Do Recent Consent Decrees Indicate a Shift in FCC Enforcement Policy?

September 5, 2014

In August, the FCC adopted consent decrees with three companies (Border Media Business Trust, Time Warner Cable, and ASUSTeK Computer Inc.) to resolve investigations into potential violations by each company of the Commission's rules. What makes these consent decrees noteworthy is the inclusion of new language and provisions not seen in settlements from prior years. All three consent decrees include an admission of liability by the company and refer to the monetary payments the company will make as "civil fines" or "civil penalties" rather than "voluntary contributions." These changes may indicate a potentially significant shift in the Enforcement Bureau's policy in resolving allegations of FCC rule violations. If this indeed becomes Enforcement Bureau policy, it could make it significantly harder to resolve investigations through consent decrees, where often the primary benefit obtained by the regulated entity is a resolution without any findings of liability. Here is an example of the new provisions in these consent decrees:

6. **Admission of Liability**. TWC admits, solely for the purpose of this Consent Decree and for Commission civil enforcement purposes, and in express reliance on the provisions of paragraph 8 herein [TLM Note: paragraph 8 terminates the investigation and agrees not to use the investigation to TWC's detriment in certain ways], that the circumstances described in paragraph 3 herein constitute violations of the Commission's Network Outage Reporting Rules.

14. **Civil Penalty**. TWC will pay a civil penalty to the United States Treasury in the amount of one million one hundred thousand dollars ($1,100,000) within thirty (30) calendar days after the Effective Date.

Previously, consent decrees contained provisions stating that the Commission did not find liability, and that describe the payment as a "voluntary payment." For an example, see the Consent Decree in this post, resolving a network outage reporting investigation similar to the Time Warner Cable investigation. (See paragraphs 11 and 16 in the prior consent decree). The new consent decrees cover a variety of alleged violations of the FCC's rules (indecency, network outage reporting, and marketing of unauthorized devices). All three are substantive areas which have been enforcement focuses in the recent past (developments we've noted on several occations). The fact that the language is included in several different areas suggests a broader Enforcement Bureau policy rather than a feature of particular substantive areas. Such a policy may be part of an overall goal for the Commission to ramp up its enforcement efforts, as highlighted by Chairman Wheeler's recent announcement of the Universal Service Fund enforcement "Strike Force." Historically, one incentive for companies and individuals to enter into consent decrees was to avoid a finding of liability, and often agreeing to a reduced fine, in exchange for termination of the investigation without further adjudicative proceedings. If, going forward, the Bureau removes this incentive by choosing to characterize monetary payments as civil penalties or fines and demanding that companies entering into such agreements admit liability for the alleged violations, we expect to see more entities that are subject to enforcement investigations opting to fight the allegations rather than settle with the FCC. Companies may also be dissuaded from self-reporting potential violations for fear of liability admission and stiff monetary penalties. **Update:** As this post was being drafted, the Commission released a settlement which did not contain these new admissions. Companies that are, or become, subject to an investigation should watch the Commission's actions in this area carefully.