F.C.C. 70-513

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re
APPLICABILITY OF FRAUDULENT BILLING RULE

(May 15, 1970)

THE COMMISSION BY COMISSIONERS BURCH (CHAIRMAN), BARTLEY, ROBERT E. LEE, COX, JOHNSON, H. REX LEE, AND WELLS APPROVED THE FOLLOWING PUBLIC NOTICE.

The fraudulent billing practices prohibited by sections 73.124, 73.299, 73.678, and 73.1205 of the Commission's rules and regulations include all practices commonly referred to as "double billing." Most "double billing" as practiced in the past has been designed to deceive and defraud manufacturers into paying a larger share of a local dealer's cooperative advertising expenditure than was stipulated in their agreements with such local dealers. However, there may have been other cases in which the manufacturers reimbursed a dealer on the basis of a bill for cooperative advertising which the manufacturer knew to be inflated or fictitious, because the manufacturer wished to use this scheme to violate the Clayton and Robinson-Patman Acts (15 U.S.C. 13), which make it unlawful for a manufacturer or distributor engaged in commerce to give discriminatory discounts, rebates or advertising allowances to its dealers. Any information coming to the Commission's attention indicating possible violations of these statutes will be considered by this Commission and referred to the Federal Trade Commission for appropriate action by that agency. As previously stated by this Commission, participation by a licensee in a scheme to violate a Federal statute reflects seriously upon his qualifications.

Since fraudulent billing practices may take many forms, the following list of examples should not be considered as all-inclusive. It is provided merely to supply illustrations of certain fraudulent practices with which the Commission already is familiar. It should be remembered that the essential element in "double billing" is the furnishing of false information to any party contributing to the payment of broadcast advertising as to the amount actually charged by the licensee for such advertising or as to the nature, quantity or content of such advertising.

Since the first issuance of the "Applicability of Fraudulent Billing Rule" public notice in 1965, other instances of fraudulent billing practices have arisen, not involving "double billing" but simply outright misrepresentation, to the advertiser who placed the advertising, of the quantity or time of advertising broadcast. These are covered by examples 9 and 10 below, and are strictly prohibited by the fraudulent billing rule.

The above-mentioned rules state, and the Commission wishes to emphasize, that licensees shall use reasonable diligence to see that their employees do not engage in fraudulent billing practices.

EXAMPLES

1. A licensee issues a bill or invoice to a local dealer for 50 commercial spots at a rate of $5 each for a total of $250. In connection with the same 50 commercial spots, the station also supplies the local dealer or an advertising agency, jobber, distributor, or manufacturer of products sold by the local dealer, another affidavit, memorandum, bill, or invoice which indicates that the amount charged the local dealer for the 50 spots was greater than $5 per spot.

Interpretation: This is fraudulent billing, since it tends to deceive the manufacturer, jobber, distributor or advertising agency to which the inflated bill eventually is sent, as to the amount actually charged and received by the station for the advertising.

2. A licensee issues a bill or invoice to a local dealer for 50 commercial spots at $5 each and the bill, invoice or accompanying affidavit indicates that the 50 spots were broadcast on behalf of certain cooperatively advertised products, whereas some of the spots did not advertise the specified products, but were used by the local dealer solely to advertise his store or other products for which cooperative sponsorship could not be obtained.

Interpretation: This is fraudulent billing, even though the station actually received $5 each for the 50 spots, because, by falsely representing that the spots advertised certain products, the licensee has enabled the local dealer to obtain reimbursement from the manufacturer, distributor, jobber or advertising agency for advertising on behalf of its product which was not actually broadcast.

3. A licensee sends, or permits its employees to send, blank bills or invoices bearing the name of licensee or his call letters to a local dealer or other party.

Interpretation: A presumption exists that licensee is tacitly participating in a fraudulent scheme whereby a local dealer, advertising agency or other party is enabled to deceive a third party as to the rate actually charged by licensee for advertising, and thereby to collect reimbursement for such advertising in an amount greater than that specified by the agreement between the third party and the local dealer. It is the licensee's responsibility to maintain control over the issuance of bills and invoices in the licensee's name, to make sure that fraud is not practiced.

4. A licensee submits bills or invoices to an advertising agency, station representative, or other party indicating that licensee's rate per spot is $50, whereas the licensee actually receives only $5 or $10 per spot in actual payment from the agency, representative or other party. Licensee claims that the remaining 80 or 90 percent of its original invoice has been deducted by the agency as "commission" and therefore no "double billing" is involved.

Interpretation: This is fraudulent billing. The agency discount does not customarily exceed 15 percent and the supplying of bills and

invoices by the licensee to agencies which indicate that the licensee is charging several times as much for advertising as he actually receives constitutes participation in a fraudulent scheme.

5. A licensee submits a bill or invoice to a local dealer or other party for 50 commercial spots at $5 each for a total of $250. However, the bottom of the bill or invoice carries an addendum, so placed that it may be cut off of the bill or invoice without leaving any indication that the invoice originally carried such an addendum. The addendum specifies a "discount" to the advertiser based on volume, frequency or other consideration, so that the amount actually billed at the bottom of the page is less than $5 for each spot.

Interpretation: The preparation of bills or invoices in a manner which seems designed primarily to enable the dealer to deceive a cooperative advertiser as to the amount actually charged for cooperative advertising raises a presumption that the licensee is participating in a "double billing" scheme.

6. A licensee submits a bill or invoice to a local dealer for 50 spots involving cooperative advertising of a certain product or products at a rate of $5 each, and actually collects this amount from the dealer. However, as a "bonus" the licensee "gives" the dealer 50 additional spots in which the product or products named on the original invoice are not advertised, so that the dealer actually obtains the benefit of 100 spots in return for payment to the station of the $250 billed for the 50 cooperative spots.

Interpretation: If the 50 "bonus" spots were broadcast as the result of any agreement or understanding, expressed or implied, that the dealer would receive such additional advertising in return for contracting for the first 50 spots at $5 each, the so-called bonus spots were, in fact, a part of the same deal, and the licensee, by his actions, is participating in a scheme to deceive and defraud a manufacturer, jobber, distributor or advertising agency.

7. A local appliance dealer agrees to purchase 1,000 spots per year from a station and thereby earns a discount which reduces his rate per spot from $10 to $5. During the course of the year, the dealer purchases 100 spots from the station which advertise both the dealer and "appliance *A*" and for which the dealer pays $5 per spot. Since the station's rate per spot for 100 spots is $10, the dealer asks the station to supply him with an invoice for the 100 spots on behalf of "appliance *A*" at $10 per spot, claiming that if the manufacturer of the appliance had purchased the 100 spots, or if the dealer himself had purchased only these 100 spots within the course of a year, the $10 rate would apply, and that, therefore, the manufacturer should be required to reimburse the dealer at the $10 rate.

Interpretation: This practice constitutes fraudulent billing unless the dealer can provide satisfactory evidence that the manufacturer of "appliance *A*" is aware that the dealer actually paid only $5 per spot because of the volume discount.

8. A licensee issues a bill or invoice to a dealer for commercial spots which were never broadcast.

Interpretation: This practice, prima facie, involves fraud, either against the dealer or against a third party which the dealer expects to provide partial reimbursement for the nonexistent advertising.

9. A licensee knowingly issues a bill or invoice to a local or national advertiser which shows broadcast of commercial announcements 1 minute in length, whereas in fact some of the announcements were only 30 seconds in length.

Interpretation: This is fraudulent billing, since it misrepresents the length of the commercials, a highly important element of the price charged for them.

10. A licensee knowingly issues a bill or invoice to a local or national advertiser which sets forth the time of day or date on which commercial announcements were broadcast, whereas in fact they were presented at a different time or on a different day, or were not broadcast at all.

Interpretation: This is fraudulent billing, since time of broadcast is often highly important in its value and the price charged for it. Charging for advertising not broadcast is clearly fraudulent.

Action by the Commission May 13, 1970. Commissioners Burch (Chairman), Bartley, Robert E. Lee, Cox, Johnson, H. Rex Lee, and Wells.