau “intends that broadband providers should employ effective privacy protections in line with their privacy policies and core tenets of basic privacy protections.” The Bureau also invited entities to seek guidance from the Bureau regarding privacy issues through use of the new advisory opinion process. It subsequently released a public notice regarding the availability of advisory opinions more generally.
 - The Section 222 Enforcement Advisory does not appear to provide any meaningful guidance. Moreover, given the limitations/constraints of the new advisory opinion process and the general recent posture of the Enforcement Bureau, it is far from clear that many entities will seek guidance from the Bureau regarding privacy or other open Internet issues.

Cramming

- The FCC Enforcement Bureau, the Consumer Financial Protection Board, and Attorneys General of all 50 states and the District of Columbia entered into “global” settlements with two nationwide wireless carriers to resolve allegations that the carriers charged customers for third-party products and services that they did not authorize (“cramming”).
 - One global settlement had a value of up to \$90 million: (1) up to \$70 million for a consumer redress program; (2) \$16 million to the states; and (3) a \$ 4 million FCC-related fine to the U.S. Treasury.
 - The other global settlement had a value of \$68 million: (1) \$50 million to fund a consumer redress program; (2) \$12 million to the states; and (3) a \$6 million FCC-related fine to the U.S. Treasury.
 - Both global settlements involved various compliance commitments.
 - Last year, the FCC, the FTC, and the states had entered into similar global settlements with the other two nationwide wireless carriers.

Privacy/CPNI

- The Enforcement Bureau entered into a Consent Decree with a major carrier regarding data breaches involving Personal Information (“PI”) and CPNI by employees at call centers operated by contractors. The carrier “does not contest” that its actions violated Section 222(c) of the Act (limitations on access, to use of, and disclosure of, CPNI), Section 64.2010(a) of the Commission’s rules (requirement to take “reasonable measures” to discover and protect against attempts to gain unauthorized access to CPNI), and Section 64.2011(b) of the rules (notification to law enforcement of CPNI breaches). The carrier agreed to pay a \$25 million civil penalty and to implement an extensive compliance plan, a portion of which lasts for seven years, rather than the standard three-year period in FCC Consent Decrees.
 - This was the largest FCC privacy enforcement action, and one of the largest FCC enforcement actions ever. In the accompanying News Release, the Enforcement Bureau Chief encouraged companies to look to the agreement for guidance.

911 Outage/Network Outage Reporting Rules

- The Enforcement Bureau entered into Consent Decrees with two carriers/911 Service Providers in connection with a 911 outage. The Consent Decree referenced Section 4.9 of the Commission's rules (regarding notifications to PSAPs of network outages) and Section 64.3002 of the Commission's rules (requiring carriers to deliver all 911 calls to a PSAP, a designated statewide answering default answering point, or an appropriate local emergency authority). The carriers agreed to pay fines of \$16 million and \$1.4 million, agreed to extensive compliance plans, admitted that the rules required timely notification of the outage to PSAPs and that they did not provide such timely notice, and agreed to compliance plans. The \$16 million fine was the largest FCC enforcement action relating to its 911 or network outage rules. The Bureau had previously entered into a \$3.4 million Consent Decree with another carrier regarding the same outage; the combined payments for the outage thus totaled \$20.8 million.

EAS Tones

- The Enforcement Bureau entered into a Consent Decree with a radio programmer regarding misuse of Emergency Alert System tones. The company admitted liability, agreed to a \$1 million civil penalty, and agreed to a compliance plan. The accompanying press released noted: "In the last six months, the Commission has taken five enforcement actions totaling nearly \$2.5 million for misuse of EAS tones by broadcasters and cable networks." The FCC considers the misuse of EAS tones to be a threat to public safety.

Universal Service

- The Commission entered into two related Consent Decrees of \$6.9 million and \$4 million against a major carrier and a former affiliate regarding violations of the Lifeline de-enrollment, certification, and recordkeeping rules. The companies agreed to pay civil penalties of \$6.9 million and \$4 million, admitted violations, and agreed to compliance plans.
- The Enforcement Bureau entered into a Consent Decree with a reseller regarding violation of USF contribution and various other rules that the company disclosed to the Bureau. The company agreed to pay a civil penalty of \$2 million and admitted violations "as a result of prior legal counsel."
- The Enforcement Bureau released a \$100,000 NAL against a prepaid calling card provider for not registering with the FCC through USAC.
- The Enforcement Bureau entered into a Consent Decree with a wireless carrier that had certified it would unlock phones for its customers enrolled in the Lifeline program but then failed to do so. The carrier committed to provide unlocked phones, which the Bureau estimated had a value in the range of \$80 million. It also agreed to make certain offsets to the Lifeline program of potentially up to \$3.2 million. Notably, unlike most Enforcement Bureau Consent Decrees, this Consent Decree did not include an admission or a payment to the U.S. Treasury.

Class A Television Station

- The Media Bureau entered into a Consent Decree with a Class A television station settling a previously initiated "show cause" proceeding to determine whether to reclassify the station as a low power television station due to it having been off the air as well as resolving public file and FCC filing issues raised in connection with the station's renewal application. The station agreed to make a \$55,000 "voluntary contribution" to the U.S. Treasury, admitted rule violations, and agreed to continue to comply with FCC rules going forward. (The Media Bureau, unlike the Enforcement Bureau, continues to issue some Consent Decrees with payments characterized as "voluntary contributions" rather than "fines" or "civil penalties.") Unlike most Enforcement and Media Bureau Consent Decrees, this Consent Decree did not include a compliance plan.

Equipment Marketing

- The Enforcement Bureau issued an Order to Show Cause why a company's equipment authorization should not be revoked because it sold and marketed a cell phone jammer, at variance with the company's authorization and underlying application.