Interesting FCC Enforcement Actions — February 2016 Edition

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It's no secret that one of the majo

r stories in the last two years has been the increased activism of the Federal Communications Commission's ("FCC") Enforcement Bureau ("Bureau"). February 2016 was no exception in terms of the nature and level of activity. In this blog entry, we highlight a few orders that stand out among the crowd.

OneLink. On February 12, 2016, the FCC announced a $29.6 million proposed fine against four related companies — OneLink Communications, Inc.; TeleDias Communications, Inc.; TeleUno, Inc.; and Cytel, Inc. ("the Companies") — for apparently fraudulent, deceptive, and manipulative practices targeting consumers with Hispanic surnames. The FCC alleges that the Companies "slammed" consumers by switching their long distance carrier without the required authorization and "crammed" unauthorized charges after switching carriers onto consumers' bills. Notably, the NAL alleges that the Companies fabricated recordings and then submitted these false recordings to the FCC as proof that consumers authorized the change in long distance carriers. The FCC reviewed more than 200 consumer complaints against the Companies, 142 of which alleged apparent "slams," "crams," and misrepresentations within the 12 months prior to the release of the NAL. Bureau staff also contacted 50 consumers to discuss their complaints.

The NAL proposes to fine OneLink $8,020,000; TeleDias $7,660,000, TeleUno $9,620,000, and Cytel $4,300,000, totaling $29.6 million. The FCC finds the Companies apparently liable for violating Section 201(b) by making misrepresentations in connection with marketing calls to consumers, submitting falsified audio "verification" recordings, and placing unauthorized charges on consumers' telephone bills. The FCC also finds the Companies apparently liable for violating Section 1.17 of the Commission's rules for providing the Commission with false or misleading material information as well as Section 258 of the Communications Act of 1934, as amended (in addition to Section 64.1120 of the Commission's rules) for submitting requests to switch consumers' preferred long distance carriers without the proper authorization or verification.

Notably, the NAL also states that in light of the Companies' "egregious misconduct," the Commission would consider initiating proceedings against the Companies to revoke their FCC authorizations once the Companies had an opportunity to respond to the NAL. The Commission has revoked a carrier's authorization in only two instances, once in the late 1990s for entities accused of slamming and once last year for a company's failure to comply with its National Security Agreement with the US Government. If the FCC proceeds down this path with OneLink, it will be a significant action by the agency.

Calling 10 and TelSeven. On February 18, 2016, the FCC issued Forfeiture Orders imposing a $1,680,000 fine against Calling 10, LLC, Telseven, LLC ("Calling 10" or "the Companies"), and the Companies' joint owner, for "cramming" charges for their service on consumers' local telephone bills and for deceptively marketing an "Enhanced Number Assistance and Directory Assistance" service. Separately, the FCC issued a Forfeiture Order against Telseven and the Company's owner, proposing a monetary penalty of $1,758,465 for failure to contribute fully to the USF, the cost recovery mechanisms for local number portability ("LNP") and the North American Numbering Plan ("NANP"), failing to pay regulatory fees, and failing to provide good faith estimates of its revenues in its Quarterly Telecommunications Reporting Worksheet filings ("Form 499-Q").

The Forfeiture Orders are notable for their pursuit of personal liability against the owner of the two companies. The Forfeiture Order confirms the penalty proposed in a 2012 NAL, and finds Calling 10 and its owner apparently liable for violating Section 201(b) for "cramming" charges on consumers' bills, as well as misleading and deceptive practices. Both Calling 10 and Telseven were in bankruptcy at the time of the NAL and thus did not respond. However, the Companies' owner timely responded to the Commission in his individual capacity, stating that the Commission should rescind the proposed Forfeiture Order as to him because the Commission incorrectly applied the "piercing the corporate veil" test. The Commission disagreed. As a result, Calling 10, Telseven and their owner were found jointly and severally liable for the entirety of the forfeiture proposed in the NAL.

DSM Supply, LLC and Somaticare, LLC. On February 18, 2016, the FCC released a Forfeiture Order imposing a monetary penalty of $1,840,000 against DSM Supply, LLC, Somaticare LLC (collectively, "DSM Companies" or the "Companies") and the Companies' owner for sending 115 unsolicited faxes to 26 consumers. As with the Calling 10 and Telseven orders, the agency's action includes a finding of personal liability by the company's owner. The Forfeiture Order affirms the 2014 NAL which found the DSM Companies and its owner apparently liable for violating Section 227(b)(1)(C) of the Communications Act of 1934, as amended. Under the Forfeiture Order, the DSM Companies and its owner are also apparently liable for violating Section 64.1200(a)(4) of the Commission's rules for sending fax advertisements without the prior express invitation or permission of the recipients, and failing to meet the requirements for advertisements faxed under an established business relationship. None of the parties filed a timely response to the NAL, but the DSM Companies sent the Commission a response seven months after the filing deadline. The Companies' NAL response contested certain facts in the NAL, sought a retroactive waiver, and also asked the FCC to remove the Companies' owner from the current action. The FCC rejected these arguments and found the Companies (as well as the owner) jointly and severally liable for the full penalty proposed in the NAL.