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Departing Martin Takes 31 Parting Shots At Cable

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In what has to have been an unprecedented farewell kiss-off by any Chairman, on January 19, 2009, now-former FCC Chair Kevin Martin appears to have caused the Enforcement Bureau to issue 28 separate notices of apparent liability (NALs) and three forfeiture orders, all directed to cable companies, seeking an aggregate of more than \$500,000 in fines.

Don't check your calendars – January 19 was, indeed, Martin Luther King Day, a Federal holiday. (It's probably a fair question to ask whether the Bureau staffers – many of them union members – got time-and-a-half for coming in on their day off.)

The fines all stem from the cable industry's on-going conversion to digital signal distribution, which usually cannot be seen on a TV set without a cable box of some sort, for which a monthly gratuity to the cable company gets tacked on to your bill. An earlier round of related NALs was described in the October, 2008 *Memo to Clients*.

Fifteen of the new fines (ranging from \$7,500 to \$22,500 each) were directed to operators who had moved program services to digital tiers, unavailable to analog customers, without first giving those customers the notice required by the Section 76.1603(b) of the rules. These fines were accompanied by an order requiring the operators to refund affected subscribers the princely sum of \$0.10 per channel per month.

In the forfeiture orders, three systems were each spanked for \$20,000 for navigation device-related violations arising from their shift to switched digital video (SDV) platforms. (By the way, "forfeiture orders" are the next step after NALs in the Enforcement Bureau's playbook.) These folks also got hit with refund obligations on top of their fines. One operator was fined \$7,500 for failing to notify its local franchising authority of the shift to SDV. Three cable systems which had previously been ordered to shell out refunds for various violations were fined \$25,000 each for failing to provide the Commission with a timely description of their proposed refund methodology. (They had previously been ordered to refund subscribers for certain similar violations.)

And nine systems were whacked \$25,000 each for suggesting to the FCC that some of this is none of their beeswax, which in governmentese is called “failing to respond fully and completely” to FCC inquiries sent to them last October. (Think Glenn Close in *Fatal Attraction*: “I will not be ignored.”)

Having confirmed that the 31 *billets doux* were out the door, Martin then took pen in hand to send a three-page letter to Senators Rockefeller and Hutchinson (the new head honchos on the Senate Commerce, Science and Transportation Committee) to let them know what a good boy he had been, beating up on the bad, bad cable industry and all.

Notwithstanding Martin’s grandstanding letter (in which he parrots language from some of the NALs, accusing the cable operators of “contempt for the Commission’s authority”, among other things), the NALs do *not* constitute final determinations of misconduct. Rather, they are more in the nature of accusations to which the targeted companies may respond. Of course, the charges may lead to final determinations sometime down the line . . . but then again, they may not. If the cases get litigated out to the max, it could take years before we know for sure who’s right and who’s wrong, particularly since a new Chairman will be piloting the FCC cruise liner when the seagulls come home to roost. And if the kerfuffle gets resolved through the settlement/consent decree process, we may never get a clear-cut ruling of guilt or innocence. However it all ends up, it will be out of Martin’s hands (and in the hands of an Administration which may take more kindly to cable than Martin did).

The underlying factual basis for the Commission’s claims may not be 100% favorable to the Commission’s position. It appears that most if not all of the cablers *did* respond to the Commission within the deadline established in the October NALs. Considering that that deadline was only two weeks after the inquiries were sent out, some of the responding companies said that they did not have enough time to pull together all the information the FCC requested. Some also pointed out that the requested information included materials covered by confidential provisions in agreements they have with third-parties, certainly a valid complicating factor for anyone who takes his/her contractual obligations seriously.

Alas, the Commission was unmoved by such considerations. (The fact that it took the FCC more than two months to crank out the NALs, though, would seem to lend credence to the claim that a two-week response limit might not have afforded enough time – but you never know about these things.)

A curiosity appears in the NALs for shifting program services to digital tiers without notice. Those NALs indicate that the shifting of each program service is a separate violation, and each violation warrants a \$7,500 fine. But only two cable operators were hit with fines of more than \$7,500, even though several more were alleged to have moved

more than one service without notice.

Time will tell whether the accused cable operators have been (a) unjustly vilified, or (b) properly brought to justice, or (c) something in between.

But whatever the merits of the MLK Day orders, they are a remarkable final testament to the former Chairman's style of administration. Why, after all, was it so all-fired important to get the orders out the door before he left the Commission? Yes, we all know of his pronounced lack of affection for the cable industry, and some of us who have seen our own analog cable signals flicker into darkness unless we rent expensive cable boxes may feel that the lack of affection is warranted. But isn't it a bit, er, cheesy to insist that the Bureau staff come in on a Federal holiday to crank out orders on the technical last day of his tenure so that Martin can then claim credit for them in a letter to the Hill?

In any event, the Martin regime is now in the history books, for better or worse. Many industries and individuals affected by the Commission's activities will breathe a sigh of relief, while keeping their fingers crossed that the new Administration will not bring with it some new regulatory yoke or quagmire.