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FCC Enforcement Monitor September 2023

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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 $116,156,250 Robocalling Fine for Over 20,000 Calls to Toll Free Numbers*
- *Illinois Class A TV Station Pays Nearly Six-Figure Penalty for FCC Violations*
- *FCC Proceeds with $4,000 Civil Penalty Against Alaska Broadcaster Following Investigation*

Robocaller Fined Over $116 Million for TCPA Violations

The FCC issued a Forfeiture Order imposing a $116,156,250 penalty against one individual and three related companies (the Companies) for making 9,763,599 illegal robocalls to toll free numbers without the called party's prior express consent. The robocalls claimed to be a "Public Service Announcement" warning toll free customers about the dangers of illegal robocalls, and would repeat for up to ten hours unless the receiving party terminated the call. This is one of the largest Telephone Consumer Protection Act (TCPA) robocall fines ever issued by the FCC.

As we discussed here, in July 2022 the FCC adopted a Notice of Apparent Liability for Forfeiture (NALF) in which it proposed a $116 million penalty. The individual contested it, stating that he struggled to find anything in the NALF that is accurate, but offering no counterarguments to the FCC's findings. The individual asserted that he was not the party the FCC was after, that the calls were permissible because they were made in good faith, that he did not violate the TCPA "with intent" because he was purportedly advised by a lawyer that the robocalling operation did not violate the TCPA, and that the FCC should have issued a warning prior to releasing the NALF.

When the FCC assesses fines, it considers the "nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." After fully considering the individual's responses to the NALF, the FCC affirmed the fine, stating that it was in accordance with Section 503(b) of the Communications Act of 1934 (the Act), Section 1.80 of the Commission's Rules, and the FCC's Forfeiture Policy Statement (Forfeiture Policy).

The TCPA, Section 227(b)(1)(A)(iii) of the Act, and Section 64.1200(a)(1)(iii) of the FCC's Rules prohibit making prerecorded voice calls to numbers for which the called party is charged for the call (including toll free numbers) unless there is an emergency, or the recipient has given prior express consent to receive the call. The FCC found that the Companies made 9,763,599 illegal robocalls to toll free numbers, and the FCC's Enforcement Bureau (the Bureau) staff verified at least 20,650 of those calls were violations of the TCPA.

The FCC dismissed the individual's 'mistaken identity' argument as meritless, explaining that its investigation identified the Companies as the source of the 20,650 verified robocalls. In October 2020, an industry group tasked by the Bureau with tracing illegal robocalls alerted the Bureau that a caller was apparently targeting toll free services with robocalls. The calls were traced to a competitive local exchange carrier (CLEC) which identified the sources of the calls as two of the Companies. The CLEC supplied records showing that the individual signed a service agreement with the CLEC in July 2020 for several thousand direct inward dial telephone numbers and VoIP service. Additionally, call records produced by the CLEC showed millions of calls to toll free numbers originating from the Companies' account between January and March 2021. The CLEC paid one of the Companies $0.0001 (one ten thousandth of a cent) for each minute of outbound calls that it made to toll free numbers. The individual then used the revenue from the robocalls to fund telephone denial of service (TDoS) attacks against other companies. The individual offered no evidence to refute these findings, and the FCC concluded that the Companies made the calls identified in the NALF.

The FCC also dismissed the argument that the calls were permissible because the toll free customers receiving them were not charged for calls. The FCC reviewed a number of the toll free service providers' publicly available billing practices, and found that the providers do indeed charge their toll free customers on a per call basis or in bundles of minutes. Thus, the robocalling scheme resulted in actual financial losses to the toll free customers receiving the calls. Finally, the FCC explained that there is no "good faith" or "public safety doctrine" exception in the TCPA that would permit the calls, rejecting the individual's claim that he "acted in good faith."

Section 227(b)(4)(E) of the Act provides that the statute of limitations is four years (rather than one year) if the violation was committed "with the intent to cause such violation." In the NALF, the FCC stated that the Companies made prerecorded calls with the intent to violate the TCPA because the Companies (1) targeted protected toll free numbers; and (2) had no reasonable basis to believe they had consent for the calls. The FCC noted that the individual's response refuted neither of those findings, as he did not contest that he targeted toll free numbers, and merely argued that reliance on legal advice constituted a defense against liability. The FCC disagreed, and cited the Companies' complex calling scheme as further evidence of intentionality.

Despite the individual's claim that he was entitled to a warning, the Commission noted that the TRACED Act allows the FCC to issue a Notice of Apparent Liability for violations of Section 227(b) of the Act without first issuing a warning citation. The FCC affirmed its decision in the NALF, concluding that the $116,156,250 fine was warranted due to the Companies' egregious conduct. After considering the relevant factors and its Forfeiture Policy, the FCC found that the proposed base fine and upward adjustments applied in the NALF were consistent with the FCC's rules. The Commission therefore found the individual and Companies jointly and severally liable, and the $116,156,250 fine must be paid within 30 calendar days after the release of the Forfeiture Order.

Rule Violations by Illinois Class A TV Station Result in Consent Decree and $97,000 Penalty

In the course of processing the license renewal application of an Illinois Class A TV station, the FCC's Media Bureau determined that (1) the license renewal application was filed nearly a month after the filing deadline; (2) the applicant certified that there had been no violations by the licensee of the Act or the rules or regulations of the FCC during the preceding license term; and (3) the applicant certified that all required documentation had been uploaded to the station's Public Inspection File when required. According to the Media Bureau, however, the licensee failed to timely upload 28 issues and programs lists, all of its records concerning commercial limits compliance in children's programming, 23 children's television programming reports, and copies of documents related to a 2014 forfeiture order issued to the licensee.

Section 73.3526 of the FCC's Rules lists the materials a Class A TV station must upload to its Public Inspection File and the deadlines for making those submissions. Under Sections 73.3514(a) and 1.65(a) of the FCC's Rules, applications filed with the FCC must include all information called for by the application form, and the applicant must ensure the continuing accuracy and completeness of its application by making any necessary amendments within 30 days of a response becoming inaccurate.

To comply with these requirements, the licensee should have filed its license renewal application by the applicable deadline, timely uploaded all required documents to its Public Inspection File, correctly answered the questions and certifications in its license renewal application form, and amended its application when any of its answers or certifications become inaccurate.

To bring the Media Bureau investigation of these violations to a close, the licensee entered into a Consent Decree with the FCC in which it admitted to the violations and agreed to pay a $97,000 civil penalty. In return, the Media Bureau agreed to grant the station's license renewal application, which also cleared the way for grant of an unrelated station assignment application. If a station has a pending license renewal application, the FCC generally will not grant any applications to assign or transfer the station until the license renewal has been granted.

Alaska Radio Stations Enter $4,000 Consent Decree for Various Violations, Including Ceasing Operations Without FCC Notification or Approval

The licensee of an Alaska AM station and FM translator entered into a Consent Decree with the FCC's Media Bureau resolving an investigation into several rule violations, including discontinuing operations without Commission notification or authorization and originating programming on the FM translator when the AM station was not operational.

The investigation stemmed from an informal complaint the FCC received in September 2020 alleging that the AM station had been off the air for an extended period of time, and that the FM translator had been originating programming while the AM station was silent. The current licensee obtained the two stations approximately one year after the complaint was filed, and subsequently filed timely license renewal applications for the stations. The FCC treated the informal complaint as an informal objection to the license renewal application.

In response to the complaint, the Commission sent inquiries to the licensee in March and July of 2023. The licensee first filed a request for Special Temporary Authority (STA) to operate the AM station with reduced power in April 2022, which the FCC granted. In the licensee's responses to the FCC's inquiries, the licensee estimated that (1) the AM station had been off-air for approximately 18 days between the licensee's September 2021 acquisition of the station and the February 1, 2022 end of the license term; (2) the translator continued to operate during the AM's periods of silence; (3) there were periods when the AM station operated at reduced power due to an issue with its transmitter; and (4) the AM station's various periods of silence did not exceed 30 days, but may have exceeded 10 days. The FCC noted it had no record of the licensee submitting required notifications of discontinued, limited, or reduced power operations prior to the April 2022 STA request.

The FCC has a variety of rules addressing situations where a station goes dark or operates at reduced power due to equipment failures. Section 73.1740 of the FCC's Rules requires broadcasters to notify the FCC no later than the tenth day of limited or discontinued operation and to file an STA request for periods of limited or discontinued operations that last more than 30 days. Similarly, Section 73.1560(d) of the Rules provides that where a station is unable to operate at its authorized power level, it must notify the FCC of periods of reduced power exceeding ten days, and request an STA to operate with reduced power where full power operations won't resume within 30 days. Section 73.1745 of the Rules states that a broadcast station may not operate with modes of power other than those specified in its license, and Section 73.1690(b)(5) requires the licensee of a commercial AM station to apply for and obtain a construction permit from the FCC before reducing an AM station's power permanently. Finally, Section 73.1745 of the Rules prohibits an FM translator from originating programming while its primary station is off the air (except in limited circumstances not applicable to this case).

To end the investigation, the licensee entered into a Consent Decree in which it stipulated that it violated the FCC's rules by reducing daytime power, limiting operating hours, discontinuing operations of the AM without FCC notification/authorization, and originating programming on the FM translator while the AM station was silent.

Initially, the Media Bureau proposed a civil penalty of $7,000, an amount the Media Bureau determined to be consistent with Section 503(b) of the Act, Section 1.80 of the Rules, and the FCC's Forfeiture Policy. However, the licensee requested a reduction of that amount based on an inability to pay. It also submitted its financials to the FCC in support of that request. According to the Media Bureau, the financials demonstrated that the licensee's operations had been in the red since acquiring the stations. The FCC asserted that gross revenues are the best indicator of a licensee's ability to pay a fine, and in some cases, net losses may also be relevant. In examining the amount of the civil penalty, the FCC has recognized that a fine representing even five percent of gross revenues may be excessive if the licensee has operated at a significant loss. After considering the licensee's financial situation, the Media Bureau found there was a sufficient basis to reduce (but not cancel) the penalty from $7,000 to $4,000. Under the terms of the Consent Decree, however, if the licensee defaults on payment of the $4,000 civil penalty, it increases by $3,000, for a total civil penalty of $7,000.