Communications July 2014

# FCC Enforcement Monitor

By Scott R. Flick and Carly A. Deckelboim

*Headlines:*

- *Multi-Year Cramming Scheme Results in $1.6 Million Fine*
- *Violation of Retransmission Consent Rules Leads to $2.25 Million Fine*
- *$25,000 Fine for Failure to Respond to FCC*

## Continued Cramming Practices Lead to Double the Base Fine

The FCC recently issued a Notice of Apparent Liability for Forfeiture ("NAL") against a Florida telephone company for "cramming" customers by billing them for unauthorized charges and fees related to long distance telephone service.

The FCC had received more than 100 customer complaints against the company. The complaints alleged that the company had continued to bill the customers and charge them late fees after they had paid their final bills and canceled their service with the company. The FCC opened an investigation in response to the complaints and issued a Letter of Inquiry ("LOI") to the company in July 2011, but the company did not submit a timely response. The FCC issued an NAL in 2011 proposing a $25,000 fine against the company for its failure to reply to the LOI, and ultimately issued a Forfeiture Order fining the company $25,000.

Section 201(b) of the Communications Act of 1934 (the "Act") requires that that "[a]ll charges . . . in connection with . . . communication service shall be just and reasonable." Prior decisions of the FCC have determined that placing unauthorized charges and fees on consumers' phone bills is an "unjust and unreasonable" practice and is therefore unlawful.

The NAL provides information from 11 customer complaints detailing instances where customers attempted to cancel their service and continued to be charged late fees and other fees by the company. The FCC determined that the phone company did not have authorization to continue billing these customers after they canceled their service.

Although the FCC's Forfeiture Guidelines do not provide a base fine for cramming, the FCC has settled on $40,000 as the base fine for a cramming violation. The NAL addressed 20 cramming violations, which would create a base fine of $800,000. However, the FCC determined that an upward adjustment of the fine was appropriate in this case because the unlawful cramming practices had been occurring since 2011, the company did not respond to the 2011 LOI, and there was a high volume of customers who received cramming charges. Therefore, the FCC increased the proposed fine by $800,000, resulting in a total proposed fine of twice the base amount, or $1.6 million.

## Cable Operator's Retransmission of Six Texas TV Stations Results in Multi-Million Dollar Fine

Earlier this month, the FCC issued an order against a cable operator for rebroadcasting the signals of six full-power televisions stations in Texas in violation of the FCC's retransmission consent rules.

The cable operator serves more than 10,000 subscribers in the Houston Designated Market Area ("DMA") in 245 multiple-dwelling-unit buildings and previously had retransmission consent agreements with the stations. However, those agreements expired in December 2011 and March 2012. The cable operator continued retransmitting the signals of those stations without extending or renewing the retransmission consent agreements, and the licensees notified the cable operator that its continued retransmissions were illegal. Subsequently, each licensee filed a complaint with the FCC.

In its May 2012 response to the complaints, the cable operator did not deny that it had retransmitted the stations without the licensee's express written consent, but said that it had relied on the master antenna television ("MATV") exception to the retransmission consent requirement. The cable operator noted that it had begun converting its buildings to MATV systems in November 2011 and had hoped to complete the installations before the retransmission agreements expired in December 2011, but did not complete the MATV installation until July 26, 2012.

In December 2012, the FCC's Media Bureau sent a letter to the cable operator indicating that the operator's actions violated both the FCC's Rules and the Act. After receiving the FCC's letter, the cable operator assigned its cable operation and fiber optic network to two affiliated companies and continued to retransmit the cable signals. The FCC issued an NAL against the cable operator in June of 2013, proposing a fine of $2,250,000.

The NAL noted that the cable operator had violated Section 325 of the Act and Section 76.64 of the FCC's Rules. Section 325 obligates cable systems to obtain "the express authority of the originating station" to retransmit a TV station's signal, and this requirement is codified in Section 76.64 of the FCC's Rules, which also requires that retransmission consent agreements be in writing and that they "specify the extent of the consent being granted." One exception to the retransmission consent requirements applies to MATV facilities. The FCC has likened the MATV exception to "an individual purchasing and installing a roof top antenna to receive broadcast signals." The base fine for violating these rules is $7,500 for each violation, up to a maximum of $37,500 for each violation (or each day) where the violator is a cable operator.

The cable operator asserted in its response to the NAL that (1) it completed MATV installation on all buildings by March 31, 2012 and (2) there had not been any ongoing violations of the FCC's Rules since installation of the MATV system. The FCC rejected the first argument, noting the ample documentation in the record indicating the cable operator had previously disavowed March 2012 as being the completion date of the MATV installation. The FCC noted that Section 76.64(e) does not provide an exception for merely planning or beginning conversion to a MATV system, and that the cable operator's violations were (1) willful, because it consciously and deliberately retransmitted the stations without written retransmission consent agreements in place, and (2) repeated, because the retransmissions occurred for more than one day.

The FCC also found that "the mere presence of off-air antennas at an MDU does not satisfy the narrow requirements of the exception in Section 76.64(e)," as the TV stations' signals were still being retransmitted from the cable operator's off-site headend facility.

The cable operator requested a reduction in the proposed fine for five reasons, all of which the FCC rejected. First, the FCC rejected the claim of an earlier MATV facility completion date based on sworn representations the cable operator had previously made to the FCC. Second, the FCC rejected the cable operator's argument that it had not benefited financially, noting the cable operator obtained a substantial financial benefit by not paying retransmission consent fees and not reducing the price of its cable services. Third, the FCC rejected the cable operator's argument that prior good behavior justified a reduction in the proposed fine, finding that the intentional and repeated nature of the violations, and the high degree of culpability, outweighed the history of no prior offenses. Fourth, the FCC rejected the cable operator's inability to pay claim because the cable operator had not submitted sufficient documentation of its financial condition. Finally, the FCC rejected the argument that the proposed penalty was not in accordance with prior precedent.

In addition to the $2.25 million fine, the FCC directed the cable operator to submit a written statement no later than 30 calendar days from the release date of the Forfeiture Order certifying that it was in compliance with the retransmission consent rules.

## Robocalling Company Receives $25,000 Fine for Not Providing Requested Information to the FCC

The Enforcement Bureau released an NAL against a robocalling company proposing a $25,000 fine for the company's repeated failure to reply to FCC communications.

The FCC is investigating whether the company violated its robocalling rules, which prohibit using artificial or prerecorded voice messages to call cell phones unless the customer has consented or there is an emergency. In March of last year, the Telecommunications Consumers Division (the "Division") of the FCC sent an LOI to the company and ordered it to provide certain information and documents. About one month later, the Division spoke to the company's president on the phone, who said that his lawyer would handle the company's response to the LOI and would contact the Division. Shortly thereafter, the company's attorney requested an extension of time to respond to the LOI. The Enforcement Bureau noted in the NAL that the company's eventual LOI Response was "materially deficient" because it did not provide information about the time frame the LOI requested. One week after receiving the deficient LOI Response, the Division contacted the company's lawyer to notify him of the problem, and the attorney never responded. Subsequently, neither the attorney nor the company responded to the Division's repeated attempts to contact them.

In October of last year, the Division issued a Citation to the company for failure to comply with an FCC order and warned that each day the company failed to respond would be a continuing violation. The company was given one month, until November 2013, to respond to the Citation. Three days after the deadline the Division had set, the company submitted a written response to the Citation saying only that "[t]he Company stands by its . . . written response and documents provided to the FCC in response to the FCC's [LOI]."

The Enforcement Bureau noted in the NAL that failure to respond to an LOI is a violation of a Commission order for purposes of enforcement action, and the Citation had provided actual notice that failure to respond to the LOI was an actionable violation of a Commission order. The base forfeiture amount for failure to respond to FCC communications is $4,000. However, the Enforcement Bureau pointed out that it has issued fines in excess of the base amount for egregious behavior. Because the company here had ignored multiple communications from the Division and repeatedly failed to respond adequately, the Enforcement Bureau proposed a fine of $25,000 and ordered the company to fully respond to the LOI within 10 calendar days.

---

If you have any questions about the content of this Advisory, please contact the Pillsbury attorney with whom you regularly work, or the authors of this Advisory.

Scott R. Flick (bio)
Washington DC
+1.202.663.8167
scott.flick@pillsburylaw.com

Carly A. Deckelboim (bio)
Washington, DC
+1.202.663.8006
carly.deckelboim@pillsburylaw.com