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FCC Enforcement Monitor April 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:

- *FCC Fines Long-Distance Carrier $4.1 Million Over Cramming and Slamming Violations*
- *Wireless Internet Service Provider's Unauthorized Operations Lead to Consent Decree*
- *Mississippi and Michigan Radio Station Licensees Admonished for Late License Renewal Filings*

Long Distance Carrier Receives $4.1 Million Fine for Deceptive Billing and Service Practices Targeting Vulnerable Populations

The FCC fined a long-distance telephone service provider $4.1 million for deceptive practices involving switching customers from their preferred interexchange carrier (the company handling a caller's long-distance calls) without their permission, a practice known as "slamming," and adding unauthorized charges to customers' telephone service bills, a practice referred to as "cramming." This far-reaching scam employed tactics targeting vulnerable customers, including senior citizens and individuals with severe health conditions. To make matters worse, when the fraudulent charges went unpaid, a number of these customers had their phone service disconnected. Given the age and health of many of the affected individuals, losing phone service was not just an inconvenience, but a health and safety risk.

Section 201(b) of the Communications Act of 1934 (the Communications Act) generally protects consumers from unjust and unreasonable practices by telecommunications providers, which the FCC has found to include misrepresentations about a carrier's identity or service intended to persuade customers to change their long-distance carrier. The FCC has also found that placing unauthorized charges on a customer's telephone bill constitutes a prohibited "unjust and unreasonable" practice under the Communications Act. Additionally, Section 258 of the Communications Act and Section 64.112 of the FCC's Rules prohibit telecommunications carriers from changing a subscriber's telephone exchange provider without prior authorization from the customer, which must be done in accordance with the FCC's verification requirements.

To make the FCC's enforcement efforts more effective and efficient, Section 1.17(a) of its Rules prohibits parties from providing false or misleading information to the Commission. The FCC has found that even absent an intent to deceive, false or misleading statements may still violate its rules if provided without a reasonable basis to believe the statement is true.

In 2017, the FCC noted that a significant number of consumer complaints regarding this long-distance carrier had been received by the Commission, state regulatory agencies, the Federal Trade Commission, and the Better Business Bureau. The complaints alleged that the carrier switched their—or in many cases their older relatives'—long distance carrier without authorization or charged them for services they did not request. Many complaints stated that the carrier's telemarketers misrepresented themselves by claiming affiliation with the customer's telecommunications service provider. Others stated that the carrier offered a nonexistent discount on the consumer's existing phone service or discussed a fraudulent government assistance program for low-income individuals and senior citizens that it falsely claimed could lower their cost of service. According to many of the complaints, the "slamming" and "cramming" left many elderly and vulnerable customers unable to contact caregivers due to disconnected service. For example, one complaint filed on behalf of a 94-year-old woman emphasized that, beyond the harmful financial impact, the "slamming" and "cramming," and subsequent termination of telephone service, had created a broader safety issue.

In April 2018, the FCC issued a Notice of Apparent Liability (NAL) proposing a $5.3 million fine for these actions. The NAL alleged that the carrier violated the Communications Act and FCC rules by changing the selected carrier of 24 customers without complying with the required verification procedures and placed 21 unauthorized charges on customer bills. The NAL also alleged that the carrier failed to respond fully to the FCC's letter of inquiry and submitted false information in the form of fraudulent third-party verifications.

In response, the carrier denied the slamming, cramming, misrepresentation, and altered third-party verification claims, and challenged the validity of the evidence relied upon by the FCC. The carrier also argued that the FCC had exceeded its authority, violated the carrier's due process rights, and proposed an unlawful fine amount. Finally, the carrier urged reduction of the proposed fine based on its inability to pay such an amount. The FCC considered the carrier's arguments but largely reaffirmed the conclusions set forth in the earlier NAL. It did, however, decline to find that the carrier violated Section 1.17(a) of the Commission's Rules regarding the third-party verifications submitted. The carrier had argued that it maintained an arms-length relationship with its third-party verification provider, with no opportunity to alter or falsify recordings, and therefore had a reasonable basis for believing the recordings provided were authentic. Although the FCC expressed doubts regarding the validity of the recordings, it concluded that the carrier had a reasonable basis for believing the recordings were legitimate.

Because of this finding, the FCC reduced the fine from the originally-proposed $5.3 million to $4.1 million. The carrier now has 30 days from release of the Order to pay the fine. If it is not paid within that time period, the FCC noted it may refer the matter to the Department of Justice to enforce collection.

FCC Enters Consent Decree with Wireless Internet Service Provider Over Interference to FAA Systems

The FCC entered into a Consent Decree with a wireless internet service provider, concluding an investigation into the operation of unauthorized devices causing harmful interference to a Federal Aviation Administration (FAA) weather radar system.

Section 301 of the Communications Act prohibits the use or operation of any device that transmits radio signals, communications, or energy without an FCC license. There is an exception to this general licensing requirement under Part 15 of the FCC's Rules whereby certain low power devices that comply with established technical parameters to limit interference may operate without a license. In particular, the FCC has set aside spectrum in the 5 GHz band for unlicensed use by Unlicensed National Information Infrastructure (U-NII) devices, commonly used for Wi-Fi and broadband internet access. To avoid harmful interference to other nearby authorized services, the Part 15 rules require unlicensed U-NII devices to incorporate "Dynamic Frequency Selection" capability, which enables such devices to detect nearby radiofrequency devices and avoid operating on frequencies that could create interference to those devices.

As we discussed **here**, in May 2018, the FCC issued an initial warning to the wireless internet service provider regarding U-NII devices causing interference to a nearby doppler radar station. In response, the provider assured the FCC that all of its devices were operating in compliance with Commission rules. A year later, however, the FCC received a report from the FAA that the same radar station was experiencing interference from a source operating on a nearby frequency in the 5 GHz band. In June 2019, the FCC Enforcement Bureau began investigating the interference claims and identified two U-NII devices operated by the wireless internet service provider without Dynamic Frequency Selection capabilities enabled. Following this discovery, the Bureau instructed the provider to modify the U-NII devices to operate on a different frequency, which immediately resolved the interference. In May 2020, the Bureau issued an NAL to the wireless provider, proposing a $25,000 fine for violations of the Part 15 rules.

In response to the NAL, the wireless internet service provider admitted that in June 2019, it was in fact operating U-NII devices in violation of the FCC's rules, but corrected the device configurations immediately upon discovery of the issue. The provider also informed the FCC that it had since implemented a policy to verify on a monthly basis that all of its devices are operating on the correct frequency. Additionally, in an effort to obtain a reduction of the proposed $25,000 fine, the company submitted financial documentation demonstrating its inability to pay the proposed fine amount.

To resolve the investigation, the Bureau entered into a Consent Decree under which the company (1) admitted, for purposes of the Consent Decree, that it violated the FCC's rules governing U-NII devices; (2) agreed to pay a reduced $11,000 penalty; and (3) agreed to implement a compliance plan to prevent future violations.

Mississippi and Michigan Radio Stations Avoid Fines, But Receive Admonishments for Failing to Timely File Their License Renewal Applications

The FCC recently canceled proposed fines against the licensees of a Michigan FM station and FM and AM stations in Mississippi for late license renewal application filings and instead admonished the stations for the violations.

Section 73.3539(a) of the FCC's rules requires that license renewal applications be filed four months prior to the license expiration date. The Michigan station's license renewal application was due June 1, 2020, but was not filed until September 29, 2020, while the Mississippi stations' applications were due February 3, 2020, but were not filed until May 20, 2020.

Under Section 1.80(b) of the FCC's Rules, the Commission sets a base fine amount of $3,000 for failure to timely file a required form, which may be adjusted upward or downward based on consideration of the "circumstances, extent and gravity of the violation." Absent an explanation from the Mississippi stations regarding the late filings, the FCC last month proposed the full $6,000 fine ($3,000 for each late-filed application). In response, the licensee argued that it was not aware of the filing deadline and therefore did not intentionally violate Section 73.3539(a) of the FCC's Rules. The licensee also submitted federal tax returns in support of a request to cancel the proposed fine based upon an inability to pay such an amount.

The FCC responded that licensees are responsible for complying with the Commission's rules, and even violations resulting from inadvertent errors or a lack of familiarity with the Commission's rules are still considered willful violations. The FCC did, however, accept the licensee's financial hardship showing and did not issue the proposed $6,000 fine. The Commission instead admonished the station for willful violations of its rules.

With regard to the Michigan FM station, the FCC proposed a $3,000 fine against the Michigan School District to which the station is licensed. In response, the School District explained that due to restrictions associated with COVID-19, the employees did not have access to the station, which is located in inside a school, from March 12, 2020 to June 24, 2020. The licensee further noted that it mistakenly believed the license renewal application was due on July 1, rather than June 1, 2020, and thought it had timely filed a renewal application on June 29, 2020.

To complicate matters further, it turned out the licensee was mistaken in its belief that it had filed on June 29. According to the licensee, it was not until several months later when it received an inquiry from the FCC's Media Bureau regarding the failure to file that it discovered the application had been prepared, but not correctly filed, in the FCC's filing system on June 29.

While the FCC noted the licensee was incorrect in its understanding of the relevant deadline, it did find that the licensee was unable to file by June 1 due to the COVID-19-related school closure. The FCC also verified in the Commission's licensing database that the licensee prepared a draft application dated June 29, 2020 that was never filed. In light of the circumstances, the FCC found that, although the station's failure to file before the June 1 deadline was due to its inability to access the station, the subsequent failure to file resulted from a misunderstanding of the Commission's electronic filing procedures. The FCC emphasized that such inadvertent errors still constitute willful violations of the Commission's Rules. Weighing the circumstances, however, the FCC cancelled the $3,000 fine, and admonished the station for failing to comply with the Commission's rules.