Advisory

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Communications

March 2015

FCC Enforcement Monitor

By Scott R. Flick and Jessica Nyman

Headlines:

- *Deceptive Practices Yield Multi-Million Dollar Fines for Telephone Interexchange Carriers*
- *LPFM Ads Cost $16,000*
- *Multiple TV Station Licensees Face $6,000 Fines for Failing to File Children's TV Programming Reports*

Interexchange Carriers' "Slamming" and "Cramming" Violations Yield Over $16 Million in Fines

Earlier this month, the FCC imposed a $7.62 million fine against one interexchange carrier and proposed a $9 million fine against another for changing the carriers of consumers without their authorization, commonly known as "slamming," and placing unauthorized charges for service on consumers' telephone bills, a practice known as "cramming." Both companies also fabricated audio recordings and submitted the recordings to the FCC, consumers, and state regulatory officials as "proof" that consumers had authorized the companies to switch their long distance carrier and charge them for service when in fact the consumers had never spoken to the companies or agreed to the service.

Section 258 of the Communications Act and Section 64.1120 of the FCC's Rules make it unlawful for any telecommunications service carrier to submit or execute a change in a subscriber's selection of telephone exchange service or telecommunications service provider except with prior authorization from the consumer and in accordance with the FCC's verification procedures. Additionally, Section 201(b) of the Communications Act requires that "all charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communications service [by wire or radio], shall be just and reasonable." The FCC has found that any assessment of unauthorized charges on a telephone bill for a telecommunications service is an "unjust and unreasonable" practice under Section 201(b), regardless of whether the "crammed" charge is placed on consumers' local telephone bills by a third party or by the customer's carrier.

Further, the submission of false and misleading evidence to the FCC violates Section 1.17 of the FCC's Rules, which states that no person shall "provide material factual information that is incorrect or omit material information . . . without a reasonable basis for believing that any such material factual statement is correct and not misleading." The FCC has also held that a company's fabrication of audio recordings associated with its "customers" to make it appear as if the consumers had authorized the company to be their preferred carrier, and thus charge it for service, is a deceptive and fraudulent practice that violates Section 201(b)'s "just and reasonable" mandate.

In the cases at issue, the companies failed to obtain authorization from consumers to switch their carriers and subsequently placed unauthorized charges on consumers' bills. The FCC found that instead of obtaining the appropriate authorization or even attempting to follow the required verification procedures, the companies created false audio recordings to mislead consumers and regulatory officials into believing that they had received the appropriate authorizations. One consumer who called to investigate suspect charges on her bill was told that her husband authorized them—but her husband had been dead for seven years. Another person was told that her father—who lives on another continent—requested the change in service provider. Other consumers' "verifications" were given in Spanish even though they did not speak Spanish on the phone and therefore would not have completed any such verification in Spanish. With respect to one of the companies, the FCC remarked that "there was no evidence in the record to show that [the company] had completed a single authentic verification recording for any of the complainants."

The FCC's forfeiture guidelines permit the FCC to impose a base fine of $40,000 for "slamming" violations and FCC case law has established a base fine of $40,000 for "cramming" violations as well. Finding that each unlawful request to change service providers and each unauthorized charge constituted a separate and distinct violation, the FCC calculated a base fine of $3.24 million for one company and $4 million for the other. Taking into account the repeated and egregious nature of the violations, the FCC found that significant upward adjustments were warranted—resulting in a $7.62 million fine for the first company and a proposed $9 million fine for the second.

Investigation Into Commercials Aired on LPFM Station Ends With $16,000 Civil Penalty

Late last month, the FCC entered into a consent decree with the licensee of a West Virginia low power FM radio station to terminate an investigation into whether the licensee violated the FCC's underwriting laws by broadcasting announcements promoting the products, services, or businesses of its financial contributors.

LPFM stations, as noncommercial broadcasters, are allowed to broadcast announcements that identify and thank their sponsors, but Section 399b(b)(2) of the Communications Act and Sections 73.801 and 73.503(d) of the FCC's Rules prohibit such stations from broadcasting advertisements. The FCC has explained that the rules are intended to protect the public's use and enjoyment of commercial-free broadcasts in spectrum that is reserved for noncommercial broadcasters that benefit from reduced regulatory fees.

The FCC had received multiple complaints alleging that from August 2010 to October 2010, the licensee's station broadcast advertisements in violation of the FCC's noncommercial underwriting rules. Accordingly, the FCC sent a letter of inquiry to the licensee. In its response, the licensee admitted that the broadcasts violated the FCC's underwriting rules. The licensee subsequently agreed to pay a civil penalty of $16,000, an amount the FCC indicated reflected the licensee's successful showing of financial hardship. In addition, the licensee agreed to implement a three-year compliance plan, including annual reporting requirements, to ensure no future violations of the FCC's underwriting rules by the station will occur.

Failure to "Think of the Children" Leads to $6,000 Fines

Three TV licensees are facing $6,000 fines for failing to timely file with the FCC their Form 398 Children's Television Programming Reports. Section 73.3526 of the FCC's Rules requires each commercial broadcast licensee to maintain a public inspection file containing specific information related to station operations. Subsection 73.3526(e)(11)(iii) requires a commercial licensee to prepare and place in its public inspection file a Children's Television Programming Report on FCC Form 398 for each calendar quarter. The report sets forth the efforts the station made during that quarter and has planned for the next quarter to serve the educational and informational needs of children. Licensees are required to file the reports with the FCC and place them in their public files by the tenth day of the month following the quarter, and to publicize the existence and location of those reports.

This month, the FCC took enforcement action against two TV licensees in California and one TV licensee in Ohio for Form 398 filing violations. The first California licensee failed to timely file its reports for two quarters, the second California licensee failed to file its reports for five quarters, and the Ohio licensee failed to file its reports for eight quarters. Each licensee also failed to report these violations in its license renewal application, as required under Section 73.3514(a) of the Rules. Additionally, the Ohio licensee failed to timely file its license renewal application (in violation of Section 73.3539(a) of the Rules), engaged in unauthorized operation of its station after its authorization expired (in violation of Section 301 of the Communications Act), and failed to timely file its biennial ownership reports (in violation of Section 73.3615(a) of the Rules).

Despite the variation in the scope of the violations, each licensee now faces an identical $6,000 fine. The FCC originally contemplated a $16,000 fine against the Ohio licensee, as its guidelines specify a base forfeiture of $10,000 for unauthorized operation alone. However, after assessing the licensee's gross revenue over the past three years, the FCC determined that a reduction of $10,000 was appropriate, resulting in the third $6,000 fine.

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

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

Jessica Nyman (bio)
Washington DC
+1.202.663.8810
jessica.nyman@pillsburylaw.com

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