

FCC Enforcement Monitor

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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:

- *Louisiana FM Radio Stations' Late Filings Lead to \$3,000 Proposed Fines*
- *Telemarketer Fined \$9.9 Million for Thousands of Spoofed Robocalls*
- *Wi-Fi Device Manufacturer's Equipment Marketing Violations End with Consent Decree and \$250,000 Penalty*

Late Filings Come at a Cost: FCC Proposes \$3,000 Fines Against Louisiana FM Stations Over Late License Renewal Applications

Earlier this month, the Media Bureau issued Notices of Apparent Liability for Forfeiture (NAL) against two Louisiana FM radio licensees – one a supermax prison and the other a religious noncommercial broadcaster – for filing their respective license renewal applications late. The FCC proposed a \$3,000 fine for each of the late filings.

Section 73.3539(a) of the FCC's Rules requires broadcast station license renewal applications to be filed four months prior to the license expiration date. The prison station's renewal application was due February 3, 2020 (the first business day following the February 1 deadline), but was not filed until May 29, 2020, mere days before its June 1 license expiration. Similarly, the noncommercial broadcaster's station, also subject to the February 3 deadline, did not file its renewal application until May 22.

Section 1.80(b) sets a base fine of \$3,000 for failure to file a required form, which the FCC can adjust upward or downward depending on the circumstances of the situation, such as the nature, extent, and gravity of the violation. In these cases, the FCC noted that neither licensee provided an explanation for their untimely filing, and ultimately proposed the full \$3,000 fine for each late application.

Each NAL instructs the licensee to respond within 30 days by either: (1) paying the fine, or (2) providing a written statement seeking a reduction or cancellation of the fine along with any relevant supporting documentation.

Neither NAL, however, impacted the FCC's review of the stations' license renewal applications themselves. According to the FCC, the late filings did not constitute "serious violations" and the FCC found no other evidence of a pattern of abuse. As such, the Commission stated that it would approve each station's renewal application in a separate proceeding assuming no other issues are uncovered that would preclude grant of a license renewal.

Thousands of Spoofed Political Robocalls End with \$9.9 Million Fine

The FCC recently issued a Forfeiture Order, affirming a \$9.9 million fine against a California telemarketer for violations of the Communications Act and the FCC's rules regarding the use of spoofed phone numbers.

Section 227(e) of the Communications Act prohibits using a telephone 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[.]” Moreover, the Telephone Consumer Protection Act (TCPA) also protects consumers from unwanted calls by imposing numerous restrictions on robocalls. Such restrictions include requiring the called party's prior express consent for certain pre-recorded calls to wireless phones and, for pre-recorded messages to wireless or wireline phones, requiring the calling party to identify itself at the beginning of the message and provide a callback number.

In the midst of a contentious primary election campaign, thousands of San Diego County residents received a pre-recorded robocall from a falsified phone number alleging that one of the candidates was involved in a sexual assault. The California Secretary of State immediately submitted a complaint to the FCC's Enforcement Bureau. The Enforcement Bureau's investigation revealed that a California telemarketer was paid to make 47,610 pre-recorded calls on behalf of a client over two days and intentionally set the calls to transmit the caller ID information of a business rival. Of the 47,610 calls made, 11,000 were pre-recorded messages to wireless phones made without consent, and all 47,610 calls failed to disclose the identity of the calling party and instead only stated that the message was “paid for by Jennifer Jones” (which the telemarketer admitted was a pseudonym). Perhaps unsurprisingly, the offending telemarketer had been embroiled in several TCPA-related lawsuits in the past, including multiple complaints he previously filed against the same business rival.

Following its investigation, the FCC released an NAL in December 2019 proposing a \$9.9 million fine against the telemarketer for his apparent spoofing of caller ID information with intent to cause harm and to wrongfully obtain something of value. In his response, the telemarketer argued that the NAL should be rescinded because the political content of the calls exempted him from liability under the TCPA and FCC rules. Additionally, while admitting to intentionally making spoofed calls using the other company's phone number, he claimed that he did not intend to cause harm because when he tried calling the number, he was directed to voicemail, and therefore assumed the number was out of service. The telemarketer made several other claims, including that the call recipients had in fact consented to receiving political robocalls when they registered to vote, that he did not intend to cause harm to the recipients, and that he did not intend to wrongfully obtain anything of value.

The FCC was not persuaded. With respect to the intentional spoofing allegations, the FCC noted that the operative issue is whether the telemarketer had permission to use the phone number, which he did not, regardless of whether the number was in still in use. The FCC also found that his actions violated the TCPA by failing to provide the required identifying information in the pre-recorded messages and failing to obtain the necessary prior express consent. In response to the telemarketer's argument that voter registration constituted consent under the TCPA, the FCC explained that the mere act of registering to vote does not create express consent to receive unwanted calls and specifically noted that the registration forms themselves did not support this claim. Further, by accepting compensation for his unlawful robocalling campaign, the FCC concluded that the telemarketer intended to wrongfully obtain something of value in violation of the Communications Act. The FCC also found that the telemarketer had indeed intended to cause harm, citing use of his rival's phone number as evidence of an intent to cause reputational damage, and the failure to include identifying information in the pre-recorded messages as evidence of an intent to cause consumer harm.

Lastly, in terms of the substance of the pre-recorded message, the telemarketer argued that he was unaware at the time that the sexual assault allegations against the candidate had been dismissed, and challenged what he considered to be an effort to regulate the content of political speech. The FCC rejected these arguments and emphasized that the content of the message was irrelevant.

Of the 47,610 spoofed calls, the FCC identified 5,713 calls made to wireless phones that displayed an unauthorized phone number. The base fine amount is \$1,000 for each of the 5,713 calls. Considering the extent and severity of the telemarketer's actions, the Commission applied an upward adjustment of 75% for a total fine of approximately \$9.9 million.

Wi-Fi Device Manufacturer Pays \$250,000 for Equipment Marketing Violations

The Enforcement Bureau entered into a Consent Decree with a major wireless device manufacturer to resolve an investigation into the marketing of Wi-Fi access point devices that violated the FCC's equipment marketing rules.

Section 302 of the Communications Act limits the manufacture, import, sale, or shipment of devices capable of causing harmful interference to radio communications that fail to adhere to FCC rules designed to prevent such interference. Section 2.803(b) of the FCC's Rules requires devices that emit radiofrequency (RF) energy, such as mobile phones, to comply with the Commission's **equipment authorization procedures** before being marketed or sold in the United States. These devices must adhere to frequency restrictions and power and emissions limits to prevent interference to other authorized wireless operations.

In response to a complaint alleging that multiple models of the manufacturer's Wi-Fi access points violated the Commission's rules, staff from the FCC's Office of Engineering and Technology tested the devices and confirmed that three Wi-Fi access point models contained software errors that allowed the devices to exceed the emissions limits and frequency parameters prescribed by FCC rules. Two of the three models were also capable of exceeding the emissions levels specified in their respective equipment certifications in violation of the Commission's rules.

The FCC's Spectrum Enforcement Division followed up with a Letter of Inquiry in April 2019 directing the manufacturer to submit a sworn statement responding to questions regarding its marketing practices for the relevant devices. The following month, the manufacturer responded by acknowledging that it had marketed Wi-Fi access points capable of operating outside authorized parameters, and noted that it had conducted a firmware update for all devices operating in the U.S. to resolve the power and emissions issues identified (albeit two days before submitting its response). After confirming the devices had been properly modified to comply with the FCC's rules, the Enforcement Bureau entered into a Consent Decree with the manufacturer to address the violations.

Under the terms of the Consent Decree, the manufacturer must pay a \$250,000 penalty and implement a three-year compliance plan designed to prevent future violations.