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FCC Enforcement Monitor March 2021

By Scott R. Flick and Simone A. Wood

HEADLINES

Pillsbury's communications lawyers have published FCC Enforcement Monitor monthly since 1999 to inform our clients of notable FCC enforcement actions against FCC license holders and others. This month's issue includes:

- *Texas-Based Telemarketers Fined Record $225 Million for Robocall Campaign*
- *Georgia AM License Renewal Designated for Hearing Over Extended Periods of Silence*
- *Public File Violations Lead to Consent Decree for Arkansas Noncommercial FM Station*

FCC Issues Record Fine of $225 Million Against Texas-Based Telemarketers for Illegal Robocalls

The FCC recently issued a $225 million fine, the largest in its history, against a Texas company and its owners for transmitting approximately one billion robocalls, many of which were illegally spoofed.

The Truth in Caller ID Act, codified at Section 227(e) of the Communications Act of 1934, and Section 64.1604 of the FCC's Rules, prohibits using a caller ID service to "knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value"—a practice known as "spoofing." Additionally, the Telephone Consumer Protection Act (TCPA), and the FCC's implementing rules, prohibit prerecorded voice messages to wireless telephone numbers absent the subscriber's express consent unless the call is for an emergency purpose.

In September 2018, a telecommunications industry trade group provided information to the FCC's Enforcement Bureau regarding millions of robocalls that had been transmitted over its members' networks. The trade group estimated that 23.6 million health insurance robocalls crossed the network of the four largest wireless carriers each day and that many, possibly all, of those robocalls contained false caller ID information. In response, the Bureau began an investigation to determine the origin of the spoofed robocalls.

The FCC found that many of the calls included false or misleading information about the identity of the caller and that the Texas company made the spoofed calls on behalf of its health care industry clients. The pre-recorded messages at issue claimed to offer health insurance from well-known health insurance providers such as Aetna, Blue Cross Blue Shield, Cigna, and UnitedHealth Group, yet the FCC found no evidence that the company had any connection with these providers. Part of the FCC's findings were based upon recorded conversations between the owners, which included numerous discussions of the company's robocalling operations, from a roughly three-month period when one of the owners was incarcerated for an unrelated matter.

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Between January and May 2019, the company made more than one billion robocalls to American and Canadian consumers on behalf of its clients, a portion of which the Enforcement Bureau reviewed and confirmed were spoofed. The trade group followed up with the company directly multiple times in 2019 to notify the owners that the robocalls appeared to violate prohibitions against unsolicited telemarketing calls and malicious spoofing. In response, one of the company owners admitted to making millions of robocalls daily and even admitted to making calls to numbers registered to the Do Not Call Registry in an effort to increase sales. Although the company informed the trade group that it ceased spoofing caller ID information in September 2019, the robocalls continued.

In June 2020, the FCC issued a Notice of Apparent Liability (NAL), proposing a $225 million fine against the company for violating the Communications Act and the FCC's rules by spoofing caller ID information with the intent to cause harm and wrongfully obtain something of value. The company responded to the NAL, claiming that: (1) it did not itself initiate any calls because it was acting as a technology consultant for its client's calling campaigns; (2) it had only a limited role in the robocall campaigns, did not draft the messages, and believed that it had consent and therefore did not intend to defraud, cause harm, or wrongfully obtain anything of value; (3) the NAL impermissibly lumped the owners and the company (and its affiliates) together rather than attributing wrongful conduct to each party; (4) the owners cannot be held personally liable; and (5) the FCC failed to consider the company's inability to pay and lack of any prior violations.

The FCC considered but was ultimately not persuaded by any of the company's arguments. In issuing the $225 million fine, the FCC noted that, among other things, the company did not contest that it spoofed more than 500 million calls and thus knowingly caused the display of inaccurate caller ID information. While the company argued that it had only a limited role in initiating these calls, as it was acting in accordance with its client's wishes, the FCC found that, even if the company was acting at a client's request, it still knowingly agreed to display the inaccurate information. The FCC also found that the company acted with wrongful intent by executing a telemarketing campaign in which call recipients were deceived by offers of health insurance from well-known providers. Because the calls were spoofed, consumers could not identify the caller or easily choose to ignore or block the call and therefore the FCC concluded that the company employed spoofing in furtherance of the fraudulent scheme.

With respect to the owners' personal liability, the FCC's analysis of the company's corporate structure and the public policy implications of broadly shielding individuals from liability for evading legal obligations led the FCC to conclude that it was necessary to hold the owners liable for their actions as officers of the company. The FCC also distinguished this case from past decisions supporting reductions of proposed fines, noting that the decisions cited by the company did not involve spoofing. Finally, the FCC noted that the company failed to provide the financial information required to support a claim of inability to pay.

The $225 million fine must now be paid within 30 days following release of the Order. The FCC noted that if it is not paid within that time, the matter may be referred to the U.S. Department of Justice for enforcement.

Extended Periods of Silence Lead to Hearing Designation Order for Georgia AM Station

The Media Bureau has designated for hearing the license renewal application of a Georgia AM station based on the station's extended periods of silence during the most recent license term.

Under Section 312(g) of the Communications Act of 1934, a station's license automatically expires if the station "fails to transmit broadcast signals for any consecutive 12-month period." Where silent stations resume operations for only a short-period of time before the one-year limit passes, the FCC has cautioned that such stations will face a "very heavy burden in demonstrating that [they have] served the public interest," noting that extended periods of silence are an inefficient use of the nation's limited broadcast spectrum.

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Section 309(k)(1) of the Communications Act provides that in determining whether to grant a license renewal application, the FCC must consider whether, in the previous license term, the licensee: (1) served the public interest; (2) has not committed any serious violations of the Act or of the FCC's rules; and (3) has not committed other violations that, taken together, would constitute a pattern of abuse. If the licensee falls short of this standard, the FCC can either grant the renewal application with conditions, including an abbreviated license term, or deny it after a hearing to more closely examine the station's performance.

The licensee acquired the AM station in January 2018, and the station was mostly silent or operating at unauthorized power levels following that date. Given the station's silent status for most of its license term, the FCC designated the renewal application for hearing to determine whether the station's license should be renewed. In the Hearing Designation Order, the FCC detailed the station's operational history from acquisition through the end of its license term on April 1, 2020. According to the Order, the station operated for 270 days in 2017, for 16 days in 2018, and for just two days in 2020. According to the FCC, even when the station was operating, for an unknown period of time it was operating at 50% of authorized power without obtaining authority from the FCC to do so.

Unlike FCC hearings historically, which were handled as trial-like proceedings before an Administrative Law Judge, recent changes to the FCC's rules now permit the FCC to designate matters for hearing proceedings that rely solely on written submissions and which will ultimately be decided based on the written record developed. In this proceeding, the licensee will bear the burden of proving that the station has served the public interest and that the license renewal application should be granted.

Arkansas FM Station Enters Into Consent Decree Over Public Inspection File Violations

The FCC's Media Bureau entered into a Consent Decree with the licensee of an Arkansas FM station to resolve an investigation into the station's failure to comply with its Public Inspection File obligations. This action is one of several recently released relating to Public File violations identified in the FCC's review of station license renewal applications. With the Public Inspection File now online, it is easy for both the FCC and third parties to verify the timeliness and sufficiency of documents uploaded.

Section 73.3527 of the FCC's Rules requires noncommercial stations to maintain a Public Inspection File containing documentation related to the station's operations and service to its community of license. These include Quarterly Issues/Programs lists, which detail the programs aired during the preceding quarter that provided the most significant treatment of local community issues.

When the licensee filed its license renewal application in February 2020, it disclosed that the station had failed to upload required documents to the Public Inspection File throughout the license term. The licensee admitted that the all-volunteer station staff was not aware of the station's Public File obligations until preparing the license renewal application, and only then began working to upload the missing documents.

While the licensee acknowledged the station's failure to comply, it asked that its recent efforts to reconstruct the Public File be taken into consideration in the FCC's review of the renewal application. In response to the licensee's disclosure, the Media Bureau suspended processing of the renewal application and commenced an investigation into the violations.

To resolve the investigation, the licensee entered into a Consent Decree with the Media Bureau in which it admitted to repeated violations of the FCC's rules and agreed to implement a compliance plan to prevent future violations. Citing the "exceptional circumstances" facing the radio industry and the "unique situation" presented with regard to this particular matter, the Media Bureau declined to include a financial penalty in the Consent Decree, instead limiting the Consent Decree to compliance and reporting requirements for the station going forward.

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