ADVISORY

FCC Enforcement Monitor February 2024

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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:

- *New Hampshire Presidential Primary Deepfake Robocalls Lead to Enforcement Action Against Call Originator*
- *TV Broadcaster Faces $720,000 Fine for Failure to Negotiate Retransmission Consent in Good Faith*
- *Statutory Maximum Penalty of $2,391,097 Proposed for Pirate Radio Operator*

Telecommunications Company Accused of Originating Illegal Robocalls That Used President Biden's Voice

A Michigan-based telecommunications company received a *Notice of Suspected Illegal Traffic* ("Notice") from the FCC's Enforcement Bureau accusing it of originating illegal robocall traffic related to the New Hampshire Presidential Primary election.

Two days before voting began in the Primary, New Hampshire residents believed to be potential Democratic voters began receiving calls purportedly from President Joe Biden telling them to "save" their vote for the November general election and not vote in the Primary. The caller ID information indicated the call came from the spouse of a former state Democratic Party chair who was running a super PAC urging state Democrats to write in President Biden's name in the Primary. The call was not authorized by President Biden or his campaign or an authorized committee, nor did it include a legitimate message from the president but instead was a so-called deepfake using the President's voice. The caller ID information was spoofed.

Following widespread news reporting of the calls, the FCC investigated the matter together with the New Hampshire Attorney General, the Anti-Robocall Multistate Litigation Task Force and USTelecom's Industry Traceback Group ("ITG"). This group determined that the telecommunications company was the originating provider of the robocalls at issue, and the ITG provided identifying call data to the company for the suspect calls. In response, the company identified another entity as the party that initiated the calls and told the ITG that it had warned the initiating entity as to the illegality of the calls. According to the Notice, both the company and the apparent initiating entity have been previous subjects of illegal robocall investigations.

It is illegal under federal law to “knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value” and the law requires originating providers to protect their networks by taking “affirmative, effective measures to prevent new and renewing customers from using its network to originate illegal calls, including knowing its customers and exercising due diligence in ensuring that its services are not used to originate illegal traffic.” Failure by a provider to protect its network can lead to downstream providers permanently blocking all of the upstream provider’s traffic. In this case, the FCC believed the caller knowingly transmitted misleading and inaccurate caller ID information to deceive and confuse call recipients and apparently intended to harm prospective voters by using the President’s voice to tell them to not participate in the Primary. The company also signed the calls with A-Level Attestation, an authentication designation that signals to downstream providers that the company has a direct relationship with the customer and that the customer legitimately controls the phone number in the caller ID field.

Transmittal of the Notice triggered several obligations for the company, including that it investigate the illegal traffic identified by the FCC and block or cease accepting all of the illegal traffic within 14 days of the Notice if the company’s investigation determines that it was part of the call chain for the identified traffic or substantially similar traffic. Failure to respond to the Notice or to comply with additional obligations could result in temporary or permanent blocking of all traffic from the company, removal of the company from the Robocall Mitigation Database, which would cause all intermediate and terminating providers to immediately cease accepting the company’s telephone traffic and more. The FCC also issued a Public Notice notifying all U.S.-based voice service providers of the suspected illegal traffic coming from the company and authorizing the providers, at their discretion, to block or cease accepting traffic from the company without liability under the Communications Act of 1934 if the company failed to effectively mitigate the illegal calls.

According to the FCC, voice service providers at all levels of the call chain should take note of this and other recent robocall enforcement actions, continuously monitor their networks for suspicious activity, and take action to prevent such activity whenever it is found.

FCC Proposes $720,000 Fine for Failure to Negotiate Retransmission Consent in Good Faith

For the second time in as many months, the Commission has sought to fine a broadcaster for allegedly failing to negotiate retransmission consent for its stations in good faith. **Last month**, we discussed a broadcast licensee facing a $150,000 fine for claimed good faith violations. This month, the Commission released yet another *Notice of Apparent Liability for Forfeiture* (NAL), this time proposing a $720,000 fine against a TV broadcaster.

Under Section 325 of the Communications Act of 1934, TV stations and multichannel video programming distributors (*i.e.,* cable and satellite TV providers) have a duty to negotiate retransmission consent agreements in good faith. In its 2000 *Good Faith Order*, the FCC adopted rules relating to good faith negotiations, setting out procedures for parties alleging violations of the rules. The *Good Faith Order* established two good faith negotiation standards. The first is a list of objective negotiation standards, the violation of any one of which is deemed to be a per se violation of a party’s duty to negotiate in good faith. The second is a subjective “totality of the circumstances” test in which the FCC reviews all of the facts presented to determine if the combined facts establish an overall failure to negotiate in good faith, even if none of the individual facts represent a per se violation.

In this case, a cable provider complained that the broadcaster it was negotiating with breached its statutory duty to negotiate in good faith when it (i) refused to extend the prior agreement until the parties reached either a new agreement or an impasse; and (ii) conditioned retransmission consent on proposals that, among other things, would have prohibited either party from seeking further relief from the Commission with respect to the parties’ negotiation and final retransmission consent agreement. The FCC rejected the cable provider’s first complaint, stating that the broadcaster’s refusal to extend the parties' prior agreement until they reached a new agreement, or an impasse, is not a violation of the requirement to negotiate in good faith. The FCC explained that such an extension cannot be lawfully required under the Communications Act, and that the FCC "lacks the authority to order carriage in the absence of a broadcaster's consent due to a retransmission consent dispute."

With respect to the second complaint, the FCC asserted that the broadcaster had indeed breached its duty to negotiate retransmission consent in good faith. The broadcaster defended the proposal to include mutual releases in the agreement, explaining that such provisions "would have applied mutually to both parties" and would not have prevented the cable provider from filing any future complaints. The Commission disagreed and cited the *Good Faith Order*, which states that "proposals for contract terms that would foreclose the filing of complaints with the Commission" are presumptively in conflict with the good faith negotiation requirement.

Section 503(b)(2)(A) of the Act allows the FCC to assess a fine of up to $59,316 per violation or day of a continuing violation, up to a statutory maximum of $593,170 for a single act or failure to act. The FCC also cited to its *Forfeiture Policy Statement*, which establishes a base fine of $7,500 for a "violation of the cable broadcast carriage rules." The Commission reasoned that the proposal of the mutual release was a single act that continued for a period of eight days, until the parties executed a renewal agreement ($7,500 x 8 days = $60,000). The FCC then exercised its discretion to upwardly adjust the proposed fine from $60,000 to $120,000, asserting that the increase was justified based on the broadcaster's revenues and prior rule violations (citing only to a 2010 violation of the public files rules), and the FCC's view that a larger fine was necessary to serve as a meaningful deterrent against future violations rather than simply the "cost of doing business."

The FCC further reasoned that all six stations in question should factor into the calculation despite four being satellite stations, stating that a satellite station is defined as "operating on a channel specified in the...Table of Assignments and meeting all of the technical requirements of our rules, but one which usually originates no local programming." As such, the FCC multiplied the $120,000 fine by six stations, resulting in a total proposed fine of $720,000. The broadcaster has 30 days to pay the full amount or file a request seeking reduction or cancellation of the proposed fine.

Repeat Offender Faces Maximum Penalty for Miami Pirate Radio Broadcasts

The FCC issued an NAL proposing a $2,391,097 fine against a North Miami, Florida pirate radio operator under the Preventing Illegal Radio Abuse Through Enforcement Act (PIRATE Act). The PIRATE Act gave the FCC enhanced authority to take enforcement action against pirate radio operators themselves and against landlords and property owners who knowingly and willfully allow pirates to broadcast from their properties. Illegal broadcast operations can interfere with licensed communications and pose a danger to the public by interfering with licensed stations carrying public safety messages, including Emergency Alert System transmissions.

According to the NAL, the station operator and two accomplices have a long history of drawing enforcement actions from the FCC and have been involved in pirate radio broadcasts since 2012. The operator and accomplices have, over the last 12 years, been subject to Notices of Unauthorized Operation, Notices of Apparent Liability, Forfeiture Orders, and seizures of equipment. The FCC's investigations tied the operator to the station by, among other ways, determining he had announced his personal phone number as the phone number of the station, posted pictures of himself on a social media page for the station, announced that he was "live on the air" and to "tune in," and admitted his DJ name, thereby confirming he was the station's on-air personality. FCC field agents repeatedly measured the field strength of the pirate signal and found it exceeded the limits for unlicensed operation under Part 15 of the FCC's Rules and that no station was licensed in that area to operate on the detected frequency.

More recently, FCC field agents on several occasions monitored the frequency the pirates had used in the past, traced it to a private residence, and observed an FM broadcast antenna. The transmissions from the antenna exceeded the limits for unlicensed operation and, once again, no station was licensed to operate in that area on that frequency. The agents heard the station use the same branding associated with the operator's past pirate radio operations, and heard the on-air talent announce himself using the DJ name the operator had earlier admitted was his. The FCC believes the unauthorized station was operating for at least 22 days throughout early 2023.

Under the PIRATE Act, the FCC may impose a fine against any person "who willfully and knowingly does or causes or suffers to be done any pirate radio broadcasting." In this case, the FCC proposed a base fine of $20,000 for each of the 22 days of apparent violations for a total base fine of $440,000. Citing the operator's intentional conduct and history of violations, the FCC concluded that an upward adjustment was warranted and proposed the maximum penalty of $119,555 for each of the 22 days, for a total penalty of $2,630,210. This proposed amount was then reduced to the statutory maximum penalty of $2,391,097.