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FCC ENFORCEMENT UPDATE

This edition summarizes notable FCC-related enforcement matters since mid-April. Questions or comments may be addressed to David H. Solomon at 202-383-3369 or dsolomon@wbklaw.com.

Enforcement Bureau Leadership and Priorities

- Chairman Pai announced that Rosemary Harold will be the new Chief of the Enforcement Bureau. She was most recently a Wilkinson Barker partner. Prior to that she was Legal Advisor to then-Commissioner McDowell and Deputy Chief of the Media Bureau.

  In the accompanying news release, the Chairman said the FCC "has a critical role in enforcing the law to protect consumers and support competition." He referred specifically to illegal robocalls and unlawful interference with broadcast licensees (pirate radio) as enforcement priorities. He also said the Enforcement Bureau has been "getting back on track in recent months" and that enforcement efforts should be "governed by the facts and the law." He said Ms. Harold's experience and expertise will help the FCC "conduct sound investigations and craft legally sustainable enforcement actions." The Chairman also praised the "superb and tireless work" of Acting Bureau Chief Michael Carowitz, who will continue to "help lead" the Bureau as Deputy Bureau Chief.

Caller ID Spoofing/Robocalls

- The Commission released a $120 million Notice of Apparent Liability ("NAL") for violations of the Truth in Caller ID Act and FCC implementing rules, which prohibit knowingly transmitting misleading or inaccurate caller ID information with the intent to defraud, cause harm, or wrongfully obtain anything of value. The individual (and related companies) allegedly made nearly 100 million robocalls in the last quarter of 2016 alone using spoofed caller ID that made the calls appear to originate from local numbers. The robocallers offered holiday vacations and cruises while allegedly falsely claiming to be affiliated with well-known American travel and hospitality companies.

  As Commissioner Clyburn noted, this is the largest NAL in FCC history. The Commission set a base forfeiture amount of $1,000 for each instance of caller ID spoofing. It then multiplied that number by the 80,000 spoofed calls documented by the Commission, for a total base forfeiture of $80 million. It then made a $40 million (50 percent) upward adjustment in light of the egregious number of violations, the egregious nature of the harms, the fact that the individual involved is "highly culpable," and the fact that the individual had previously been the subject of a court injunction for violation of the Telephone Consumer Protection Act's ("TCPA") prohibition on robocalls.

Because of special forfeiture provisions in the Truth in Caller ID Act, the Commission was not required to issue a Citation warning the company about its violations before proceeding to an NAL, as it typically is required to do for entities not generally regulated by the FCC. Concurrently with the NAL, the Enforcement Bureau issued a Citation against the individual for related violations of the TCPA's robocalling prohibition and wire fraud.

In connection with the NAL, the Chairman stated: "This FCC is an active cop on the beat for consumers, and a cop that means business when it [relates] to their top concern; the scourge of robocalls. We plan to put unlawful robocallers out of business and to deter anyone else from hatching a business plan that plunders American consumers' pocketbooks." Commissioner Clyburn stated: "The Commission has an obligation to ensure that all of its rules are robustly enforced, including those that protect consumers against 9-1-1 outages, cramming, slamming, and other core consumer protections." Commissioner O'Rielly concurred without a written statement, indicating orally that he wants "more precise" items from the Enforcement Bureau.

Pirate Radio/Unauthorized Operation

- The Commission released a $404,166 NAL against an individual for apparently operating without authorization on frequencies licensed to the New York City Police Department, maliciously interfering with police communications, and transmitting false distress calls. The Commission tripled the base forfeiture amount of $177,000 to $531,000 based on the egregious nature of the violations and their substantial harm, but lowered the amount to the $404,166 statutory maximum for the 21 apparent violations at issue. The Chairman stated: "For as long as the FCC has existed the agency has had the important mission of preventing radio interference. And within the realm of public safety, the FCC has no higher purpose than promoting secure and reliable public safety and emergency response communications. The Commission must continue to discharge these critical duties – and vigorous prosecution of the fight against unauthorized operators is an important way to do so."

- The Commission issued a $144,344 NAL (the statutory maximum) against two individuals who had been operating a low power television station for approximately 19 years after its license expired through its failure to file a renewal application. The unauthorized operation continued even after the Enforcement Bureau issued a Notice of Unauthorized Operation earlier this year instructing them to cease operations. Commissioner O'Rielly issued a statement that the case "highlights how toothless the Commission's approach to broadcast pirates had become under past leadership." He indicated that "all pirate operators should be put on notice that we can and will turn that situation around," and he called on Congress to revisit and restructure the penalties for pirate broadcasting to assist the Commission as it implements a "reenergized enforcement approach" in that area.

- In two pirate radio cases, the Enforcement Bureau issued an NAL of $20,000 and a Forfeiture Order of $25,000.

Universal Service Fund

- The Commission issued a $975,000 Forfeiture Order against a telecommunications carrier that had failed to make required USF and other contributions. The Commission reduced the penalty amount from the $1.6 million proposed in the NAL based on the company's inability to pay. As a result of the reduction, the Commission explained that it need not address the company's now-moot argument that the Commission had improperly treated the non-payment violations as continuing violations and thus violated the statute of limitations.

- In a rare (and perhaps unique) procedural step, the Commission issued an Amendment to an NAL issued last fall against a telecommunications carrier regarding compliance with the fair and open bidding requirements of the USF Rural Health Care Program. Specifically, the amended NAL changed the underlying legal theory to conform to the theory expressed in then-Commissioner Pai's partial dissent to the NAL. Specifically, the Commission based the NAL on improper invoices submitted by the carrier rather than improper forms submitted by the health care provider. The Amendment to the NAL also increased the proposed forfeiture amount from $21.7 million to $22.4 million.

- As part of a comprehensive report regarding the Lifeline program, the Government Accountability Office ("GAO") found that the FCC has no documented enforcement strategy. GAO concluded that an articulated strategy with a rational method for resource prioritization could help the FCC identify potential problems within the one-year statutory time frame for enforcement actions. In addition, GAO found that a strategy could enhance transparency for enforcement actions. Consequently, GAO recommended that the FCC develop an enforcement strategy that details what violations lead to penalties and apply this as consistently as possible to all Lifeline providers to ensure consistent enforcement of program violations. In formal comments included with the report, the FCC agreed with GAO's recommendation "concerning the importance of a consistent enforcement strategy to maintaining the integrity of the Lifeline program" and said the Enforcement Bureau will "be taking a comprehensive view of Lifeline cases in order to improve consistency in its Lifeline enforcement strategy." In a news release after release of the report, Chairman Pai said: "I stand ready to work with my colleagues to crack down on the unscrupulous providers that abuse the program."

Telephone Consumer Protection

- The GAO report on Lifeline also found that customers may not always be able to identify what line item on their bill accounts for the USF charge. The report recommends that, during USAC's audit process, it assess whether there is a brief, clear, non-misleading, plain-language description of the service or services rendered to accompany each charge. Such USAC audits could be a source for FCC truth-in-billing enforcement actions.

- The Commission released a $1 million Forfeiture Order against a carrier for cramming, slamming, deceptive marketing, and violations of the truth-in-billing rules in connection with improperly switching consumers' long distance carrier. The Commission had originally proposed a $7.6 million forfeiture (in 2013), but reduced it in response to the carrier's inability to pay arguments. The Commission reaffirmed that actual harm or deception is not necessary for a deceptive marketing forfeiture and, more generally, that actual harm is not required for any FCC forfeiture. The Commission also reaffirmed that inability to pay is only one relevant factor in calculating the forfeiture amount; in light of the egregiousness of the misconduct and the substantial harm it found was in fact caused to consumers, the Commission apparently did not lower the forfeiture amount as much as it otherwise would have based solely on the "inability to pay" factor.

Simulated EAS Tones

- The Enforcement Bureau entered into a Consent Decree with a television licensee that had broadcast an advertisement with simulated Emergency Alert System ("EAS") tones four times over three days. The licensee agreed to pay a $55,000 civil penalty, admitted liability, and agreed to a Compliance Plan.

Children's Television

- The Commission entered into a Media Bureau-generated Consent Decree with a Class A television licensee involving, among other things, failure to meet children's educational and informational programming requirements. The licensee agreed to make a $14,750 settlement payment and agreed to a compliance plan that, among other things, requires it to air an average of four (rather than three) hours of children's educational and informational programming on all its stations until Commission action on the next license renewal for the station at issue. (That station will be subject to a two-year, short-term renewal.) The licensee also admitted that it failed to meet the requirements of the children's television rule and numerous other rules.

Other Notable Actions

- **Equipment Enforcement**: The Enforcement Bureau entered into a Consent Decree with a manufacturer of lighting fixtures regarding compliance with Part 15 equipment authorization rules. The company admitted that the fixtures had not been tested and authorized as required, agreed to a $90,000 civil penalty, and agreed to a Compliance Plan.

- **Broadcast Public Inspection File**: The Media Bureau released a $20,000 NAL against a noncommercial television licensee for alleged electronic public file and related violations. It also entered into a Consent Decree with a commercial television licensee regarding public inspection file and late-filed renewal application/unauthorized operation issues; the licensee agreed to make a $20,000 settlement payment, admitted to certain facts, and agreed to a Compliance Plan.

- **False Certifications**: The Media Bureau entered into a Consent Decree with an FM translator radio permittee in which the permittee admitted violations of Section 1.17 of the Commission's rules regarding truthful and accurate statements to the Commission and agreed to pay a $30,000 civil penalty. The Consent Decree did not include a compliance plan.