FCC Enforcement Monitor

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Headlines:

- *FCC Proposes $11,000 Fine for Marketing of Unauthorized Device*
- *$2,944,000 Fine for Robocalls Made Without Recipients' Consent*
- *Sponsorship Identification Complaint Leads to $185,000 Consent Decree*
- *Premature Consummation of Transaction Results in $22,000 Consent Decree*

Modifying Design of Parking Meter Requires New FCC Certification and Warning to Users

Earlier this month, the Spectrum Enforcement Division of the FCC's Enforcement Bureau issued a Notice of Apparent Liability for Forfeiture ("NAL") against a company that designs, develops, and manufactures parking control products (the "Company"). The NAL indicated the Company had marketed one of its products without first obtaining an FCC certification and for failing to comply with consumer disclosure rules. The FCC's Enforcement Bureau proposed an $11,000 fine against the Company.

In August of 2013, the FCC received a complaint that a particular product made by the Company did not have the required FCC certification and that the product did not comply with consumer disclosure requirements. After receiving the complaint, the FCC's Spectrum Enforcement Division issued a Letter of Inquiry ("LOI") to the Company. The Company responded in the middle of March, at which time it described the product in question as a "parking meter that accepts electronic payments made with credit cards, smart cards, or Near Field Communications-enabled mobile device applications." The response to the LOI indicated that the Company had received an FCC authorization in 2011 but had since refined the design of the product. Although one refinement involved relocating the antenna on the device, which increased the field strength rating from the level authorized in 2011, the Company assumed that the changes to the device qualified as "permissive changes" under Section 2.1043 of the FCC's Rules. In addition, the Company admitted to marketing the refined product before obtaining a new FCC certification for the increased field strength rating, and that its user manual did not contain required consumer disclosure language. However, the Company had not actually sold any of the new parking meters in the U.S.

Section 302(b) of the Communications Act prohibits the manufacture, import, sale, or shipment of home electronic equipment and devices that fail to comply with the FCC's regulations. Section 2.803(a)(1) of the FCC's Rules provides that a device must be "properly authorized, identified, and labeled in accordance with the Rules" before it can be marketed to consumers if it is subject to FCC certification. The parking meter falls under this requirement because it is an intentional radiator that "can be configured to use a variety of components that intentionally emit radio frequency energy." The Company's product also meets the definition of a Class B digital device, in that it is "marketed for use in a residential environment notwithstanding use in commercial, business and industrial environments." Under Section 15.105(b) of the FCC's Rules, Class B digital devices "must include a warning to consumers of the device's potential for causing interference to other radio communications and also provide a list of steps that could possibly eliminate the interference."

The base fine for marketing unauthorized equipment is $7,000, and the base fine for marketing devices without adequate consumer disclosures is $4,000. The Company argued that even though it had marketed the device before it was certified, it had not sold any, and it promptly took corrective action after learning of the issue. The Enforcement Bureau declined to reduce the proposed fines because the definition of "marketing" does not require that there be a sale, and "corrective measures implemented after the Commission has initiated an investigation or taken enforcement action do not nullify or mitigate past violations." The NAL therefore assessed the base fine for both violations, resulting in a total proposed fine against the Company of $11,000.

Unsolicited Phone Calls Lead to Multi-Million Dollar Fine

Earlier this month, the FCC issued an NAL against a limited liability company (the "LLC") for making unlawful robocalls to cell phones. The NAL followed a warning issued more than a year earlier, and proposed a fine of $2,944,000. The LLC provides a robocalling service for third party clients. In other words, the LLC's clients pay it to make robocalls on their behalf to a list of phone numbers provided by the client.

The Telephone Consumer Protection Act ("TCPA") prohibits robocalls to mobile phones unless there is an emergency or the called party has provided consent. These restrictions on robocalls are stricter than those on live calls because Congress found that artificial or prerecorded messages "are more of a nuisance and a greater invasion of privacy than calls placed by "live" persons." The FCC has implemented the TCPA in Section 64.1200 of its Rules, which mirrors the statute.

The LLC received an LOI in 2012 from the Enforcement Bureau's Telecommunications Consumers Division (the "Division") relating to an investigation of the LLC's services. The Division required the LLC to provide records of the calls it had made, as well as to submit sound files of the calls. This preliminary investigation revealed that the LLC had placed 4.7 million non-emergency robocalls to cell phones without consent in a three-month period. After making these findings, the Division issued a citation to the LLC in March of 2013, warning that making future calls could subject the LLC to monetary penalties and providing an opportunity to meet with FCC staff and file a written reply. The LLC replied to the citation in April of 2013, and met with FCC staff.

However, in June of 2013, the Division initiated a second investigation to ensure the LLC had stopped making illegal robocalls. The LLC objected, but produced the documents and audio files requested. The Division determined, by analyzing the materials and contacting customers who had received the prerecorded calls made by the LLC, that the Company made 184 unauthorized robocalls to cellphones after receiving the citation.

The FCC rejected the LLC's argument that it was merely making the calls on behalf of its clients and should therefore be absolved of liability. Specifically, the FCC said that the LLC was defining "making" a call too narrowly and cited prior cases holding that a company "may be held vicariously liable for certain third-party telemarketing calls." The FCC noted that the pertinent inquiry is whether there is a direct connection between an entity and the placement of a telephone call, and concluded, after analyzing the affirmative acts performed by the LLC on behalf of its third party clients that the LLC had such a connection because it was "directly involved in the phone calls" it placed for its clients. The FCC also rejected the LLC's argument that it should receive the same exclusion from liability as a fax broadcaster because that limitation is narrowly construed only for unsolicited advertisement faxes.

The LLC had also filed a request for reconsideration of the original citation, but the FCC denied it. The FCC determined that the request was not ripe because the citation is not a "final" FCC action. In addition, the FCC denied reconsideration on the merits for three reasons. The first two were discussed above – the FCC determined that the LLC did initiate calls and was not entitled to the exemption from liability afforded fax broadcasters. The LLC's third argument was that imposing liability on the Company would violate the First Amendment. The FCC denied the First Amendment argument because "[i]t is well-settled law that the TCPA's restrictions on speech are constitutional."

The maximum penalty for each robocall violation is $16,000. Although the FCC ordinarily considers a $4,500 per violation fine to be "an appropriate base amount," in this case, the FCC imposed the maximum per-call penalty of $16,000 for each of the 184 violations that occurred after the issuance of the citation. This led to a total penalty of $2,944,000. The FCC justified its imposition of the statutory maximum fine by noting that the "penalty is based on the number of apparent wilful, repeated violations involved, all of which occurred after the Commission warned the Company of its obligations under the law and the consequences for non-compliance," and that the LLC's behavior indicated an intentional disregard of the FCC's Rules.

Illinois Radio Station Licensee Agrees to Pay $185,000 Under Terms of Consent Decree for Sponsorship I.D. Violations

The FCC issued an order adopting a Consent Decree terminating its investigation of an Illinois licensee's alleged violations of sponsorship identification laws. Under the terms of the Consent Decree, the licensee agreed to make a $185,000 voluntary contribution to the United States Treasury and, if a pending sale of the station is not consummated, to adopt a compliance plan to avoid future violations of the sponsorship identification rules. If the sale does occur, the buyer has agreed to implement such a compliance plan.

The FCC's sponsorship identification laws, Section 73.1212 of its Rules, require broadcasters to air announcements identifying when they are being paid to broadcast material and who is paying them, and are based on the idea that listeners and viewers have the right to know who is trying to persuade them.

In July of 2010, the FCC received a complaint alleging that the licensee's AM station broadcast a daily talk show without disclosing that the "guests" had paid the station to appear on the program and promote their products and services. The licensee admitted that its actions violated the sponsorship identification laws. However, the licensee filed assignment applications in April of 2013 to assign the licenses of the AM station and a translator to another company. The buyer has been providing services to the station under a time brokerage agreement since May of 2013 and has agreed to accept the terms of, and comply with, the Consent Decree, including the implementation of a compliance plan. On July 26, 2013, the Enforcement Bureau issued an LOI to the licensee regarding the allegations from the complaint. In its response to the

LOI, the licensee admitted that it had promoted the program in question and received payment for the show's guests to appear on the show.

The FCC, the licensee, and the buyer entered into a Consent Decree to terminate the investigation. Regardless of whether the licensee sells the station, it agreed in the Consent Decree to make a voluntary contribution of $185,000 to the United States Treasury. The FCC granted the applications to assign the licenses of the station and the translator earlier this month. Under the terms of the Consent Decree, a grant of the applications requires that the licensee notify the Chief of the Investigations and Hearings Division of the Enforcement Bureau within 90 calendar days of the public notice of the grant as to whether or not the assignment was consummated.

If the licensee does sell the station, the Consent Decree requires that the buyer develop and implement a compliance plan and file periodic compliance reports for a period of 3 years. The compliance plan would include creating operating procedures to help ensure compliance with the sponsorship identification laws, drafting and distributing a compliance manual to employees, implementing a compliance training program (which includes providing a hotline for employees to call the compliance officer, contractual clauses requiring compliance with the sponsorship identification laws in agreements with employees, and committing to enforce high standards to ensure compliance with sponsorship identification requirements). In addition, the station must educate prospective sponsors about the laws, submit annual compliance reports to its board, and file reports regarding implementation of the compliance plan within 90 calendar days, 12 months, 24 months, and 36 months after closing of the sale. If the licensee does not consummate the sale, these requirements will be the obligation of the licensee rather than of the buyer. In addition, if the licensee is granted another FCC license for any broadcast station within 3 years of consummating its sale of the station to the buyer, the licensee must create the same compliance plan for its new station(s).

Consent Decree and $22,000 Payment for Premature Consummation of Transaction

Earlier this month, the Media Bureau issued an Order that adopted a Consent Decree between the Media Bureau, the transferor and transferee of a radio licensee and a television licensee with stations in Ohio, and the licensees themselves (the transferor, transferee, and licensees collectively, the "Parties").

In May of last year, the Parties filed five Form 315 transfer of control applications that proposed using various intervening entities to transfer control of the licensee from the transferor to the transferee. The transferor's ownership interest in the television licensee would go from 88.25% to 33.66%, and the transferee's ownership interest in the television licensee would increase from a non-attributable 2% to a 56.59% controlling interest. The transferor's ownership interest in the radio licensee would go from 70% to 0%, and the transferee's ownership interest in the radio licensee would increase from 10% to 80%.

The Parties had consummated the ownership changes five months before filing the appropriate applications and receiving FCC approval of the transfer of control. The Parties argued that the unauthorized transfer resulted from a miscommunication with their local communications counsel. After realizing their mistake, the Parties contacted FCC staff and amended the applications to explain how the premature consummation had occurred.

The Consent Decree notes that Section 310(d) of the Communications Act and Section 73.3540 of the FCC's Rules prohibit transfers of control of broadcast licenses without the consent of the FCC. Moreover, Section 73.3540(b) requires that a licensee file an application with the FCC "45 days prior to the contemplated effective date of the . . . transfer of control."

The Parties stipulated they had violated Section 310(d) of the Communications Act and Section 73.3540 of the Rules. Under the terms of the Consent Decree, the Parties will make a voluntary contribution of $22,000 to the United States Treasury. $11,000 is to be paid on behalf of the television licensee and another $11,000 is to be paid on behalf of the radio licensee. In addition, the Parties must adopt a three-year compliance plan to ensure compliance with the Communications Act and the FCC's Rules, requiring training of all employees at least once every 12 months and within 5 days of any new employee starting work at any of the stations, as well as engaging independent FCC counsel to provide guidance on FCC compliance issues.

If you have any questions about the content of this Advisory, please contact the Pillsbury attorney with whom you regularly work, or the authors of this Advisory.

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