

FCC Enforcement Monitor January 2021

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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:

- *Idaho Man Behind Racist Robocall Campaigns Fined \$9.9 Million for Thousands of Illegally Spoofed Robocalls*
- *FCC Affirms \$233,000 Fine Against Large Radio Group for Sponsorship ID Violations*
- *FCC Proposes a Combined \$47 Million in Fines Against EBS Licensees for Failure to Meet Now-Defunct Educational Requirements*

Scammer Hit With \$9.9 Million Fine for Thousands of Illegally Spoofed Calls

The FCC recently issued a \$9.9 million fine against an Idaho man behind a controversial media company linked to various racist and anti-Semitic robocall campaigns across the country. The man caused thousands of robocalls to display misleading or inaccurate caller ID information—a practice known as “spoofing.”

The Truth in Caller ID Act, codified at Section 227(e) of the Communications Act and Section 64.1604 of the FCC's Rules, prohibits the use of a caller ID service to transmit or display misleading caller ID information with the intent to knowingly cause harm or wrongfully obtain something of value.

During the summer and fall of 2018, individuals across the country received thousands of robocalls targeting several contested political campaigns and controversial local news events. In August 2018, for example, Iowa residents received 837 prerecorded messages referring to the arrest of an undocumented immigrant from Mexico charged with the murder of a University of Iowa student. More than 1,000 residents in Georgia and Florida received calls making racist attacks against the gubernatorial candidates running in those states. In response to complaints received about the robocalls, the FCC traced 6,455 spoofed calls to the Idaho man and his media company after identifying the dialing platform he used to make the calls. By matching the platform's call records with news coverage of the calling campaigns, the Enforcement Bureau identified six specific robocall campaigns in California, Florida, Georgia, Iowa, Idaho and Virginia. Using the platform, the man selected phone numbers that matched the locality of the call recipients to falsely suggest that the calls were local.

In January 2020, the FCC issued a Notice of Apparent Liability (NAL), proposing a \$12.9 million fine against the man for violating the Communications Act and the FCC's Rules by spoofing caller ID information with the intent to cause harm or wrongfully obtain something of value. In response, the man called for cancellation of the NAL, claiming that: (1) the FCC failed to establish the identity of the caller and prove that the caller was the same person that caused the display of inaccurate caller ID information; (2) some of the caller IDs used were either assigned to him or were non-working numbers and therefore there was no intent to cause harm; (3) the spoofing of unassigned numbers and content of the messages themselves were forms of political speech protected by the First Amendment; (4) the FCC could not verify that each of the 6,455 calls contained the pre-recorded messages at issue; (5) the NAL failed to establish any intent to cause harm to the call recipients; (6) the "wrongfully obtain something of value" factor should only apply to criminal wrongdoing or telemarketing; and (7) the FCC failed to issue a citation before adopting the NAL in accordance with its rules.

The FCC considered and rejected most of these arguments. In reviewing the dialing platform's records, the Commission verified that the calls originated from his account and that there was no evidence to support his claim that someone else had selected the call numbers. Further, although he denied involvement in selecting the caller ID numbers, the man noted that several of the numbers contained patterns that signify neo-Nazi ideology, which the FCC used to support its finding that the Idaho man knowingly chose the numbers at issue. And despite what the man referred to as the "well established" and "recognized" meanings behind the numbers, the FCC concluded that the use of such numbers did not constitute protected speech because it was not clear the meaning was understood by the call recipients as required by the First Amendment.

The FCC also addressed how it verified the spoofed calls, noting that it relied on the same methodology used in prior spoofing enforcement actions where a sample of all calls made were reviewed, identical statements were confirmed in the recordings, and wrongful intent was identified. Regarding the argument that enforcement should only apply to criminal conduct or telemarketing, the FCC concluded that the use of local numbers to deceive call recipients demonstrated the man's intent to cause harm and wrongfully obtain something of value in the form of avoiding liability and promoting his personal brand.

Finally, the FCC noted that neither the Truth in Caller ID Act nor the Commission's rules require issuance of a citation prior to an NAL.

The Idaho man did, however, successfully demonstrate that one of the caller ID numbers displayed was not spoofed. The FCC found that a May 2018 robocall campaign targeting California residents displayed a contact number that was assigned to the man and was therefore not spoofed. As a result, the FCC affirmed its original fine but reduced it by \$2.9 million to account for the calls that were not spoofed. The \$9.9 million fine must now be paid within 30 calendar days after release of the Order.

FCC Affirms \$233,000 Fine Against Large Radio Group for Sponsorship ID Violations

The FCC issued a \$233,000 fine against a national radio group for violating the Commission's Sponsorship Identification rule and the terms of a 2016 Consent Decree by failing to timely notify the FCC of the violations.

Under the Communications Act and the FCC's rules, broadcast stations must identify on-air any sponsored content, as well as the name of the sponsoring entity, whenever "money, service, or other valuable consideration" is paid or promised to the station for the broadcast. According to the FCC, identifying sponsors ensures that listeners know who is trying to persuade them, and prevents misleading information from being conveyed without attribution of the source.

As we covered in detail [here](#), in August 2019, the FCC issued an NAL against the radio group, proposing a \$233,000 fine for apparent violations of the sponsorship identification rule. The actions at issue in the NAL date back to a 2016 Consent Decree between the radio group and the Enforcement Bureau. The Consent Decree resolved the Bureau's investigation into a New Hampshire FM station for airing 178 ads promoting a utility project over a 6-month period that had failed to properly disclose the company sponsoring the ads. Toward the end of the ad run, the station was acquired by the national radio group.

The terms of the Consent Decree required the new owner to, among other things, report future Sponsorship Identification rule violations by any of its stations within 15 calendar days following discovery of a violation. Despite this directive, in January 2018, the group disclosed a non-compliant ad that had aired thirteen times on several of its Michigan stations seven months prior. An additional May 2018 disclosure revealed a non-compliant ad that aired nine times on a Georgia station. Following these disclosures, the FCC issued an NAL for the violations of both the Consent Decree and the Sponsorship Identification rule.

In September 2019, the radio group responded, arguing for a reduction or rescission of the proposed fine. In particular, the radio group noted that several of the violations cited in the NAL, as well as its entry into the Consent Decree, occurred prior to the radio group's 2018 bankruptcy and reorganization and should therefore not be attributed to the current company. The radio group also questioned the FCC's analysis of the case law cited, and argued that it did not support an upward adjustment or the overall fine proposed.

The FCC ultimately dismissed each of these arguments. The Commission rejected the claim that it had erred in its consideration of past violations and disputed the notion that the company is a drastically different organization following its 2018 bankruptcy reorganization, noting that the core management team and legal counsel remained unchanged. The FCC also concluded that it was appropriate to consider other types of past rule violations when calculating fine adjustments, and that the radio group's cited caselaw regarding upward adjustments was inapplicable, as those cases did not involve sponsorship identification violations. Finally, the FCC determined that the separate fine for the Consent Decree violations was justified, emphasizing that it has broad discretion to issue fines on a case-by-case basis and that there is an expectation that parties will honor agreements with the Commission.

The fine, which includes \$208,000 for the sponsorship identification violations and \$25,000 for violating the Consent Decree, must be paid within 30 days after release of the Order.

EBS Licensees Face a Combined \$47.5 Million in Proposed Fines for Failure to Satisfy Educational Requirements

The FCC recently issued NALs against ten entities, proposing a combined \$47.5 million in fines, for failure to satisfy the educational requirements of their Educational Broadband Service licenses.

The Educational Broadband Service (EBS) is a band of spectrum first allocated for educational purposes in 1963 to "further the educational mission of accredited public and private schools, colleges and universities" through video, data or voice services. To promote this educational purpose, the FCC required EBS licensees to satisfy a unique set of regulatory obligations, including the establishment of a Local Program Committee in each community where the licensee does not have a presence to ensure local programming needs are considered, and where the licensee leases out excess spectrum, requires the licensee to reserve a minimum of 5% of spectrum capacity and provide at least 20 hours of educational use per channel per week.

Over the past few years, however, the FCC has made [significant changes](#) to its EBS rules by giving licensees greater flexibility in how they use the spectrum, including eliminating the educational use requirements and permitting more direct licensing of [EBS spectrum to commercial entities](#).

All ten NALs involved the minimum educational use and Local Program Committee requirements in effect for EBS at the time of the apparent violations. One such case involved a Virginia non-profit organization whose mission is centered on providing educational resources to children and parents. While educationally focused, the non-profit also distributes hardware such as tablets and modems to educational institutions to facilitate access to the services offered over its licensed spectrum. Overall, the non-profit held 22 EBS licenses, 21 of which were leased to the subsidiaries and affiliates of a national wireless carrier.

On July 11, 2019, the same day the FCC voted to eliminate the EBS eligibility requirements, Commissioner Brendan Carr sent the non-profit a letter requesting information on its prior compliance with those requirements, which was followed only a few weeks later by a Letter of Inquiry from the Enforcement Bureau seeking information about the non-profit's licenses going back to 2009. In its response, the non-profit noted that its spectrum lease agreements during that time included a provision requiring the licensee to reserve a minimum channel capacity consistent with the FCC's Rules, though the provision did not expressly mention the 5% threshold or the 20-hour educational use requirement. Instead, the organization asserted that the hardware it provides is intended to be used for research, school administration, and other in-classroom uses, and that it does not dictate how schools utilize this equipment or its data service. The NAL noted that the non-profit had ceased providing broadband service and equipment to several sites, and for sites where it had maintained service, the non-profit was unable to produce usage documentation. Additionally, in response to questions about Local Program Committees, the non-profit conceded that while committees must have been formed in the relevant communities, it lacked documentation to demonstrate that.

The FCC concluded that the lack of documentation regarding educational use at the institutions aside from the mere distribution of hardware failed to demonstrate compliance with the 20-hour requirement. Regarding the Local Program Committee, the FCC interpreted the organization's lack of evidence during the relevant period to be an "apparent failure to comply" with the rule.

Due to a one-year statute of limitations for such violations, the Bureau limited its review to apparent violations occurring between December 9, 2019 and April 27, 2020 (when the educational use requirements were eliminated). The FCC proposed a base fine of \$8,000 for the 20-hour educational programming requirement violation for each of the 21 leased licenses, multiplied by the 19 weeks between December 2019 and April 2020, and added \$7,000 for the failure to maintain a Local Program Committee for each of the 22 EBS licenses held, for a combined \$3.3 million proposed fine. The organization now has thirty days from the release of the NAL to either pay the fine in full or file a written statement seeking a reduction or cancellation of the fine.