

FCC ENFORCEMENT UPDATE

January 9, 2012

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

[Consumer Protection Enforcement](#)

- **Misleading Marketing**: The Commission issued five Notices of Apparent Liability ("NALs") proposing forfeitures of \$5 million each against pre-paid calling companies. The NALs alleged misleading and deceptive marketing of pre-paid calling cards in violation of the "just and reasonable" practices requirement of section 201(b) of the Act. The Enforcement Bureau also issued an Enforcement Advisory on the subject.
- **Telephone Consumer Protection Act**: The Commission issued a \$2.96 million NAL for the delivery of unsolicited, pre-recorded messages to cell phones or residential telephone lines – the statutory maximum for the 185 violations at issue. It also issued a \$252,000 NAL regarding unsolicited ("junk") faxes.
- **Do-Not-Call List**: The Enforcement Bureau entered into a \$400,000 consent decree with a wireless carrier regarding compliance with company-specific do-not-call rules.

[Disabilities Enforcement](#)

- **HAC Enforcement**: The Enforcement Bureau issued 14 NALs ranging from \$15,000 to \$100,000 against mostly small wireless carriers for violation of the Hearing Aid Compatibility ("HAC") rules. The Bureau compared each carrier's annual HAC reports to the Office of Engineering and Technology Equipment Authorization System to determine whether the carrier offered the requisite number or percentage of HAC phones. Notably, it appears that, in the HAC context, the Bureau is no longer routinely sending a pre-NAL Letter of Inquiry to the carrier but is now proceeding directly to an NAL in the first instance. Thus, companies whose annual HAC reports reflect apparent violations may receive an NAL without any warning. The Bureau also issued HAC consent decrees of \$35,000 and \$13,000. (In addition, the Bureau rescinded numerous NALs and Citations that had been issued last year regarding HAC posting and reporting violations prior to publication in the Federal Register that the Office of Management and Budget had approved the rules under the Paperwork Reduction Act.)
- **VRS Enforcement**: The Enforcement Bureau issued 24 Citations against entities that were unlawfully providing Video Relay Service ("VRS").

[Universal Service Enforcement](#)

- The Enforcement Bureau issued an NAL totaling approximately \$960,000 against two related companies for non-payment into the Universal Service Fund and related issues.

[Network Outage Reporting Enforcement](#)

- The Enforcement Bureau entered into a \$150,000 consent decree to settle a pending network outage reporting investigation. It also entered into a \$50,000 consent decree settling an earlier \$55,000 NAL.

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Other Potential “Hot” Enforcement Areas

- Open Internet Rules: The Open Internet rules became effective November 20, 2011. This could become an area of active FCC enforcement.
- Lifeline Service Eligibility: The Enforcement Bureau issued an Enforcement Advisory reminding Eligible Telecommunications Carriers (“ETCs”) offering Lifeline service of their obligation to confirm consumers’ eligibility and to avoid providing duplicative service. The Bureau referred to pending “active” investigations and warned that “stiff penalties” could result from violations, potentially including revocation of ETC status or of carriers’ section 214 authorizations.
- Form 477 Broadband Reports: The Enforcement Bureau issued an Enforcement Advisory regarding Form 477 broadband reports that must be filed every six months by (1) facilities-based providers of broadband connections to end user locations, (2) providers of wired or fixed wireless local exchange telephone service, (3) providers of interconnected Voice over Internet Protocol (“VoIP”) service, and (4) providers of mobile telephony service. The Bureau listed problems it has identified in this area and warned of enforcement action for non-compliance.
- CableCARDS: The Enforcement Bureau issued an Enforcement Advisory reminding cable operators of their obligations under recently revised CableCARD rules, and reiterating the Commission’s statement that it will “strictly enforce” these rules.
- Children’s Television Commercial Limits: The Government Accountability Office recommended that the FCC develop and implement a strategy for overseeing compliance by cable operators and satellite providers with the advertising limits in the Children’s Television Act. In response, the FCC may devote more attention to compliance by those entities.
- Advanced Communications Services Accessibility Rules: The FCC adopted sweeping new rules to expand the accessibility of advanced communications services (“ACS”) to persons with disabilities. The new rules cover such products and services as interconnected VoIP service, non-interconnected VoIP service, electronic messaging service, interoperable video conferencing service, and equipment used for ACS, such as general purpose hardware with included software that provides users with access to ACS. The new rules include a variety of recordkeeping requirements (expected to take effect within the next month) that will apply to manufacturers and service providers subject to the new ACS rules and to existing section 255 accessibility rules. The new rules also require an annual certification of compliance with the recordkeeping requirements, the first of which must be filed on April 1, 2013, and the FCC is likely to review the filings for potential enforcement action. More generally with respect to enforcement, in addition to the availability of FCC-initiated investigations, the Commission established processes for both informal and formal complaints regarding the new ACS rules and existing section 255 accessibility rules; such complaints will be handled by the Enforcement Bureau. Informal complaints will be adjudicated within 180 days, as required by statute. In addition, the new rules provide for an informal dispute resolution process handled by the Consumer and Governmental Affairs Bureau. A request for such informal dispute resolution is a requirement prior to filing an informal complaint, but not prior to filing a formal complaint.

Other Notable Actions

- Indecency: Following remand by the Supreme Court in light of the Supreme Court’s first *Fox* “fleeting expletives” opinion, the Third Circuit reversed for a second time the Commission’s decision to impose a forfeiture on CBS stations for broadcast of the Janet Jackson/Super Bowl “wardrobe malfunction.” It again found that the Commission had arbitrarily and capriciously departed from its prior “fleeting material” policy without admitting such a change, and that a forfeiture could thus not be imposed.

On January 10, 2012, the Supreme Court will hold oral argument on First Amendment challenges to the Commission's indecency policy raised in the *Fox* fleeting expletives case and the "NYPD Blue" nudity case.

- **Broadcast EEO:** The Media Bureau issued NALs of \$14,000 and \$8,000 (and imposed reporting requirements as part of renewal grants) for violations of the broadcast EEO recruitment rules. The NALs underscore that Internet-only recruitment is not sufficient. At an EEO "Best Practices" workshop, staff reported that the Media Bureau has issued broadcast EEO NALs every year since 2005, for a total of 21 NALs against 75 stations, totaling more than \$250,000. The staff also indicated that more NALs will be forthcoming.
- **Traffic Pumping:** The Commission issued another section 208 formal complaint order finding a "traffic pumping" (or "access stimulation") tariff unjust and unreasonable under section 201 of the Communications Act, and denied reconsideration of that and a prior such order. The D.C. Circuit upheld the Commission's grant of an earlier traffic pumping complaint.
- **Jamming Devices:** The Enforcement Bureau issued an omnibus Citation against 20 online retailers for marketing a total of 215 unlawful cellular, GPS and other jamming devices. The Bureau directed each online retailer to take steps to cease marketing signal jamming devices to U.S. consumers and ordered each online retailer to provide information about their signal jammer suppliers, distribution channels, and sales, as well as the corrective actions they had taken or will take to comply with the law. It subsequently issued one additional Citation.
- **Unauthorized Operation and Unauthorized Transfer of Control:** In addition to numerous actions involving lesser amounts, the Enforcement Bureau (1) entered into a \$150,000 consent decree with a large international metal and minerals company regarding a variety of instances of unauthorized transfer of control of private radio licenses and unauthorized operation of private radio stations, (2) entered into a \$100,000 consent decree regarding failure to obtain a required international section 214 authorization, and (3) issued a \$100,000 NAL also regarding failure to obtain a required international section 214 authorization.
- **Cable Program Access Complaints:** The Media Bureau granted two related program access complaints regarding access to Regional Sports Network programming, which the Commission affirmed on review three months later.
- **Cable Program Carriage Complaint:** The Chief Administrative Law Judge granted a cable program carriage complaint.
- **Broadcast Shared Services Agreements:** The Media Bureau denied a complaint that a particular shared services agreement (which did not involve or require an application) constituted an unauthorized transfer of control or violated the Commission's duopoly rule. The Media Bureau indicated, however, that its decision "does not preclude us from considering in the context of licensing proceedings whether the actions taken by the licensees in this case, or analogous actions by other licensees, are consistent with the public interest." In particular, it noted that "consideration of the impact such agreements have on competition and diversity may be relevant to determining whether license renewal for one or either of the stations that are subject to the transaction would be consistent with the public interest...."