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FCC Enforcement Monitor July 2022

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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:

- *Turning Away FCC Inspectors Leads to a Notice of Violation for Florida Low Power FM Station*
- *Texas FM Stations Receive Short-Term License Renewals After Extended Silence*
- *FCC Proposes $116 Million Robocalling Fine for TCPA Violations*

West Palm Beach LPFM Station Turns Away FCC Inspectors, Receives Notice of Violation

The FCC Enforcement Bureau issued a Notice of Violation to the licensee of a West Palm Beach, Florida low power FM station after two FCC enforcement agents were denied entry to conduct an inspection.

Under Section 73.1225(a) of the FCC's Rules, "[t]he licensee of a broadcast station shall make the station available for inspection by representatives of the FCC during the station's business hours, or at any time it is in operation." In this case, two agents visited the station to conduct an inspection and were denied access to the station by on-site station personnel. The station owner was reached by phone during the visit and also refused to make the station available for inspection, even after the agents reminded the owner of the FCC's rule for station inspections.

The Notice of Violation requires that within 20 days, the station licensee: (1) fully explain the violation, including all relevant facts and circumstances; (2) include in its response a statement of the specific action(s) taken to correct each violation and preclude recurrence; and (3) include a timeline for completion of any pending corrective actions. An authorized officer of the licensee with personal knowledge of the representations made in the response must also submit an affidavit verifying the truth and accuracy of the provided information. Though the Notice of Violation itself carried no monetary penalty, the Enforcement Bureau can take additional action in the future, including issuing a fine.

Extended Silent Periods Result in Shortened License Renewal Terms

Seven Texas FM stations licensed to the same company were given one-year license renewal terms after extended periods of silence during their last license term. In all instances, the license renewal applications were filed on time, but the stations were silent for at least 25% of their license term and, in the case of six of the seven stations, silent for at least

40% of the extended term that included the time the license renewal applications were pending. Under FCC precedent, broadcast station silence is considered a fundamental failure to serve the station's community since a silent station is not airing public service programming. Even turning on the signal between long periods of silence is thought by the FCC to be of little value, as the listening public will not be accustomed to tuning into the station.

When considering whether to grant a station's license renewal, the FCC looks at (1) whether the station has served the public interest, convenience, and necessity; (2) whether there have been any serious violations of the Communications Act or the Commission's rules; and (3) whether there have been any violations which, taken together, constitute a pattern of abuse. If the station fails to meet this standard, the Commission may either deny the license renewal application (with notice and an opportunity for a hearing) or, as it did in this case, grant a renewal for a term less than the standard eight-year term.

In a 2001 order, the FCC found that "a licensee will face a very heavy burden in demonstrating that it has served the public interest where it has remained silent for most or all of its prior license term." In this case, even though the licensee received FCC permission for the stations' silent periods, the Media Bureau found that the "[l]icensee's stewardship of the stations fail[ed] to meet the public service commitment which licensees are expected to provide to their communities of license on a daily basis because the stations were silent for a significant portion of their license term." The stations must now submit license renewal applications by March 1, 2023 for license terms ending July 18, 2023.

In a separate matter, the stations disclosed in their license renewal applications that certain of their quarterly issues/programs lists were not timely uploaded to their online public inspection files. For these violations of 47 C.F.R. § 73.3526 (the FCC's Online Public Inspection File Rule), the licensee and the Media Bureau entered into a consent decree under which the licensee agrees to appoint a compliance officer, implement a compliance program, develop a compliance manual and training, file a compliance report with the FCC in one year, and report any Public Inspection File violation to the FCC within ten days of discovering it.

Robocaller Fined $116 Million for Traffic Pumping Scheme

The FCC proposed to fine one individual and three companies (the "Companies") over $116M for apparently making 9,763,599 illegal robocalls to toll free numbers without the called party's prior express consent. This is one of the largest Telephone Consumer Protection Act (TCPA) robocall fines 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, Congress enacted the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act) in 2019 to expand the FCC's ability to combat illegal robocalls. The TRACED Act allows the FCC to issue a Notice of Apparent Liability for Forfeiture for violations of Section 227(b) of the Communications Act (the "Act") without first issuing a warning citation, and also increases the penalties for intentional violations of Section 227(b).

On October 29, 2020, an industry group tasked by the FCC's Enforcement Bureau (the "Bureau") with tracing illegal robocalls to determine their origin 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. On April 14, 2021, the Bureau subpoenaed the CLEC which then 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. The Companies participated in the CLEC's "port recovery credits" system whereby the CLEC paid the Companies $0.001 per minute per call to a toll free number. Generating toll free traffic to boost a CLEC's revenue is known as toll free traffic pumping or access stimulation, which is costly to the industry and consumers. The Communications Fraud Control Association estimated $4.54 billion in fraud losses related to traffic pumping in 2021.

Between January 1, 2021 and March 2, 2021, the individual used one of his Companies to make over 9.7 million prerecorded voice message calls ("robocalls"). The robocalls claimed to be a "Public Service Announcement" warning toll free customers about the dangers of illegal robocalls and directed recipients to report robocalls to the FCC, phone companies, and the Companies' website. One of the Companies, a nonprofit corporation, placed the robocalls to toll free numbers as part of the alleged traffic pumping scheme. The FCC indicated that the CLEC was paying the nonprofit for each call placed to a toll free number, and the individual used that revenue to then fund telephone denial of service (TDoS) attacks against other companies. The robocall message also directed the call recipients to visit the individual's website and report suspected robocallers – information which he then used to identify targets for his TDoS attacks. TDoS attacks can be incredibly dangerous because they can disable telephone networks and interrupt essential emergency services.

The purpose of the TDoS attacks was to target "verified scammers" by overwhelming a phone system with so many incoming calls that the system essentially crashed and could not make or receive any calls. The individual claimed that his operation could send as many as 3,600 calls per second to a phone system, and cost a "scammer" approximately $4M in one day. The FCC indicated, however, that the individual employed "inadequate verification methods to confirm" whether the attacked parties were in fact making illegal calls.

Bureau staff verified 20,650 of the more than 9.7 million calls were violations of the TCPA. The FCC also received several complaints. When one complainant confronted the Companies about the calls, the Companies allegedly responded "if you think the FCC will do anything, you are very much mistaken."

The FCC found that the Companies apparently willfully and repeatedly violated the TCPA, Section 227(b)(1)(A)(iii) of the Act, and Section 64.1200(a)(1)(iii) of the Commission's Rules. Because of the large number of calls, the Commission proposed to base the fine on the 20,650 calls verified by Bureau staff. The FCC has taken this approach in other cases involving a high volume of unlawful calls. The FCC explained that there is a diminishing value in verifying each violation in such large-scale robocall operations, and finds this approach "balances precedent with pragmatic factors."

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. However, the Commission may upwardly adjust fines to account for the degree of culpability and the egregiousness of the violation. Here, the FCC upwardly adjusted the proposed fine due to the Companies' egregious conduct, pointing out that (1) the Companies used revenue generated from the robocalls to fund TDoS attacks which targeted innocent parties, (2) the calls cost toll free customers substantial money while tying up phone lines which prevented potential customers from reaching the businesses that rely on those toll free numbers, and (3) access-stimulation/traffic-pumping schemes impose undue costs on consumers while harming competition.

As a result, the FCC proposed a 25% upward adjustment to the base fine, for a total of $5,625 per illegal call, resulting in a total proposed fine of $116,156,250. The Commission found the individual and Companies jointly and severally liable. The FCC asserted that the upward adjustment will serve to punish those responsible and serve as a deterrent to others from engaging in future violations.