

# FCC Enforcement Monitor September 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 Proposes Largest Robocalling Fine Under TCPA*
- *Tennessee Broadcaster Fined for Failing to File License Applications for FM Translators*
- *FCC Fines Rhode Island Broadcaster for Late-Filed License Renewal Application*

### **FCC Proposes \$5 Million Robocalling Fine in First Case Under TRACED Act's TCPA Revisions**

The FCC proposed to fine two individuals and a Virginia lobbying firm over \$5.13M for apparently making 1,141 illegal robocalls to wireless numbers without the subscribers' prior express consent. This is the largest Telephone Consumer Protection Act (TCPA) robocall fine ever proposed by the FCC.

The TCPA and Section 64.1200(a)(1)(iii) of the FCC's Rules prohibit prerecorded voice calls to wireless telephone numbers unless there is an emergency or the subscriber has given prior express consent to receive the call. Additionally, the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act) allows the FCC to issue a Notice of Apparent Liability for Forfeiture (NAL) for violations of Section 227(b) of the Communications Act (the "Act") without first issuing a warning citation. Due to Congress's recent amendment of the TCPA, this is the first time the FCC has been able to proceed directly to a proposed fine against a robocaller.

In September 2020, the FCC began receiving complaints about the prerecorded calls at issue. The recorded message in the call told potential voters that if they voted by mail, their "personal information will be part of a public database that will be used by police departments to track down old warrants and be used by credit card companies to collect outstanding debts."

In cooperation with the Ohio State Attorney General's Office, the Enforcement Bureau (the "Bureau") identified the dialing service providers that placed the calls. Subpoena responses from those providers revealed the existence of the robocalling campaign and identified the individuals as the customers who hired the providers to place the calls on their behalf and on behalf of the lobbying firm. Bureau staff determined that 1,141 calls were made to mobile telephone numbers and reached out to the consumers assigned to those numbers. None of the consumers the Bureau contacted stated that they had consented to receive the calls.

In addition to the two individuals, the FCC concluded that the lobbying firm violated Section 227(b) of the Act and Section 64.1200(a)(1)(iii) of the Commission's Rules. The FCC has held that an entity may be deemed to be the maker of a call if it was "so involved in the placing of a specific telephone call" that it can effectively be found to have initiated it. To determine this, the FCC looks to the "totality of the facts and circumstances surrounding the placing of a particular call" to find "who took the steps necessary to physically place the call" and "whether another person or entity was so involved in placing the call as to be deemed to have initiated it, considering the goals and purposes of the TCPA."

The FCC also considered factors such as the fact that the prerecorded messages identified both individuals by name, one of the individual's personal telephone number was listed as the calling party, both individuals admitted their involvement in the calling campaign under oath, and the lobbying firm paid one of the dialing platforms with a company check. The FCC therefore determined that both individuals and the firm were integral to the call campaign and were so involved as to be deemed to have initiated the calls.

In calculating a proposed fine, the FCC considers prior decisions involving unlawful, unsolicited prerecorded calls, and it has on many occasions applied a base fine of \$4,500 per call. Though most prior decisions involved a smaller number of calls, the FCC found those cases analogous and saw no reason to deviate from them as precedent. As a result, the FCC proposed a total fine of \$5,134,500 (\$4,500 per call multiplied by 1,141 calls) for which it found the two individuals and the lobbying firm jointly and severally liable.

### **FCC Proposes \$7,000 Fine for Failure to File for Licenses to Cover Two FM Translator Stations**

The FCC issued an NAL to a Tennessee broadcaster for failing to timely file applications for licenses to cover two FM translator stations and engaging in unauthorized operation of the translators after their respective construction permits expired.

The broadcaster received construction permits for the two FM translators in January and February 2018, with expiration dates in January and February 2021, respectively. However, the broadcaster did not file covering license applications by the expiration dates. As a result, it was forced to file a Petition for Reconsideration in April 2021 to attempt to resuscitate the expired permits.

The FCC treated the Petition for Reconsideration as a request for waiver of Section 73.3598 of the Commission's Rules, which specifies that construction permits will be forfeited upon expiration if construction has not been completed and an application for a license has not been filed. Because the broadcaster failed to file the required license applications and did not seek Special Temporary Authority from the FCC to continue operating the translators after the construction permits expired, the FCC found the broadcaster had engaged in unauthorized operation of the translators for over five months.

The FCC ultimately granted the waiver, reinstated the permits, and gave the broadcaster until August 2021 to file the required license applications, which the broadcaster subsequently did. However, the Commission also issued the NAL pursuant to Section 503(b)(1)(B) of the Communications Act, which states that a person who is found to have willfully or repeatedly failed to comply with a provision of the Act may be fined accordingly. Section 312(f)(1) of the Act defines "willful" as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law, and "repeated" as applying where an act occurs more than once or, if an act is continuous, for more than one day.

The FCC's base fine for failing to file a required form is \$3,000, and the base fine for broadcasting without authorization is \$10,000. However, the Commission may adjust these amounts upwards or downwards based upon factors such as the "nature, circumstances, extent and gravity of the violation," in addition to the licensee's "degree of culpability" and "any history of prior offenses."

Though the FCC tentatively found that a \$7,000 fine was appropriate for each translator, it concluded after considering the above factors (and noting that translators provide a secondary service), that it would decrease the amount to \$3,500 per station for a total of \$7,000 for both translators. The FCC indicated that it would grant both license applications in a separate proceeding if no other issues arose.

### **Broadcaster Fined \$7,000 for Late License Renewal Application**

The FCC fined a Rhode Island broadcaster for failing to timely file a license renewal application for its FM translator station. In this instance, the translator's license expired much earlier than that of most Rhode Island stations because the prior licensee had received only a short-term license renewal grant. Because of a Consent Decree entered into in October 2016, the prior licensee was granted a conditional, one-year short-term renewal set to expire in November 2017. The station was then sold, with the FCC approving the assignment application for the station in January 2017, and the parties consummating the sale in March 2017.

The new licensee should have filed an application to renew the translator's license by July 1, 2017, the first day of the fourth month prior to the license expiration date. However, the broadcaster did not file a license renewal application until September 11, 2020, and did not request Special Temporary Authority (STA) to operate without a license until September 16, 2020 – nearly three years after the license expired.

The Commission granted the STA on October 2, 2020 for a period of six months, allowing the station to operate while the renewal application was processed. However, the renewal processing took longer than six months, so the broadcaster timely sought a six-month extension of the STA. That request remains pending.

As noted above, the FCC's base fine for failing to timely file a license renewal application is \$3,000, and \$10,000 for operating a station without a license. In considering whether to adjust those amounts upward or downward, the FCC noted that the station operated without a license for a considerable amount of time – nearly three years. Though the broadcaster explained it was an oversight due to the unusual nature of a short-term renewal, the FCC did not consider that a mitigating factor, and noted that the broadcaster should have been aware of the short-term renewal because it acquired the station so close in time to the Consent Decree.

Having said that, the Commission noted that because the broadcaster had originally been licensed to operate the station, the situation was not comparable to a pirate radio operation, where fines often exceed \$10,000. It also noted that translators operate on a secondary basis, and that the violation did not constitute a "serious violation" nor a pattern of abuse that would prevent renewal of the station's license. Ultimately, the FCC proposed the full \$3,000 fine for failing to file the license renewal application, but reduced the proposed fine for unauthorized operation from \$10,000 to \$4,000, for a total fine of \$7,000.

The broadcaster must now either pay the \$7,000 fine within 30 days or file a written statement seeking reduction or cancellation of the proposed fine. The Commission stated it would grant the license renewal application after the forfeiture proceeding was concluded.