Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	File No. EB-08-TC-2581
	)	
Qwest Corporation	)	NAL/Acct. No. 200832170071
	)	FRN: 0003746757
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NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: September 12, 2008 **Released: September 12, 2008**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability For Forfeiture* ("*NAL*"), we find that Qwest Corporation ("Qwest"), as an eligible telecommunications carrier ("ETC"), apparently violated Section 54.418 of the Commission's rules.[1] Specifically, we find that Qwest apparently willfully and repeatedly failed to provide certain Lifeline customers with notices about the transition of over-the-air full power broadcasting from analog to digital service (the "DTV transition") in the monthly bills or bill notices received by these customers. Based upon our review of the facts and circumstances surrounding this apparent violation, we find that Qwest is apparently liable for a monetary forfeiture in the amount of fifty-one thousand dollars ($51,000).

II. BACKGROUND

2. On February 19, 2008, the Commission adopted DTV consumer education outreach requirements intended to promote consumer awareness of the upcoming DTV transition.[2] Under these requirements, ETCs that receive federal universal service funds must provide their Lifeline or Link-Up[3] customers with notices about the DTV transition in the monthly bills or bill notices received by such customers.[4] The notices must be in clear and conspicuous print and must contain at least the following information about the DTV transition:

- After February 17, 2009, a television receiver with only an analog broadcast tuner will require a converter box to receive full power over-the-air broadcasts

[1] 47 C.F.R. §54.418.

[2] *See DTV Consumer Education Initiative*, Report and Order, 23 FCC Rcd 4134 (2008) ("*DTV Consumer Education Initiative Report and Order*").

[3] The Lifeline/Link-Up programs provide discounts off the initial installation and monthly costs of telephone service to millions of low-income consumers. *Id.* at 4162.

[4] 47 C.F.R. §54.418(a).

with an antenna because of the Nation's transition to digital broadcasting. Analog-only TVs should continue to work as before to receive low power, Class A, or translator television stations and with cable and satellite TV services, gaming consoles, VCRs, DVD players, and similar products.

- Information about the DTV transition is available at www.DTV.gov, and information about subsidized coupons for digital-to-analog converter boxes is available at www.dtv2009.gov or 1-888-DTV-2009.[5]

If an ETC's Lifeline or Link-Up customers do not receive paper versions of either a bill or a notice of billing, then those customers must receive equivalent monthly notices in whatever medium in which they receive information about their monthly bill.[6] As an alternative to the billing notices, ETCs may send separate monthly mailers with the required information about the DTV transition.[7] ETCs should have begun to send the required DTV consumer education notices on April 30, 2008,[8] and may cease doing so in March 2009.

3. Qwest provides local telephone service to customers in numerous states and is an ETC that receives federal universal service funds. On July 2, 2008, the Commission issued a Letter of Inquiry ("LOI") to Qwest to determine whether Qwest had complied with Section 54.418 of the rules.[9] In its response to the LOI, Qwest states that "in the process of preparing its response to this inquiry, [Qwest] discovered that Lifeline and Link-Up customers receiving on-line bills in [Qwest's] central and western regions had not been receiving the DTV transition notice. This was an oversight."[10] The company offers no further explanation for the error. According to the company, approximately 8,500 of its Lifeline and Link-Up customers in nine western states failed to receive DTV transition notices in the months of May, June, and July 2008.[11] Qwest states that it has fixed this problem and that its Lifeline and Link-Up customers who receive on-line bills in the central and western region would begin receiving the monthly notice in their August bills.

4. Under Section 503(b)(1) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.[12] Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act,

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[5] *Id.* at §54.418(b).

[6] *Id.* at §54.418(c).

[7] *Id.*

[8] The DTV transition notice requirements for ETCs went into effect 30 days after the effective date of Section 54.418. That date was March 31, 2008. *See Media Bureau Announces Effective Date for the Rules in the DTV Consumer Education Initiative,* Public Notice, DA 08-757 (Media Bur. rel. March 28, 2008).

[9] Letter from Colleen Heitkamp, Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission to Melissa Newman, Vice President Federal Regulatory Affairs,, Qwest Corporation dated July 2, 2008 ("LOI").

[10] Letter from Tiffany West Smink, Senior Attorney, Qwest Corporation., to Robert Somers, Senior Attorney, and Colleen Heitkamp, Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission, dated August 1, 2008 at 3 ("LOI Response").

[11] *Id.* The states involved were Arizona, Colorado, Idaho, Montana, New Mexico, Oregon, Utah, Washington, and Wyoming.

[12] 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1); s*ee also* 47 U.S.C. § 503(b)(1)(D) (forfeitures for violation of 14 U.S.C. § 1464).

irrespective of any intent to violate" the law.[13] The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,[14] and the Commission has so interpreted the term in the Section 503(b) context.[15] The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.[16] "Repeated" means that the act was committed or omitted more than once, or lasts more than one day.[17] To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.[18] The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.[19]

III. DISCUSSION

A. Qwest Apparently Violated the Commission's Rules Requiring DTV Transition Notices To Lifeline and Link-Up Customers

5. Qwest concedes that it failed to send DTV transition notices to approximately 8,500 Lifeline and Link-Up customers in the months of May, June, and July 2008.[20] Accordingly, we find that Qwest apparently willfully and repeatedly violated Section 54.418(a) of the Commission's rules by failing to provide the required DTV transition notice to numerous Lifeline and Link-Up subscribers either as a separate mailer or with their May, June, and July 2008 bills.

B. Proposed Forfeiture

6. Section 503(b)(2)(B) of the Act authorizes the Commission to assess a forfeiture of up to $130,000 for each violation or each day of a continuing violation, up to a statutory maximum of $1,325,000 for a single act or failure to act.[21] In exercising such authority, we are to take into account

[13] 47 U.S.C. § 312(f)(1).

[14] H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) ("This provision [inserted in Section 312] defines the terms 'willful' and repeated' for purposes of section 312, and for any other relevant section of the act (e.g., section 503)…. As defined … 'willful' means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. "Repeated" means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be 'continuous' would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in sections 312 and 503, and are consistent with the Commission's application of those terms …").

[15] *See, e.g., Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) ("*Southern California Broadcasting Co.*").

[16] *See, e.g., Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) ("*Callais Cablevision, Inc.*") (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage).

[17] *Southern California Broadcasting Co.,* 6 FCC Rcd at 4388, para. 5; *Callais Cablevision, Inc.,* 16 FCC Rcd at 1362, para. 9.

[18] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

[19] *See, e.g., SBC Communications, Inc*., Forfeiture Order, 17 FCC Rcd 7589, 7591, para. 4 (2002).

[20] LOI Response at 3.

[21] 47 U.S.C. § 503(b)(2)(B). *See also* 47 C.F.R. § 1.80(b)(2); *Amendment of Section 1.80(b) of the Commission's Rules*, Order, 19 FCC Rcd 10945 (2004). We note that effective September 2, 2008, the maximum forfeiture amount allowed increased to $150,000 for each violation or each day of a continuing violation, up to a maximum of $1.5 million for a single act or failure to act. *Inflation Adjustment of Maximum Forfeiture Penalties*, Final Rule, 73

(continued....)

"the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[22]

7. The Commission's *Forfeiture Policy Statement*[23] and Section 1.80 of the Rules do not establish a specific base forfeiture for violation of Section 54.418(a)'s notice requirements. The Commission has warned, however, that "any omission of a specific rule violation from the … [forfeiture guidelines] … should not signal that the Commission considers any unlisted violation as nonexistent or unimportant."[24] Indeed, the Commission emphasized the importance of the ETC requirements in the *DTV Consumer Education Initiative*:

> In a survey on the DTV transition, the GAO found that over-the-air households are more likely to have lower incomes than cable or satellite households and that approximately 48 percent of exclusive over-the-air viewers have household incomes less than $30,000…. Because the DTV transition will greatly affect lower income households and the Lifeline/Link-Up programs already serve this same demographic, we have an already established communication path that can be used to further the success of the DTV transition. By communicating with these lower income households, we ensure that all Americans will have the knowledge they need in order to prepare for the DTV broadcast transition.[25]

The Commission further noted that Americans rely heavily on their televisions to receive emergency information through the Emergency Alert System, and tragedy might result if people lost the ability to receive such alerts because they were unaware of the DTV transition.[26] "Therefore, ensuring that all Americans receive notice of the upcoming DTV transition, including those that have been identified as at risk of not receiving the necessary information, is a critical step to achieving our mandate to promote public safety."[27]

8. Because of the significance of the Commission's DTV transition notice requirements and the potential scale of violations in this area, we find instructive the forfeiture calculation methodologies adopted by the Commission in other DTV-related enforcement areas. For example, in cases involving the interstate shipment or importation of television receivers incapable of receiving digital broadcast signals, the Commission based its forfeiture calculations on each unit shipped or imported.[28] To reflect the increasing seriousness of the violations as the number of non-compliant units shipped or imported rises, the Commission established tiers of violations with increasing per-unit forfeitures for each successive tier.[29] The Commission adopted a similar approach for cases involving the interstate shipment or U.S.

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Fed. Reg. 44663, 44664 (2008). Because the apparent violations here occurred prior to the effective date of the inflationary adjustment, the increased forfeiture amounts do not apply.

[22] 47 U.S.C. § 503(b)(2)(D); *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, Report and Order*, 12 FCC Rcd 17087, 17100-01 para. 27 (1997) (*Forfeiture Policy Statement*), *recon. denied*, 15 FCC Rcd 303 (1999).

[23] *See Forfeiture Policy Statement*, 12 FCC Rcd at 17115.

[24] *Forfeiture Policy Statement,* 12 FCC Rcd at 17099.

[25] *DTV Education Initiative Report and Order*, 23 FCC Rcd at 4162.

[26] *Id.* at 4162.

[27] *Id.* at 4163.

[28] *See, e.g., Invision Industries, Inc.,* Notice of Apparent Liability for Forfeiture, FCC 08-187 (rel. Aug. 18, 2008) (proposing a $324,000 forfeiture for the unlawful importation of 4,115 analog-only television receivers).

[29] *Id.* at ¶¶ 19-20.

manufacture of television receivers that do not comply with the Commission's program blocking rules.[30] In the *Funai NAL*, the Commission again proposed a forfeiture for each television receiver shipped interstate that did not comply with FCC rules, calculating the forfeiture based on tiers of units with increasing penalty amounts as the tiers progressed.[31]

9. We find that a similar approach should apply to violations of the DTV Consumer Education requirements, and will appropriately take into account the specific facts of each individual case. Therefore, in cases involving an ETC's failure to send monthly DTV transition notices to its Lifeline/Link-Up customers in apparent violation of 47 C.F.R. § 54.118, we will base our forfeiture calculations on the number of customers each month that failed to receive proper notice of the DTV transition, with increasing per customer forfeitures imposed for each successive month in which the ETC failed to comply with the Commission's rules. Such an approach should encourage prompt compliance and adequately punish the most egregious violators. Thus, for a single month of violations, an ETC will face a forfeiture of one dollar ($1.00) for each customer that did not receive proper notice of the DTV transition. We will increase the per-customer penalty for each additional month by an additional dollar. Thus, a second month of violations will result in a forfeiture of two dollars ($2.00) per customer, a third month would result in a forfeiture of three dollars ($3.00) per customer, and so on. We caution that if this forfeiture calculation approach does not adequately deter future violations by Qwest or other ETCs, we will consider other penalties within the scope of our authority, including substantially higher forfeitures.

10. In this case, Qwest failed to send proper DTV transition notices to 8,500 customers each month during May, June, and July 2008. Therefore, the forfeiture for Qwest 's apparent violations is $51,000.[32] Accordingly, we propose a total forfeiture of $51,000 against Qwest for its apparent willful and repeated violations of Section 54.418(a).

11. Because of the number of Lifeline/Link-Up customers served by ETCs, the failure to provide DTV consumer education notices as required by the Commission's rules is crucial, especially since consumers participating in the Lifeline and Link-Up programs are particularly likely to be over-the-air viewers and billing notices are a critical means of reaching them. The imminent nature of the DTV transition and its potential impact on unaware consumers further increases the importance of each and every educational opportunity.

IV. ORDERING CLAUSES

12. ACCORDINGLY, IT IS ORDERED THAT, pursuant to Section 503(b) of the Communications Act of 1934, as amended,[33] Section 1.80(f)(4) of the Commission's rules,[34] and authority delegated by Sections 0.111 and 0.311 of the Commission's rules,[35] Qwest IS LIABLE FOR A MONETARY FORFEITURE in the amount of fifty-one thousand dollars ($51,000) for willfully and repeatedly violating Section 54.418(a) of the Commission's rules.

13. IT IS FURTHER ORDERED THAT, pursuant to Section 1.80 of the Commission's rules,[36] within thirty (30) days of the release date of this *Notice of Apparent Liability for Forfeiture*, Qwest SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

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[30] *See Funai Corporation, Inc*., Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 19663 (2007) ("*Funai NAL*") (subsequent history omitted).

[31] *Id.*

[32] Using the formula described above, Qwest's proposed forfeiture liability is derived as follows: (8,500 * $1.00) + (8,500 * $2.00) + (8,500 * $3.00) = $51,000.

[33] 47 U.S.C. § 503(b).

[34] 47 U.S.C. § 1.80(f)(4).

[35] 47 C.F.R. §§ 0.111, 0.311.

[36] 47 C.F.R. § 1.80.

14. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment(s) must include the NAL/Account Numbers and FRN Numbers referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Qwest will also send electronic notification on the date said payment is made to Johnny.Drake@fcc.gov. Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures.

15. The response, if any, must be mailed both to the Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, ATTN: Enforcement Bureau – Telecommunications Consumers Division, and to Marcy Greene, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, and must include the NAL/Acct. Nos. referenced in the caption.

16. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

17. IT IS FURTHER ORDERED that a copy of this *Notice of Apparent Liability for Forfeiture* shall be sent by Certified Mail Return Receipt Requested and First Class Mail to Tiffany West Smink, Senior Attorney, Qwest, 1801 California Street, 10th Floor, Denver, CO 80202.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief, Enforcement Bureau