

January 24, 2017

## FCC ENFORCEMENT UPDATE

Enforcement Under  
Chairman Pai

*This edition first identifies likely upcoming changes in FCC enforcement under new FCC Chairman Ajit Pai and then summarizes notable new FCC-related enforcement matters during the fourth quarter of 2016 and the first three weeks of January 2017 under the Wheeler FCC. Questions or comments may be addressed to David H. Solomon at 202-383-3369 or [dsolomon@wbklaw.com](mailto:dsolomon@wbklaw.com).*

Universal Service

### [Enforcement Under Chairman Pai](#)

Wireless Buildout  
Requirements

- Then-Commissioner Pai (along with Commissioner O’Rielly) was highly critical of the FCC’s enforcement regime during the past three years. It is expected that enforcement will be different under his Chairmanship in numerous significant respects.
- Enforcement likely will focus more on procedural fairness and legal constraints.
- Enforcement actions likely will be more attentive to the statute of limitations and statutory requirements to prove the specifics of alleged violations.
- Enforcement likely will be more judicious and judicial rather than simply prosecutorial.
- Enforcement likely will focus more on blatant and serious violations of clear rules rather than attempting to make new policy through new and aggressive legal interpretations. There likely will be less enforcement in controversial areas where there may be future changes in recently adopted Commission rules, such as open Internet/net neutrality and privacy/data security.
- Enforcement likely will be less partisan and will likely return to its more traditional consensus-oriented approach.
- Based on prior statements, key enforcement priorities may include Lifeline (and other Universal Service Fund-related) fraud and abuse, fraud on consumer by clearly “bad actors,” basic tenets of the Telephone Consumer Protection Act, rural call completion, and spectrum-related issues such as pirate broadcast radio.

Open Internet  
Transparency Rule

Negative Option Billing

Slamming/Cramming

Broadcast Renewals

Cable Program Carriage

Broadcast Political File

Other Notable Actions

### [Universal Service](#)

- The Commission released a \$49.58 million Notice of Apparent Liability for Forfeiture (“NAL”) against a carrier and its principal regarding the High-Cost Program. The NAL – adopted unanimously – alleged that the carrier received more than \$27 million in improper payments from the High-Cost Program due to various violations relating to accounting rules and methods, and the submission and certification of inaccurate data. The News Release stated that this was the Commission’s first enforcement action regarding the high-cost program. In a separate order, the Commission required the carrier to refund to the Universal Service Administrative Fund the \$27+ million in improper payments.
- The Commission released a \$21.69 million NAL against a carrier and its principal regarding the Rural Health Care Program. The NAL alleged that the carrier violated the program’s competitive bidding rules, used forged and faked documents to seek funding from the program, and engaged in wire fraud. The Commission ordered the carrier to submit a report explaining why the Commission should not hold all disbursements and payments to it and initiate proceedings to revoke its authorizations. Commissioners Pai and O’Rielly each dissented in part. Commission Pai noted that almost all of the violations occurred outside the one-year statute of limitations for a forfeiture, and criticized (as he has in the past), the Commission’s theory that a violation relating to an inaccurate form continues for statute of limitations purposes until the violation is cured. (He also pointed out that here, the relevant forms, which were filed by health care providers, not the

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carrier, would have needed to have been corrected by the providers.) The News Release stated that this was the Commission's first enforcement action regarding the Rural Health Care Program and wire fraud.

- The Enforcement Bureau and the U.S. Attorney's Office for the Southern District of New York entered into a "Global Settlement" regarding Lifeline fraud investigations. The Commission had previously issued a \$51 million NAL. The carrier agreed to a \$30 million settlement that included forgoing \$7.46 million in withheld Lifeline distributions, with the remainder going to the U.S. Treasury and the "relator" in a qui tam False Claims Act lawsuit that had been filed by an employee of one of the carrier's affiliates. The carrier also admitted liability and agreed to a permanent ban on participation in the Lifeline program.
- The Commission released a \$392,930 NAL against a carrier for various unrelated violations; \$120,000 of the proposed penalty covered imposing a USF surcharge on customers for a period when the company had no USF contribution obligations. The accompanying News Release stated that this was the first such consumer over-collection enforcement action (although there was a Consent Decree in 2009 that included an over-collection issue). The remainder of the NAL covered four unauthorized transfers of control (\$32,000) and failure fully to pay FCC regulatory fees (\$240,930; trebled from the amount owed).
- The Enforcement Bureau released a \$100,000 NAL for a long-distance resale carrier's failure to file a USF worksheet and unauthorized transfer of its customer base.

## [Wireless Buildout Requirements](#)

- The Enforcement Bureau entered into a Consent Decree with a licensee of 39 GHz and 28 GHz spectrum settling issues regarding non-compliance with the Commission's buildout requirements. The licensee agreed to (1) turn in certain licenses; (2) pay (in installments) a civil penalty of \$15 million; and (3) either sell the remainder of its licenses, turn them in, or pay an additional \$85 million penalty. In the event of a sale of the remainder of the licenses, the Consent Decree requires that 20 percent of the proceeds be paid to the Treasury.

## [Open Internet Transparency Rule](#)

- The Enforcement Bureau entered into a Consent Decree with a nationwide wireless carrier regarding whether, under the 2010 Open Internet Transparency Rule, the carrier had adequately disclosed a de-prioritization policy that could result in slower speeds during times and places of high overall usage. The company agreed to: (1) pay a civil penalty of \$7.5 million; (2) provide certain consumer benefits (accessory discounts and tablet data) and establish a program to help bridge the "homework gap," together valued at \$40.5 million; and (3) implement a compliance plan to update its open Internet disclosures, notify customers when they are likely to exceed the thresholds that could lead to reduced speeds, use the Commission-developed "Consumer Broadband Label" on its website's Open Internet disclosures page, and either ensure that its advertisements and marketing for "unlimited" plans include material restrictions on the amount and speed of mobile data or make certain other changes to its policies. The company did not admit liability. (In 2015, the FCC had previously issued a \$100 million NAL against another nationwide wireless carrier for an alleged violation of the same rule; the company's response to the NAL remains pending.)

## [Negative Option Billing](#)

- The Enforcement Bureau entered into a Consent Decree with a major cable operator regarding the cable "negative option billing" prohibition in the Communications Act and FCC rules. In both the Consent Decree and the accompanying order, the Bureau took the position that the cable negative option billing prohibition is the equivalent of the prohibition against "cramming" by common carriers. The Bureau described the negative option billing prohibition as a "per se prohibition on a cable operator's billing cable subscribers for any services or equipment that they did not affirmatively request." The Consent Decree reflects the cable operator's disagreement with the Bureau's interpretation and includes a footnote stating that the "Consent Decree does not purport to resolve the Parties' differing interpretations" of the law. The company agreed to pay a \$2.3 million civil penalty, which the Bureau described in the accompanying news release as the highest penalty ever against a cable operator, and also agreed to a five-year compliance plan regarding various ordering and billing processes. The company did not admit liability.

## Slamming/Cramming

- The Enforcement Bureau entered into a Consent Decree regarding slamming and cramming. The carrier agreed to pay a \$4.2 million civil penalty, to refund at least \$1.9 million to consumers, and to implement a five-year compliance plan. The carrier did not admit liability.
- The Enforcement Bureau entered into a Consent Decree settling a \$5.9 million Commission-level NAL regarding slamming and unauthorized transfer of control. The carrier admitted liability, agreed to a three-year compliance plan, and agreed to pay a \$240,000 civil penalty in installment payments and, if it defaulted on any payments, to pay the full \$5.9 million proposed in the NAL.

## Broadcast Renewals

- In a Media Bureau-generated order, the Commission designated for hearing before an administrative law judge the 2005 and 2013 renewal applications of an FM radio station based on a 2007 contest held by the station in which a participant died from drinking too much water. The Commission indicated that the facts and circumstances surrounding the contest raise “serious questions” as to whether the licensee operated the station in the public interest.
- On the same day, the Media Bureau entered into a Consent Decree granting short-term renewal to a licensee that admitted to filing numerous applications over the past 30 years using pseudonyms and a variety of addresses, including fake addresses, to hide his involvement in the applications and engaging in related rule violations. The licensee also agreed to cancel certain other licenses and pay a civil penalty of \$100,000. The Bureau indicated that it did not issue a hearing designation order because “[d]ue to a variety of factors, including the number of factual issues and the passage of time (with intervening deaths of certain persons who were named as principals of some of the applicants), a hearing would be lengthy and complex and would require a significant commitment of Commission resources.”

## Cable Program Carriage

- The Commission’s Chief Administrative Law Judge granted a complaint by a programmer that a major cable operator had discriminated against it in violation of the cable program carriage provisions of the Communications Act and FCC rules. The ALJ required the cable operator to restore the network at issue to the expanded basic tier from a sports tier to which it had been moved. The ALJ also ordered a forfeiture of \$400,000, the maximum permissible amount.

## Broadcast Political File

- The Enforcement Bureau entered into a Consent Decree with a Class A television licensee regarding compliance with the political file rule. The broadcaster admitted liability, agreed to implement a compliance plan, and agreed to pay a \$32,000 civil penalty. The Media Bureau also admonished 10 television stations for political file violations, while at the same time “clarifying” that additional materials must be included prospectively. Commissioners Pai and O’Rielly criticized the Media Bureau for issuing the decision on delegated authority and said the decision would need to be revisited in the new administration.

## Other Notable Actions

- **Unauthorized Operation:** The Enforcement Bureau entered into a Consent Decree with a private land mobile radio licensee regarding unauthorized operation due to failure to file renewal applications and unauthorized transfer of control. The licensee agreed to pay a \$60,000 civil penalty, agreed to a compliance plan, and admitted liability. The Enforcement Bureau also entered into a Consent Decree regarding fixed broadband operation by a licensee on unauthorized frequencies in the 3.5 GHz Band. The licensee admitted liability, agreed to pay a \$28,000 civil penalty, and agreed to a compliance plan. The Enforcement Bureau also released six NALs against pirate radio broadcasters, ranging from \$15,000 to \$25,000.

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- **Children’s Television Programming:** The Commission entered into a Consent Decree with a television station regarding noncompliance with the requirement to have children’s educational and informational programming on supplemental digital programming streams. The company admitted liability and agreed to pay a \$29,000 “settlement payment.” The Consent Decree, which was generated through a renewal application proceeding before the Media Bureau, did not include a compliance plan.
- **Antennas:** The Enforcement Bureau issued a \$25,000 NAL against an AM station regarding compliance with requirements for cleaning, painting, and lighting towers.
- **Misrepresentation:** Based on the fact that a private land mobile radio licensee had incorrectly represented to the Commission on 50 occasions that no party controlling the company had ever been convicted of a felony, the Wireless Telecommunications Bureau designated pending modification and renewal applications for hearing, issued an order to show cause to revoke the licenses, and issued a notice of opportunity for hearing to consider whether a forfeiture should be imposed.
- **Inflationary Adjustments in Forfeiture Amounts:** The Enforcement Bureau made minor inflationary adjustments for 2017 to the maximum statutory limits, pursuant to the 2015 Inflation Adjustment Act, which requires such annual adjustments. The new amounts for the most commonly applied categories are: (1) for common carriers, \$389,305 per violation or per day of a continuing violation up to \$3,593,585 for a continuing violation (increased from \$383,038/\$3,535,740); (2) for broadcasters (other than indecency) and cable operators, \$48,114/\$481,147 (increased from \$47,340/\$473,402) ; and (3) for “others,” \$19,246/\$144,344 (increased from \$18,936/\$142,021). The maximum amount for a single, non-continuing broadcast indecency violation is now \$389,305. The Enforcement Bureau’s delegated authority remains limited to NALs and Forfeiture Orders in the amount of \$100,000 for common carriers and \$25,000 for non-common carriers.
- **District Court Statute of Limitations:** A District Judge for the Eastern District of New York agreed with the majority of the circuit courts of appeals that have addressed the issue and held that the five-year statute of limitations for FCC forfeiture collection actions runs from the date of the Commission’s Forfeiture Order, not the date of the alleged violation.