

FIRM, FAST FLEXIBLE AND FAIR: THE FCC ENFORCEMENT BUREAU AFTER THREE AND A HALF YEARS

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INTRODUCTION

Good morning. First, let me thank Bob Pettit and the FCBA for the opportunity to speak with you today.

Today I plan to give you an overview of the Enforcement Bureau and what we do, as well as some suggestions for how you can best deal with us. Several of my Enforcement Bureau colleagues are also on panels today, and I know you'll get lots of concrete information and guidance from them as well.

I want to start by talking about the overall role of enforcement at the Commission these days. Chairman Powell has made clear that enforcement is at the heart of his pro-competitive deregulatory agenda and it is clear that the Commission as a whole supports strong enforcement. One quote of the Chairman's about his approach to enforcement that I particularly like is the following: "If you cheat, we will hurt you and hurt you hard."

Enforcement is an important complement to deregulation. As deregulation intensifies, the requirements that are left are increasingly the most important ones to Congress and the FCC, and it is increasingly important to take enforcement action to ensure compliance. As Chairman Powell has indicated: "We will shift from constantly expanding the bevy of permissive regulations to strong and effective enforcement of truly necessary ones." In this regard, the Chairman has recommended that Congress amend the Act to strengthen our enforcement authority

Enforcement as an approach to solving problems can be better suited to a deregulatory environment. The FCC's traditional method of addressing regulatory problems has been to adopt rules. This typically involves a notice and comment rulemaking proceeding pursuant to the Administrative Procedure Act that can take months or years to complete. Increasingly, this approach doesn't fit a complex marketplace that is changing rapidly. Too often the answers that come out of a rulemaking proceeding address questions that are no longer relevant or attempt to solve problems that no longer need solving. Swift and discrete enforcement action, on the other hand, often can more precisely address marketplace failures or disputes. Enforcement can thus play a key role in ensuring that the benefits of competition get to consumers without adding a structure of new requirements that may be overly complex or even stifle competition or innovation.

As Chairman Powell has explained: “We need a greater emphasis on enforcement rather than ‘by the grace of us’ regulation.”

OVERVIEW OF FCC ENFORCEMENT AUTHORITY

The FCC has broad authority to conduct investigations, for example, under sections 218, 308(b) and 403 of the Communications Act.

It is important for target companies to be responsive to our inquiries. For example, we issued a forfeiture against a Bell Operating Company for \$100,000 for intentionally failing to respond with a sworn statement attesting to the truth of the response.

It is also important to be truthful in response to our inquiries. Misrepresentation or lack of candor often leads to revocation proceedings. In this regard, the Commission recently began a revocation proceeding against a long distance company for possible misrepresentation or lack of candor in connection with response to a slamming investigation and in connection with an application to discontinue service in one state. The Commission has also recently revised section 1.17 of the Rules to strengthen the obligations of companies providing information to FCC to be truthful in adjudicatory proceedings.

If we find a serious violation, the typical result is a monetary forfeiture under section 503(b) of the Act or a consent decree. In egregious cases, we may designate a revocation hearing. The Enforcement Bureau then tries such revocation hearings before an administrative law judge. In addition to revocation hearings for misrepresentation or lack of candor to the Commission that I just mentioned, other recent revocation proceedings have involved potential fraudulent-type activity against consumers by a long-distance carrier and refusal of a broadcaster to follow a Commission order to get off the air.

The Enforcement Bureau also adjudicates complaints, for example, formal complaints against common carriers under section 208 and pole attachment complaints against utilities under section 224. Such complaints can lead to the award of damages to the complainant.

Another important area of Enforcement Bureau activity involves equipment seizures under section 510 of the Act against such entities as pirate radio operators. Such seizures involve U.S. Marshals executing a warrant.

One additional tool we have that I want to mention is the possibility of a district court injunction through the Department of Justice. We have had such injunctions in the pirate radio area and, most recently, against a broadcaster who refused to get off the air pursuant to a Commission order.

OVERVIEW OF THE ENFORCEMENT BUREAU

The Enforcement Bureau is the primary organization at FCC responsible for enforcement. Our responsibility includes enforcement involving common carriers, broadcasters, wireless licensees and satellite licensees, interference resolution, public safety and other technical enforcement, consumer protection enforcement and some cable enforcement. (A lot of cable enforcement and a few discrete broadcast enforcement issues are still handled by the Media Bureau.)

With most FCC enforcement now handled in one place we can ensure that enforcement is consistent and focused on areas that matter most.

Our overriding goal is to make the FCC a strong, professional and credible enforcement agency in service of the pro-competition, pro-consumer goals of the 1996 Telecom Act and, more generally, the Communications Act.

We have about 320 people, organized into five major units:

- Market Disputes Resolution Division: This division, comprised mostly of lawyers, handles formal complaints against common carriers and common carrier mediation efforts, as well as pole attachment complaints. Alex Starr is the division chief.
- Telecommunications Consumers Division: This division, comprised mostly of lawyers and analysts, analyzes informal complaint data and trends and initiates enforcement action involving telephone consumer protection issues. It also handles any formal consumer protection complaints against carriers and any formal disability complaints that we receive. Colleen Heitkamp is chief of this division.
- Technical and Public Safety Division: This division, comprised mostly of lawyers and engineers, works on technical and public safety enforcement issues, often in conjunction with our Field staff. Joe Casey is the division chief.
- Regional and Field Offices: Our regional and field offices are comprised mostly of engineers and compliance specialists. The Field handles investigations and enforcement on technical and public safety issues.
- Investigations and Hearings Division: This division, comprised mostly of lawyers and auditors, essentially does everything else, including FCC-initiated common carrier competition investigations, broadcast and wireless non-technical enforcement and serving as separated trial staff in hearings. Maureen Del Duca is chief of this division.

The Bureau also has significant homeland security responsibilities, through Deputy Bureau Chief Linda Blair, Jim Dailey of our front office and others.

At the 30,000 foot level, our enforcement activities fall into three broad categories: (1) competition and other common carrier market enforcement; (2) consumer protection enforcement; and (3) spectrum and public safety-related enforcement.

Before focusing on our role in each of these areas and some suggestions on dealing with us, I want to spend a minute talking about some broad principles we've applied to our work. There are four of them. We aim to be firm, fast, flexible and fair.

- Firm – When significant violations occur, there is a significant enforcement response. This doesn't mean we're going to whack people for every minor violation. But it does mean that if there's a major violation, companies can expect a strong enforcement response. This is important as a way of deterring further violations, not just by the entity but by other entities as well. This in turn helps ensure compliance, which is our overall goal, so that consumers can benefit from the pro-competitive rules of the road.
- Fast – Enforcement decisions are made quickly, decisively and clearly. A quickly changing, competitive market demands no less.
- Flexible – Where appropriate, the Bureau uses alternative means other than just formal litigation to resolve enforcement matters. This includes, for example, the use of consent decrees in appropriate case and facilitating private settlements of formal common carrier complaints. Compliance, not punishment, is the ultimate goal, and if we can get it without litigation, all the better.
- Fair – Those of you who know me know I have a passion for fairness. It's personal with me. It's also essential to what we're about. Credible and effective enforcement requires that we treat parties fairly. You might not always agree with what we do, but you can be sure that what we do is focus on the facts and on the law and reach an objective and considered decision. As I think we've demonstrated, we're willing to change our mind when the record supports doing so. Thus, for example, you can see that we've cancelled some proposed forfeitures after receiving the company's response and have changed our mind sometimes on reconsideration.

COMPETITION ENFORCEMENT

Competition works to the benefit of consumers. So when we do competition enforcement, it is ultimately consumers who benefit.

We take a three-pronged approach to competition enforcement: (1) formal complaints; (2) informal dispute resolution – mediation and settlement; and (3) FCC-initiated investigations and forfeitures.

Formal Complaints

Section 208 provides that a formal complaint may be filed at the FCC against a common carrier for “any” violation. The complainant has a choice under the statute of coming to the FCC or going to federal district court.

The range of complaints we get is quite broad. Some examples of the subjects of recent and pending cases are the following:

- Interconnection delays
- Provision of shared transport
- Payphone compensation
- Premature provisioning of long distance service by a BOC
- Access to numbering resources
- Early termination provisions in tariff
- Reciprocal compensation
- Alleged refusal to negotiate relocation of wireless system in good faith
- Provision of special access service
- Rates for resale of directory assistance

In the past, the FCC did not always deal as quickly or effectively as it might have with formal section 208 complaints, many of which have statutory deadlines of five months or even less. Under the leadership of Alex Starr, who is on a panel today, our Market Disputes Resolution Division has turned the tide on handling formal complaints. The attorneys in Market Disputes have been engaged in aggressive case management. As soon as a complaint case comes in the door, the staff attorney assigned to the case devises a plan for how the case will be managed, with specific timetables. New cases don’t just go to the bottom of a stack.

In the Enforcement Bureau’s first two years, we eliminated a long-standing formal complaint backlog. Similarly, of the approximately 120 cable rate and pole attachment cases we inherited about a year ago, we’re now down to nine, many of which the parties have asked us to hold so they can try to settle.

Elimination of the backlog has allowed us to resolve new cases more quickly. The bottom line is that we’ve gotten to the point that when a new case is filed, we can now pretty much guarantee the parties that we’re going to move on it promptly. This helps the parties get real time answers, helps competition and helps consumers. The typical section 208 complaint case is now decided within about a year; many are decided even more quickly. This compares well to the 20 month average that it takes for cases to go to trial in federal district court. To give you some specifics, in November 1999, when the Bureau began, of our overall formal section 208 complaint caseload, 154 cases had

been pending more than a year. As of December 2002, only two formal complaint cases were pending more than a year. We still aim to do better, resources and workload permitting.

While we've focused on speed, we've also focused on quality. We're very proud of our formal complaints record in the Court of Appeals. So far we've won in whole or substantial part all seven of such appeals.

Congress provided a new powerful formal complaint tool in section 271(d)(6) of the Act. We have to decide section 271 "backsliding" complaints in 90 days. So far we have received only one such complaint. We're likely to get more now that more than a majority of section 271 applications have been granted.

Let me give you some advice in this area: If you're contemplating filing a formal complaint, we strongly encourage you to contact the staff in the Market Disputes Resolution Division before filing it. In many cases, the staff can discuss the dispute with the parties involved and help facilitate a private settlement acceptable to both parties even before the filing of a complaint. In this latter regard, please look carefully at the rules and follow them when you file a complaint. It wastes everyone's time when defective complaints are filed.

Let me also give you the following comment about the formal complaint area: It's sometimes difficult for some in the industry to understand the increasing importance of the formal complaint process. Adjudications like these are focused on the record and the specific parties. This leads to faster, specific decisions. But the fact that a formal complaint case is a restricted adjudication under the *ex parte* rules means it is not subject to the open-ended lobbying so typical of Commission rulemakings. The Commission is in more of a judicial than legislative role in these cases. This can make some people who are in the lobbying business uncomfortable.

The Commission has recently issued two important competition-related formal complaint cases: *Core Com/Z-Tel v. SBC* and *Core Com v. Verizon*. In these cases, the Commission unanimously reaffirmed its jurisdiction to adjudicate complaints alleging violations of section 251 and related interconnection agreements. The Commission found violations of a merger order in one case and a violation of section 251 of the Act in the other.

Informal Dispute Resolution/Settlement

Effective enforcement also means exploring new and creative ways to solve problems. Our Market Disputes Resolution Division has been placing increased emphasis on mediation of formal complaints. We recognize that formal litigation can be too costly for some. We try to facilitate private settlements between the parties because we understand that business solutions arrived at by the parties without litigation are more efficient, and save time and resources for everybody involved, including the Commission.

This not only gets quick and satisfactory results for the parties involved, but it also frees up more time and resources for us to act on those disputes that can't be settled

Here are some examples of successful mediations:

- DSL provisioning issues
- number portability issues
- interconnection agreement opt-in issues
- conversion of special access circuits to EELs (extended enhanced loops)
- conduits/rights of way
- CLEC access charges
- Non-discriminatory access to OSS (operational support systems) and UNE (unbundled network element) provisioning

Mediation has been the great success of the Accelerated Docket (AD). Over half (58 of 108) of completed AD request matters have been settled or withdrawn after staff-sponsored mediation. And, outside the AD, we've mediated another 50 or so cases, more than 2/3 of which have settled.

The involvement of our staff in sharpening issues for the parties and facilitating settlement has often been crucial in getting these disputes decided. Many disputes are resolved before a decision is made whether to place them on the Accelerated Docket.

Some advice regarding the accelerated docket and mediation requests: The more targeted the request, the better suited it is for successful mediation and, if mediation is unsuccessful, inclusion on the AD.

FCC-Initiated Competition Investigations

Since the creation of the Enforcement Bureau, the Commission has taken a much more pro-active approach to local competition enforcement than in the past.

The main sources of information for our investigations are (1) staff review of merger reports, audits, performance measurements and other submissions; and (2) informal requests for investigations (with backup material) provided by competitors

Typically, our investigations start with us issuing a letter of inquiry (involving interrogatories and document requests) to the target. We carefully evaluate the response and may have follow-up questions before we decide whether to recommend or take enforcement action. The investigations are non-public unless and until enforcement action is taken. It's important to understand that the fact that we send an inquiry letter doesn't mean we have concluded there is a violation. It simply means we have concluded there's enough of a question that it's worth looking into. There have been several instances where we have declined to initiate enforcement action after reading persuasive responses from companies to our inquiry letters.

Similarly, when we issue an NAL it is for a *proposed* monetary forfeiture. We haven't made up our mind and it's an opportunity for the target to explain things.

Some advice for people informally requesting investigations: The more specifics you can give us about the facts and what statutory or rule provisions you think were violated, the better. Also, keep in mind that you are asking us to exercise our discretion to begin an investigation. You won't be a party with rights to participation and you may not even know that we're conducting an investigation unless and until we decide to take action. If you want to participate and have a formal role in an enforcement process, you should file a formal complaint.

Some advice for targets of investigations: The key is tell the truth and to be up front about things. If you hide the ball, it's only going to make things worse. Self-disclosure can also be helpful, although I recognize there are potential tradeoffs here and that some of your lawyers may advise otherwise in particular situations.

The result of some investigations is a consent decree, which can be a constructive result in certain cases. Consent decrees are particularly useful when a party is willing to recognize that there are problems and make commitments to changes in future behavior that would benefit consumers. Plus, consent decrees can be quick. This is good for the target, for the FCC, and, most importantly, for consumers. Consent decrees avoid delay and the expense of litigation. The company cleans up its act and makes a payment, the public gets results and everybody moves on. If a target is interested in a consent decree, it should feel free to approach us at any stage in the process. But understand, there is no right to a consent decree; we will only enter into one if we conclude it is in the public interest to do so. The key is commitment of the target to recognize a problem exists and to agree to go beyond the simple requirements to fix it.

Deputy Bureau Chief Anne Weismann will be on a panel about consent decrees.

Here are some examples of major competition-related investigations that led to enforcement action in last year:

- \$6 million forfeiture relating to compliance with a merger order's local competition condition
- \$5.7 million consent decree relating to premature marketing of long distance service in violation of section 271
- \$3.6 million consent decree relating to incorrect affidavits in section 271 applications

Commission adoption of performance measurements could make enforcement more effective and efficient. Enforcement could be enhanced if Congress enacted legislation introduced by Congressman Upton in response to Chairman Powell that would (1) increase forfeiture authority for common carriers 10-fold to \$1 million per violation up to \$10 million for a continuing violation, and (2) double the statute of limitations to two years.

Maureen Del Duca, Chief of our Investigations and Hearings Division, is on a panel today about investigations.

CONSUMER PROTECTION ENFORCEMENT

As competition has increased in the telecommunications industry, Congress has amended the Communications Act on several occasions to entrust the FCC with additional important consumer protection enforcement responsibilities. Congress has recognized that for a competitive market to work well, and thereby benefit consumers, it is important that consumers are well-informed and protected against various fraudulent schemes.

Just to rattle off some of these statutes giving the FCC additional consumer protection responsibilities, we have the Americans with Disabilities Act of 1990, the Telephone Operator Consumer Services Improvement Act of 1990, the Telephone Consumer Protection Act of 1991, the Telephone Disclosure and Dispute Resolution Act of 1992, the Cable Television Consumer Protection and Competition Act of 1992 and, of course, the Telecommunications Act of 1996, which, among many other things, addressed slamming and gave the FCC important new responsibilities regarding telecommunications services and equipment for persons with disabilities.

The Consumer and Governmental Affairs Bureau is responsible for handling informal consumer complaints against phone companies. In the Enforcement Bureau's Telecommunications Consumers Division, we track these informal complaints, analyzing problems and trends that show up. We then initiate investigations where warranted. If we see significant problems through complaints, through confidential "tips" or through other information, we use our authority under section 403 of the Communications Act to investigate. And, if our investigation confirms a serious problem we take enforcement action, generally through either a monetary penalty under section 503(b) of the Act or a consent decree.

Major consumer protection enforcement actions in last year include the following:

- Slamming: We had a recent \$1.2 million forfeiture and just begun revocation hearings for slamming-related misleading marketing to consumers and slamming-related misrepresentation to the FCC. This follows aggressive slamming enforcement of over \$15 million in last three years.
- Junk Faxes: The Commission has issued about \$6.5 million in forfeitures or proposed forfeitures. The Government won a big recent victory in the 8th Circuit, which held the statute constitutional. We have also issued about 125 citations; this is a first step that often leads to compliance.
- Misleading advertising: The Commission recently entered into a \$1 million consent decree

- Pre-recorded telephone advertising: The Commission issued over two dozen citations in last year.
- Disability issues: The Commission designated for a revocation hearing authorization of a company that appeared to be de-frauding the Telecommunications Relay Service fund and worked with US Attorney's office to help them develop a criminal case, which is pending.

A major new consumer enforcement area will be Do Not Call List enforcement once the FCC adopts rules later this year to complement FTC's National Do Not Call List rules.

As in the competition area, if you're the target of one of our investigations and you're ready to clean up your act, you should feel free to approach us with the possibility of a consent decree. Even if you're not the subject of an FCC investigation, if you know you've got a problem, you will almost always be better off by bringing it to our attention yourself, and working with us, rather than waiting until we discover it, and working against us.

I should also note that the Enforcement Bureau is also responsible for enforcing broadcast-related consumer protection statutes, such as statutory restrictions on indecency and the Children's Television Act limits on commercials in children's programming. Our Investigations and Hearings Division handles these matters, along with a wide variety of other broadcast, wireless and international matters, in addition to the common carrier investigations I mentioned before. That division also serves as separated trial staff in ALJ hearing cases involving things such as license and section 214 certification revocation.

SPECTRUM/PUBLIC SAFETY ENFORCEMENT

One of the most important statutory enforcement responsibilities of the FCC remains being the spectrum cop on the beat. Spectrum is more and more important for a wide variety of telecommunications services. Our Technical and Public Safety Division and our Field offices in 25 locations across the country share responsibility in this area.

Public safety is our top technical enforcement priority. We spend a lot of time and effort resolving interference to federal, state and local law enforcement entities, as well as interference on aviation and distress frequencies. Lives can be at stake here and our direction finding technology and expertise is unmatched.

Examples of major public safety enforcement actions we've taken in the last year include:

- E-911: Over \$3 million in enforcement action
- Tower safety: Over \$1 million in enforcement action

Other important public safety enforcement areas include the Emergency Alert System, AM Tower fences, cable signal leakage and RF radiation from towers.

Some trends in the public safety enforcement area are that we are focusing more on patterns of violations and more NALs rather than just warnings or notices of violations. Also, with additional resources, we are broadening our geographic reach.

Assistant Bureau Chief Lisa Fowlkes will be on a panel to discuss public safety enforcement and other issues.

STATE/FEDERAL COOPERATION ON ENFORCEMENT

We've developed some excellent cooperative working relationships with state commissions on enforcement. I know Commissioner Bob Rowe from Montana is speaking shortly and I look forward to his remarks. Let me just mention a few highlights about our work with the state commissions.

Consumer Protection Enforcement

The Enforcement Bureau (as well as CGB) participates in a monthly call with representatives of NARUC Consumer Affairs Subcommittee to share information on consumer protection issues as part of our State and National Action Plan (SNAP).

We recently had a \$1.2 million slamming forfeiture where we worked with 14 different state commissions on the investigation.

On a recent initiation of revocation hearing for misrepresentation/lack of candor to the FCC in the course of a slamming investigation and a discontinuance application, we worked with two state commissions in the course of the investigation and have been in touch with two others since the issuance of the order to show cause.

Competition Enforcement

We coordinated very closely with the New York Public Service Commission on an investigation involving Bell Atlantic's "lost orders" problem. This led to a \$3 million FCC consent decree and related enforcement action by the New York PSC.

We have also reached out to state commissions in connection with our section 271 compliance review program. We look forward to continuing to work closely with interested states.

We also work closely with the states on section 272 biennial audits regarding FCC separation and accounting rules for Bell Operating Company provision of long distance service once section 271 approval has been granted. By statute, state commissions are part of the Joint Oversight Team and we've worked closely with several

states on the audits since the Commission transferred audit responsibility to the Enforcement Bureau about a year ago.

CONCLUSION

As you can see, we have wide-ranging responsibilities in the Enforcement Bureau and we've been active in a lot of areas.

We will continue to focus on core responsibilities – competition, consumer protection and public safety enforcement.

We will continue to stress strong, swift, flexible and fair enforcement as part of the overall competitive, deregulatory structure established by the Telecom Act of 1996.