REDACTED—For Public Inspection

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

In the Matter of	)	
	)	File No. EB-IHD-14-00017504
AT&T MOBILITY LLC	)	NAL/Acct. No. 201532080016
	)	FRN: 0018624742
Notice of Apparent Liability for Forfeiture and Order	)	

RESPONSE OF AT&T MOBILITY LLC TO NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Christopher M. Heimann
Gary L. Phillips
David L. Lawson
D. Wayne Watts
AT&T MOBILITY LLC
1120 20th Street, N.W.
Suite 1000
Washington, D.C. 20036

Peter D. Keisler
C. Frederick Beckner III
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

Michael K. Kellogg
Benjamin S. Softness
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036

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INTRODUCTION AND SUMMARY

The Commission's Notice of Apparent Liability for Forfeiture and Order ("*NAL*") flouts the most basic principles of fairness, due process, and responsible enforcement. In order to allege that AT&T violated the Commission's Transparency Rule, the *NAL* must rewrite the terms of the Rule, disavow the Commission's own prior statements, and ignore the broad reach and detailed content of AT&T's multiple, customer-friendly disclosures. The *NAL* is both unprecedented and indefensible.

The sanctions the *NAL* proposes reflect a similarly startling absence of legal authority and reasoned decisionmaking. It would impose massive forfeiture penalties on AT&T for practices that were repeatedly endorsed by the Commission. AT&T's competitors, who employed the same congestion management practices and disclosed less, have not been subjected to any similar enforcement action. The Commission's findings that consumers and competition were harmed are devoid of factual support and wholly implausible. Its "moderate" forfeiture penalty of $100 million is plucked out of thin air, and the injunctive sanctions it proposes are beyond the Commission's authority. Both, moreover, reflect an unseemly effort to coerce settlement. And the *NAL* and the related press campaign confirm that the agency has already prejudged AT&T's liability, abandoning any pretext that the Commission remains an impartial arbiter of the case.

If the findings, conclusions, and sanctions proposed in the *NAL* are adopted, they will not withstand judicial review.

1. The Commission made clear in its *2010 Open Internet Order*[1] promulgating the Transparency Rule, and in submissions to the Office of Management and Budget ("OMB"), Congress and the D.C. Circuit, that the Rule required AT&T to make a "single," "public" online

[1] Report and Order, *Preserving the Open Internet*, 25 FCC Rcd. 17905 (2010) ("*2010 Open Internet Order*"), *vacated in part*, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

disclosure.[2] That disclosure must describe congestion management practices, but no magic words are required. In particular, the Commission required no disclosure of managed speeds. Rather, the Commission opted to "allow flexibility" and "expected" only that disclosures regarding congestion management practices would include "some or all" of the following: the purposes of the practice, its effect on end users, the criteria or trigger used for the practice, usage limits and the consequences of exceeding them, and references to engineering standards where appropriate.[3]

AT&T's online disclosure of its Maximum Bit Rate ("MBR") policy included every one of those elements. Its descriptions of the practice's effect on subscribers to AT&T's Unlimited Data Plan, the criteria or trigger for the practice, and the consequences of exceeding the usage threshold were unmistakable:

> For our mobile broadband services, we've also developed a process to reduce the data throughput speed experienced by a very small minority of smartphone customers who are on unlimited plans—those who use 3 gigabytes of data or more in a billing period on a 3G or 4G smartphone, or 5 gigabytes or more on a 4G LTE smartphone. These customers will experience reduced speeds once their usage in a billing cycle reaches the applicable 3 or 5 gigabyte threshold for their smartphone. They can still use unlimited data and their speeds will be restored with the start of the next billing cycle. We will notify customers before the first time they are affected by this process.[4]

The page included a link to additional information about the program and its "effects on end users' experience,"[5] such as the fact that, "[e]ven with reduced speeds,

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[2] *Id.* ¶ 58; 47 C.F.R. § 8.3 (2011).

[3] *2010 Open Internet Order* ¶ 56.

[4] *See* AT&T, Broadband Information, http://www.att.com/broadbandinfo ("Broadband Information Page"), March 2012 archive of page attached as Exh. M to Declaration of Matthew Haymons ("Haymons Decl.") (Attachment 1). As the MBR policy was updated between 2012 and now (*e.g.*, when congestion-aware elements were implemented), the page was updated to reflect those changes.

[5] *2010 Open Internet Order* ¶ 56.

you can still have a good experience surfing the web and doing email—but you'll see the biggest difference in the quality of streaming video" because "[s]treaming video consumes the most data of all possible activities."[6]

AT&T's disclosure mirrored a 2010 disclosure by Comcast that the Commission expressly held out as an exemplar of Transparency Rule compliance. Like Comcast's, AT&T's disclosure states the purpose of the MBR policy, explains the type and level of usage that triggers the MBR policy, and describes the nature and duration of the effects of the policy.[7] Further, the disclosure makes clear that the word "unlimited," as used in the Unlimited Data Plan, is a *pricing* term, not an impossible promise of service unencumbered by any limits whatsoever. It states that customers affected by the MBR policy "can still use unlimited data" and would not be subject to overage charges, even though their speeds may be slower above certain identified usage thresholds.

Other providers interpreted the Rule just as AT&T did; indeed, all the major providers implemented programs in which they slowed data speeds of "unlimited" data plan customers. Verizon and Sprint slowed speeds for unlimited data plan customers in the "top 5%" of usage without identifying particular speeds.[8] T-Mobile slowed data speeds for "unlimited" plan customers who reached certain usage thresholds to a greater extent than AT&T.[9] This industry-wide understanding of the Transparency Rule was apparently shared by the Commission, too.

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[6] AT&T, Avoid Reduced Data Speeds with Unlimited Data Plans, http://www.att.com/esupport/article.jsp?sid=KB410284&cv=820 ("Wireless Support Page"), March 2012 version attached as Exh. J to Haymons Decl.

[7] *See id*.

[8] *See infra* pp. 25–27.

[9] *See* T-Mobile, *Data Speed FAQs*, https://support.t-mobile.com/docs/DOC-2741 (last updated July 2, 2015) (listing reduced speeds of 50 kbps, 100 kbps, and 128 kbps, depending upon the particular plan).

For nearly four years it raised no objection to widely publicized practices and disclosures that it now claims were "egregiously" harming consumers. In light of these facts, there is not even a plausible case that AT&T violated the Transparency Rule.

Scrambling for a legal theory to match its preferred conclusion, the *NAL* relies on two arguments. Neither is tenable.

First, the *NAL* claims that AT&T violated an alleged Transparency Rule requirement that providers disclose the precise transmission speeds experienced by consumers subject to the MBR policy. There is no such requirement, and the Commission's contrary claim rests on a mis-statement of the Rule. In particular, the *NAL* quotes a portion of the *2010 Open Internet Order* that does *not* apply to congestion management practices, but alters the quotation to pretend that it does.[10] Moreover, it ignores that, in describing the transparency requirement in the *2010 Open Internet Order*, the Commission held out as a model the Comcast disclosure, which, like AT&T's disclosure, did not discuss specific speeds. In this context, AT&T could not possibly have been aware—let alone aware with the "ascertainable certainty" the Due Process Clause requires—of the obligation the *NAL* has now manufactured.[11]

Second, the *NAL* relies on dictionary definitions read in isolation to suggest that use of the word "unlimited" to describe a plan that involves congestion management is a *per se* violation of the Transparency Rule, regardless of what else the required online disclosure says.[12] That approach runs afoul of the most basic principle of textual construction: context matters. Here, AT&T's disclosures make clear on their face that "unlimited" refers to data quantity, not speed. Indeed, they expressly state that speed may be reduced even though customers may still

[10] *NAL* ¶ 23.

[11] *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328–29 (D.C. Cir. 1995).

[12] *NAL* ¶ 19.

use unlimited data for a fixed price. Likewise, AT&T's wireless customer agreements have always made clear that service quality and speed are not guaranteed and have always reserved AT&T's right to protect its network against use that adversely impacts or hinders other customers' access to the network.[13] What is more, any customer who renewed the service since August 2012 signed a contract that expressly clarifies the meaning of "unlimited": "unlimited means you pay a fixed monthly charge for wireless data service regardless of how much data you use."[14] The Commission is not free to substitute its own after-the-fact definition for the one that consumers were actually supplied.

The Commission attempts to sidestep this deficiency by focusing not on the disclosures actually required by the Transparency Rule, but on other contexts in which AT&T referred to its service as "unlimited." Since, unlike other providers, AT&T has not advertised its unlimited service since 2010, the pickings are slim. The *NAL* thus finds that AT&T misled its Unlimited Data Plan customers by describing its service as "unlimited" in its customer bills and "every time a term contract was renewed,"[15] ignoring AT&T's disclosures and the terms of the relevant contracts themselves, which expressly defined "unlimited" in a manner inconsistent with the Commission's hypothesis.

In any event, the Commission's legal theory that the Transparency Rule is a vast grant of oversight authority over all carrier advertisements, public statements, and customer bills is untenable, notwithstanding the staff's "Enforcement Advisory" purporting to make it so weeks before this investigation was commenced. Liability for a Transparency Rule violation turns on—

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[13] *See, e.g.*, AT&T, August 2011 Wireless Customer Agreement §§ 3.2, 4.1, 6.2, attached as Exh. A to Haymons Decl.

[14] AT&T, August 2012 Wireless Customer Agreement, attached as Exh. B to Haymons Decl.

[15] *NAL* ¶ 20.

and only on—the actual Transparency Rule. That rule requires a "disclos[ure]," and cannot be read to grant the Commission authority to police any and all allegedly misleading statements. The Commission's contemporaneous statements in the *2010 Open Internet Order*, in its filings with OMB and Congress, and in its defense of the Transparency Rule in the D.C. Circuit all establish that the Rule can be satisfied by a single disclosure, and thus all rebut this newfound and extraordinary claim of authority. The *NAL* "under the guise of interpreting a regulation, [is seeking] to create *de facto* a new regulation."[16]

2. Under any lawful mode of analysis, the fact that AT&T complied with the Transparency Rule's requirements by posting an online disclosure containing the information the Commission required should end this case. AT&T, however, went well beyond the Rule's requirements and directly notified all users affected by the MBR policy in numerous additional ways.

AT&T announced the program through a widely cited press release three months before implementing it. It then sent all Unlimited Data Plan subscribers a conspicuous notification about the MBR policy on the first page of their monthly bill. It emailed its heaviest users and texted all potentially affected customers with information about the operation and effect of the program. And it staffed a call center dedicated to the MBR policy. AT&T took *all* of the above steps by no later than March 2012. If that were not enough, its contracts expressly withhold promises of speed or quality and clearly preserve AT&T's right to manage its network. And, since August 2012, the operative wireless customer contract has explicitly provided that "AT&T

[16] *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000).

may reduce your data throughput speeds . . . if your data usage exceeds an applicable, identified usage threshold during any billing cycle."[17]

It is thus absurd to suggest that AT&T intended to or actually did mislead the relevant Unlimited Data Plan customers. Those customers were repeatedly advised of AT&T's congestion management practices, and, for nearly four years, they chose to keep their service.

Indeed, customers subject to the MBR policy were *more likely* to renew their contracts than those who were not. Thus, as the economic analysis of Dr. Mark Israel confirms, "the vast majority of [Unlimited Data Plan] subscribers were sufficiently informed about MBR, such that they were either not surprised by being throttled or not materially affected by throttling (or both)."[18] The customer complaints on which *NAL* places great weight likewise belie its claim of inadequate disclosure, because many of the complaints reflect customers' reacting to notices that they read and clearly understood, and not a single complaint indicates that the subscriber read AT&T's website disclosure and found it inadequate.

3. Even if AT&T's statements could be deemed to violate the Transparency Rule—which, for the many reasons outlined above, they cannot—they would amount to a mere technical violation of the Rule that could not possibly support the extravagant sanctions the Commission has determined to impose. Each proposed sanction is both arbitrary and excessive and also beyond the Commission's statutory authority.

First, the relief proposed by the *NAL* is barred by the one-year statute of limitations. The *NAL* claims AT&T violated the Transparency Rule by inadequately disclosing its MBR policy. But the Transparency Rule is quite clear: AT&T was required to make a *single* website disclosure. Even if that disclosure were flawed (and it was not), the Commission was required to

[17] August 2012 Wireless Customer Agreement § 6.2.

[18] Declaration of Mark Israel ¶ 9 ("Israel Decl.") (Attachment 2).

issue any *NAL* within a year of AT&T's posting. Indeed, the *2010 Open Internet Order* expressly states that "[b]roadband providers' online disclosures shall be considered disclosed to the Commission for purposes of monitoring and enforcement."[19] AT&T's online disclosures were posted in 2011; the purported deficiencies in those disclosures have been in front of the Commission for enforcement purposes for nearly four years. The *NAL* is thus time-barred.

Second, the forfeiture amount is based on the assumption that AT&T committed "per customer" violations such that the Commission would have authority to impose a $16,000 forfeiture penalty for every AT&T unlimited customer.[20] But the Transparency Rule imposed no "per customer" obligation. To the extent that AT&T's website could be found not to satisfy the requirements of the Transparency Rule, that would be a *single* violation of the Rule supporting, at most, a $16,000 forfeiture penalty. The Commission's contrary approach of determining an "astronomical" base forfeiture level as its starting point and then asserting discretion to pick any amount under that level completely distorts the statutory scheme. The Commission's approach also denies due process. It permits the Commission to set a forfeiture penalty that, as here, cannot reasonably be anticipated, is grossly excessive, and is designed to coerce regulated parties to abandon meritorious defenses and settle.

Even apart from these fundamental errors, the $100 million proposed forfeiture amount is arbitrary. To begin with, it is calculated with reference to revenues derived from all of AT&T's unlimited customers between October 2013 and October 2014. Even aside from the fact that the one-year statute of limitations reaches back only to June 17, 2014, the *NAL* makes no attempt to show how many of AT&T's customers were actually affected by the purportedly inadequate disclosures during the time period the *NAL* deems relevant. Further, although the *NAL* claims

[19] *2010 Open Internet Order* ¶ 57.

[20] *NAL* ¶ 35.

that, if AT&T provided adequate information about its MBR policy to its customers, some of those customers "would have chosen to leave AT&T for other broadband providers during this time period,"[21] it does not support this conclusory statement or quantify the number of such customers, much less tie the statement to a proposed $100 million forfeiture. This failure is especially glaring given that the economic evidence suggests that customers were already informed of the MBR policy, and that application of the policy did not make customers more likely to leave the Unlimited Data Plan or AT&T.

While the *NAL* speaks of AT&T's "culpability" and "clear knowledge that it was misleading customers,"[22] the evidence is to the contrary. AT&T made multiple disclosures by email, bill message, text message, and online posting, precisely so that potentially affected customers would be informed about the MBR policy. And, for its part, the Commission has been well aware of AT&T's MBR website disclosures since 2011. Yet, until recently, it offered no hint that it viewed them as deficient in any respect.

Third, the Commission has no statutory authority for the "specific steps" the *NAL* would order AT&T to undertake.[23] The Commission "is not a court, and cannot rely for its action on the powers of a court of equity."[24] On the contrary, "administrative agencies . . . are creatures of statute, bound to the confines of the statute that created them."[25] Tellingly, the *NAL* cites no statutory authority for its proposed injunctive relief and no such authority exists. In any event, each of the three injunctive mandates the *NAL* proposes is independently unlawful.

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[21] *Id.* ¶ 39.

[22] *Id.*

[23] *See id.* ¶ 31.

[24] *Trans-Pac. Freight Conference of Japan v. Fed. Mar. Bd.*, 302 F.2d 875, 880 (D.C. Cir. 1962).

[25] *U.S. Fid. & Guar. Co. v. Lee Invs. LLC*, 641 F.3d 1126, 1135 (9th Cir. 2011).

The Commission cannot alter the terms of AT&T's private contracts to allow customers to evade early termination fees because, as the D.C. Circuit has held, "the Commission lacks authority to invalidate licensees' contracts with third parties."[26] Moreover, ordering that sanction here would constitute an unlawful "damages" order beyond the Commission's authority and would raise grave Takings Clause issues.

The Commission likewise has no authority to order AT&T to cease using the term "unlimited." The Transparency Rule does not extend beyond online disclosures, and, in any event, the Commission has no cease-and-desist authority in these circumstances.

Finally, the Commission has no authority to order AT&T to wear a "scarlet letter" and inform its customers that it violated the Transparency Rule—not only because such a statement would be untrue, but also because any such order would violate the First Amendment.

The *NAL* is unjustifiable and unsustainable. The only responsible course is for the Commission to recognize its error, end this investigation, and withdraw the *NAL*.

[26] *Cellco P'Ship v. FCC*, 700 F.3d 534, 543 (D.C. Cir. 2012).

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AT&T MOBILITY LLC	)	NAL/Acct. No. 201532080016
	)	FRN: 0018624742
Notice of Apparent Liability for Forfeiture	)	
And Order	)	

RESPONSE OF AT&T MOBILITY LLC TO NOTICE OF APPARENT LIABILITY FOR FORFEITURE

AT&T Mobility LLC ("AT&T") submits this response to the Notice of Apparent Liability for Forfeiture and Order ("*NAL*") issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned matter.

BACKGROUND

The *NAL* misapprehends AT&T's reasons for adopting the Maximum Bit Rate ("MBR") policy, ignores the Commission's findings endorsing such programs, and disregards the numerous disclosures AT&T made to customers regarding the program. Because this context is critical to understanding the *NAL*'s many legal and factual flaws, we briefly describe below i) the explosive growth in demand for AT&T's wireless data services; ii) AT&T's adoption of the MBR policy to respond to the problems caused to its network by the massive data usage of a small minority of its customers; and iii) the disclosures AT&T made to customers of its MBR policy.[1]

[1] In addition to all material cited herein, AT&T further incorporates by reference all previous submissions to the Commission in connection with its investigation, including the following submissions attached for the Commission's convenience in Attachment 4: AT&T's September

i. Several years ago, driven by the introduction of next-generation smart phones and the innovative applications they enabled, demand for AT&T's wireless data service skyrocketed, placing unprecedented strains on limited network resources. Between 2007 and 2011, the volume of data consumed on AT&T's network increased *20,000%*,[2] and it is still rising. This unprecedented spike stretched the capacity of AT&T's wireless network beyond its limits, increasing the number of dropped and failed voice calls, causing unavailable cell sites, and thus resulting in mounting frustration for AT&T's customers and negative press coverage.[3]

AT&T responded with a multi-pronged effort to address this capacity crisis. First and foremost, it invested billions of dollars each year in the network. This investment included, among other things, acquiring additional wireless spectrum, constructing new cell sites, and upgrading existing infrastructure to better handle increased data loads.[4] In addition, AT&T assisted application developers in designing apps that used network resources more efficiently and encouraged data customers to use increasingly available Wi-Fi alternatives.[5]

These efforts alone were insufficient, however, and AT&T decided in 2010 to discontinue the availability of the Unlimited Data Plan to new subscribers.[6] New subscribers

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5, 2014 letter to Chairman Wheeler (Exh. A); its November 10, 2014 response to the Commission's Letter of Inquiry (Exh. B); its January 7, 2015 response to the clarification questions regarding the Letter of Inquiry (Exh. C); and its February 13, 2015 *ex parte* submission filed in GN Docket No. 09-191, WC Docket No. 07-52, GN Docket No. 09-51, and GN Docket No. 14-28 (Exh. D).

[2] Declaration of Matthew Haymons ¶ 11 ("Haymons Decl.") (Attachment 1).

[3] *Id.*

[4] *See id.* ¶ 12; *see also* AT&T, Info for Smartphone Customers with Legacy Unlimited Data Plans, http://www.att.com/esupport/datausage.jsp?source=IZDUel1160000000U ("Over the past six years (2009–2014), [AT&T has] invested nearly $140 billion in [its] wireless and wireline networks, including acquisitions of wireless spectrum and operations.").

[5] Haymons Decl. ¶ 12.

[6] *Id.* ¶ 13.

were instead offered "tiered" data plans, under which subscribers purchase a fixed volume of data each month and pay for additional data consumed beyond that fixed amount.[7] Tiered plans provide customers with an effective incentive to moderate their usage and thus preserve network resources for all AT&T customers.

Although AT&T discontinued selling or marketing the Unlimited Data Plan to new customers, it "grandfathered" existing Unlimited Data Plan subscribers, allowing them both to retain and to renew their plans, subject to AT&T's Wireless Customer Agreement.[8] Those customers could also switch without penalty to the new tiered plans.[9]

ii. Even after AT&T retired the Unlimited Data Plan prospectively, a small percentage of grandfathered Unlimited Data Plan subscribers continued to push the network beyond its limitations, causing harm to AT&T's network and its other customers.[10] AT&T determined that a substantial portion of the usage spike—about 25% of all data consumed on the network—could be traced to a disproportionately small group of Unlimited Data Plan subscribers constituting about 1% of AT&T's customer base.[11]

To determine how best to address this ongoing resource challenge, AT&T conducted a series of focus groups analyzing consumer reaction to several potential modifications to its data plans, including elimination of unlimited data plans altogether and a congestion management

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* ¶ 14.

[11] *Id.*

practice similar to the MBR policy.[12] The results underscored the **[CONFIDENTIAL BEGIN]**

[CONFIDENTIAL END][13] They also showed that,

[CONFIDENTIAL BEGIN]

[CONFIDENTIAL END][14]

Consistent with these results, AT&T exercised its contractual right to protect its network from harm and to prevent the usage of a small group of customers from hindering other customers' access to the network.[15] It did so by limiting the highest-volume data customers' throughput under the MBR policy. That policy limited the amount of network resources allocated to extremely high-volume Unlimited Data Plan subscribers while honoring AT&T's commitment to provide these subscribers an unlimited volume of data at a fixed monthly price. AT&T announced the MBR policy in a July 2011 press release (the "Press Release")[16] and implemented it in October of that year.[17]

At first, the MBR policy functioned by placing a cap on the download speeds of Unlimited Data Plan customers whose data consumption during a month-long billing cycle

[12] Letter from Gary L. Phillips, General Attorney & Assoc. General Counsel, AT&T, to Erin Boone, Attorney-Advisor, Investigations and Hearings Div., Enforcement Bureau, FCC (Nov. 10, 2014) ("AT&T LOI Response"), Exh. 7 ("Focus Group Summary").

[13] *Id.* at 4.

[14] *Id.* at 11.

[15] AT&T's Wireless Customer Agreement has consistently protected (with periodic wording variations) AT&T's right to "protect its wireless network from harm," including by those "whose usage adversely impacts its wireless network" or "hinders access to its wireless network" by other customers, even when protective measures "impact legitimate data flows." August 2011 Wireless Customer Agreement § 6.2.

[16] Press Release, attached as Exh. C to Haymons Decl.

[17] Haymons Decl. ¶¶ 19, 28.

placed them in the top 5% of users in a particular market.[18] In March 2012, AT&T modified the MBR policy to cap the download speeds for Unlimited Data Plan customers whose data consumption exceeded a single national threshold during the billing cycle.[19] The threshold was set at three gigabytes for customers on AT&T's 3G and 4G wireless networks and five gigabytes on its LTE network, once that network was operating.[20]

AT&T designed the MBR policy in light of clear guidance this Commission has provided regarding appropriate congestion management practices. In the *2010 Open Internet Order*,[21] the Commission explained that "congestion management may be a legitimate network management purpose" and that "broadband providers may need to take reasonable steps to ensure that heavy users do not crowd out others."[22] The same Order stated that, "[f]or example, during periods of congestion a broadband provider could provide more bandwidth to subscribers that have used the network less over some preceding period of time than to heavier users."[23]

These statements were consistent with the Commission's statements two years earlier, when it concluded that Comcast had improperly managed network congestion by targeting a

[18] *Id.* ¶ 19.

[19] *Id.* ¶ 20.

[20] *Id*. Currently, download speeds are reduced only if an Unlimited Data Plan customer has exceeded the relevant threshold during a billing cycle *and* the customer is accessing the network when and where the network is congested. *See* Letter from Christopher M. Heimann, General Attorney, AT&T, to Paula Blizzard, Deputy Bureau Chief, Enforcement Bureau, FCC (June 25, 2015). On AT&T's 3G and 4G non-LTE networks, the MBR policy has been "congestion-aware" since July 2014.

[21] Report and Order, *Preserving the Open Internet*, 25 FCC Rcd. 17905 (2010) ("*2010 Open Internet Order*"), *vacated in part*, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

[22] *Id.* ¶ 91.

[23] *Id.* ¶ 73.

specifically disfavored application.[24] In the *Comcast-BitTorrent Order*, the Commission explained that "Comcast has several available options it could use to manage network traffic without discriminating," including the option to "throttle back the connection speeds of high-capacity users."[25]

Following the *Comcast-BitTorrent Order*, Comcast revised its network management program to match the one described in the Order. On its website, Comcast explained the change to its customers. Notwithstanding the fact that data usage was unlimited—there were no tiered plans, no overage charges, and only a flat rate was paid regardless of the data consumed—Comcast's webpage stated that customers who use "the greatest amounts of bandwidth" may have their broadband traffic "temporarily managed."[26] The page did not disclose the access speeds "managed" users would experience. In promulgating the Transparency Rule (also in the *2010 Open Internet Order*), the Commission cited Comcast's disclosures as models that "likely satisf[y] the transparency rule with respect to congestion management practices."[27]

iii. AT&T provided its customers with extensive, numerous, and complete disclosures regarding the MBR policy and how it might impact their usage. In developing these disclosures, AT&T again conducted a series of focus groups to determine how best to communicate how the MBR policy worked and its likely impact on AT&T's customers.

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[24] *See* Memorandum Opinion and Order, *Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd. 13028 (2008) ("*Comcast-BitTorrent Order*"), *vacated*, *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

[25] *Id.* ¶ 49; *see also* Staff Report, *AT&T Inc.*, 26 FCC Rcd. 16184, ¶ 24 & n.66 (2011) (describing unlimited data plans with data thresholds that trigger speed reductions as a "pricing innovat[ion]").

[26] Dec. 2008 Internet Archive of http://www.comcast.net/terms/network/update ("Comcast Network Management Disclosure"), attached as Exh. R to Haymons Decl.

[27] *2010 Open Internet Order* ¶ 56 n.177.

Consistent with the *2010 Open Internet Order*, the results suggested that **[CONFIDENTIAL BEGIN]**

[CONFIDENTIAL END][28] The results recommended that **[CONFIDENTIAL BEGIN]**

[CONFIDENTIAL END][29] AT&T took these recommendations into account when fashioning a suite of disclosures intended to satisfy and, in fact, exceed its Transparency Rule obligations.

Since 2011, AT&T has maintained a webpage with a description of the MBR policy that, like the approved Comcast disclosure, explains that the MBR policy imposes speed reductions on the heaviest data users with Unlimited Data Plans.[30] And that disclosure links to additional information, again similar to the information provided by Comcast, about the program's effect on a typical customer experience.[31] In addition, AT&T published a Press Release and notified all Unlimited Data Plan subscribers about the program with a conspicuous bill notification on the first page of their monthly bill. It emailed its heaviest users and texted all potentially affected customers with information about the operation and effect of the program. It staffed a call center dedicated to the MBR policy. Its customer agreements with Unlimited Data Plan subscribers

[28] Focus Group Summary at 7 (emphasis added).

[29] *Id.* at 2.

[30] AT&T, Broadband Information, http://www.att.com/broadbandinfo ("Broadband Information Page"), Nov. 2011, March 2012, July 2014, and May 2015 versions attached as Exs. H, M, O, & P to Haymons Decl.

[31] AT&T, Avoid Reduced Data Speeds with Unlimited Data Plans, http://www.att.com/esupport/article.jsp?sid=KB410284&cv=820 ("Wireless Support Page"), March 2012 version attached as Exh. J to Haymons Decl. (explaining that streaming video is the most likely data-usage activity to be affected by network management).

expressly reserved the right to manage the network and explicitly defined the term "unlimited." These and other disclosures are discussed in detail below.[32]

Despite being on notice of AT&T's Broadband Information Page disclosure as of its publication in November 2011,[33] for almost three years following that disclosure, the Commission never indicated, formally, informally, or in any other way, that AT&T's disclosures of its congestion management practices were of any concern.

ARGUMENT

The *NAL* fails to identify any valid basis for finding that AT&T violated the Transparency Rule. The *NAL*'s proposed remedies, moreover, exceed the Commission's authority.

I. THERE IS NO VALID BASIS FOR FINDING AT&T LIABLE.

The *NAL* concludes that AT&T apparently violated the Transparency Rule by i) failing to disclose the precise speeds available to users under the MBR policy; and ii) using the label "unlimited" to describe its unlimited-usage, fixed-price data plan.[34] That conclusion rests on a reinvention of the Transparency Rule that cannot withstand scrutiny. AT&T not only complied fully with the requirements of the Transparency Rule, it went well beyond those requirements. In all events, imposing liability on AT&T based on the *NAL*'s reinterpretation of the Transparency Rule would violate Due Process.

[32] *See infra* Section I.B.

[33] *2010 Open Internet Order* ¶ 57.

[34] *NAL* ¶ 2.

A. The *NAL*'s Findings Of An Apparent Violation Are Flawed.

1. AT&T Met Its Obligations under the Transparency Rule.

a. AT&T fully satisfied the Transparency Rule by publishing website disclosures that fully informed customers of how the MBR policy might impact their service.[35] Specifically, in November 2011, the month the Transparency Rule took effect, AT&T published information about the MBR policy on its "Broadband Information Page" at www.att.com/broadbandinfo.[36] In accordance with the *2010 Open Internet Order*'s guidance, the page begins by outlining the "purposes" of congestion management.[37] It explains that, on a network that "support[s] millions of customers at the same time . . . , congestion may occur," such as when "some customers consume a very large amount of network capacity during busy periods."[38] The page thus explains why AT&T takes steps "[t]o address potential network congestion."[39]

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[35] The *NAL* does not—and cannot—dispute that AT&T ensured that its disclosure was available "at the point of sale," as required by paragraph 57 of the *2010 Open Internet Order*. It is AT&T's policy that every customer who renews his or her Unlimited Data Plan receives at the point of sale a "Customer Service Summary" that provides precisely what the Commission has required: "a web address at which the required disclosures are clearly posted and appropriately updated." *See* Public Notice, *FCC Enforcement Bureau and Office of General Counsel Issue Advisory Guidance for Compliance with Open Internet Transparency Rule*, 26 FCC Rcd. 9411, 9414 (2011) ("*2011 Enforcement Guidance*"); *see also* Sample Customer Service Summary, attached as Exh. K to Haymons Decl.; Haymons Decl. ¶ 36.

[36] *Id.* ¶ 33. The page has been periodically updated to reflect updates to the MBR policy, such as the switch to national data usage thresholds (March 2012) and the inclusion of congestion-aware elements (July 2014 on 3G/4G, May 2015 on 4G LTE), but the disclosures remained substantively the same. *Id.* In June 2015, the page was again revised in light of the *2015 Open Internet Order*. *See* Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC 15-24 (rel. Mar. 12, 2015). The *NAL* arises "under the *2010 Open Internet Order*." *NAL* ¶ 3.

[37] *2010 Open Internet Order* ¶ 56.

[38] March 2012 Broadband Information Page.

[39] *Id.*

Again in accord with the *2010 Open Internet Order*, the page then describes the ways in which AT&T has addressed network congestion.[40] As an initial step, "AT&T has been investing billions of dollars to add more capacity to our broadband networks."[41] In addition, AT&T has "developed a process to reduce the data throughput speed experienced by a very small minority of smart phone customers who are on unlimited plans."[42] Since March 2012 (when AT&T implemented a national MBR usage threshold), the page has explained, just as the Commission advised, the usage thresholds that serve as "indicators of congestion" and "trigger" the MBR policy, the "consequences of exceeding" those thresholds, and the program's "effects on end users' experience."[43] The page states that customers "who use 3 gigabytes of data or more in a billing period on a 3G or 4G smartphone, or 5 gigabytes or more on a 4G LTE smartphone . . . will experience reduced speeds once their usage in a billing cycle reaches the applicable" threshold.[44] Those customers "can still use unlimited data and their speeds will be restored with the start of the next billing cycle."[45]

Furthermore, the page provides a link to additional information about the program and its "effects on end users' experience,"[46] such as the fact that, "[e]ven with reduced speeds, you can

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[40] *See 2010 Open Internet Order* ¶ 56 (proposing that disclosures include "descriptions of congestion management practices").

[41] March 2012 Broadband Information Page.

[42] *Id.*

[43] *2010 Open Internet Order* ¶ 56.

[44] March 2012 Broadband Information Page. Prior to the implementation of congestion-aware speed reductions (reductions that are triggered only when a customer exceeds the triggering threshold *and* is using data at a time and in an area that is experiencing congestion), the disclosure stated that customers under the MBR policy "will" (not "may") experience a speed reduction "once their usage in a billing cycle reaches the applicable 3 or 5 gigabyte threshold." *Id.*

[45] *Id.*

[46] *2010 Open Internet Order* ¶ 56.

still have a good experience surfing the web and doing email—but you'll see the biggest difference in the quality of streaming video" because "[s]treaming video consumes the most data of all possible activities."[47] And both the Wireless Support Page and the Broadband Information Page (among others) have always made clear that the MBR policy does not affect the essential feature of the Unlimited Data Plan: customers affected by the MBR policy can still use as much data as they like without ever being subject to an overage charge.[48]

b. According to the *NAL*, however, these disclosures were insufficient because, "[u]nder the 2010 Transparency Rule, broadband providers are expected to disclose the 'expected and actual access speed' of their services."[49] This requirement is conjured out of thin air.

In the *2010 Open Internet Order* and subsequent guidance, the Commission provided details about the meaning of the Transparency Rule and "effective disclosure models."[50] The Commission opted to "allow flexibility" in the implementation of the Rule and declined to require that all disclosures contain particular information or take a particular form. Rather, the Order explained that "effective disclosures will likely include *some or all* of the following types of information," including general information about the service, such as performance and price and, most pertinent here, "descriptions of congestion management practices."[51] In elaborating on

[47] Wireless Support Page.

[48] *See, e.g.*, March 2012 Broadband Information Page ("These customers will experience reduced speeds once their usage in a billing cycle reaches the applicable 3 or 5 gigabyte threshold for their smartphone. *They can still use unlimited data . . . .*") (emphasis added); July 2014 Broadband Information Page ("All such customers can still use unlimited data without being subject to overage charges . . . ."); Wireless Support Page ("You can still use an unlimited amount of data each month. That won't change.").

[49] *NAL* ¶ 23 (quoting *2010 Open Internet Order* ¶ 56).

[50] *2010 Open Internet Order* ¶ 56.

[51] *Id.* (emphasis added).

the type of congestion management information some or all of which an effective disclosure will likely include, the Order listed: "[i]f applicable, descriptions of congestion management practices; types of traffic subject to practices; purposes served by practices; practices' effects on end users' experience; criteria used in practices, such as indicators of congestion that trigger a practice, and the typical frequency of congestion; usage limits and the consequences of exceeding them; and references to engineering standards, where appropriate."[52]

The paragraph makes no reference to specific speeds available under congestion management. Indeed, the paragraph includes a footnote calling out the "description of congestion management practices provided by Comcast in the wake of the Comcast-BitTorrent incident" as one that "likely satisfies the transparency rule with respect to congestion management."[53] Notably, the Comcast disclosure does *not* mention specific speeds; instead, it describes the user experience in terms of its effect on particular applications and activities (such as Web surfing and VoIP calling).[54] The *2011 Enforcement Guidance* issued by the Commission's Enforcement Bureau and Office of General Counsel reiterated that the same Comcast document "provides a useful guide for other disclosures."[55] The *NAL* wholly ignores

[52] *Id.*

[53] *Id.* ¶ 56 n.177.

[54] *See* Comcast Network Management Disclosure ("Customers will still be able to do anything they want online, and many activities will be unaffected, but managed customers could experience things like: longer times to download or upload files, surfing the Web may seem somewhat slower, or playing games online may seem somewhat sluggish."); *see also* Attachment B: Comcast Corporation Description of Planned Network Management Practices To Be Deployed Following the Termination of Current Practices at 13 (affected users "may find that a webpage loads sluggishly, a peer-to-peer upload takes somewhat longer to complete, or a VoIP call sounds choppy"), attached as Exh. S to Haymons Decl.

[55] *2011 Enforcement Guidance*, 26 FCC Rcd. at 9414 n.23.

the Commission's prior endorsement of the Comcast disclosure.[56] It does not explain why, in the Commission's words, Comcast's statement "likely satisfies the transparency rule," but AT&T's similar disclosure so plainly fails to satisfy the Rule that it can support nine-figure forfeiture liability.

AT&T's wireless competitors understood the Transparency Rule in the same commonsense way AT&T did. Just like AT&T and Comcast, neither Verizon nor Sprint disclosed the specific speeds involved in their congestion management practices.[57] The consistent practices of these other sophisticated carriers further support the conclusion that reasonable parties did not understand the Transparency Rule to require disclosures of specific speed reductions. As then-Judge Breyer explained, when "assessing penalties under a vaguely worded, open-ended regulation," that regulation, "at least ordinarily, must be 'read to penalize only conduct unacceptable *in light of the common understanding and experience of those working in the industry.*'"[58]

In its attempt to support a different conclusion, the *NAL* badly distorts the *2010 Open Internet Order*. The *NAL* purports to quote from that Order to the effect that "broadband providers are expected to disclose the 'expected and actual access speed' of their services."[59] But this reference to "expected and actual speed" appears in a list of examples of potential disclosure topics, only "some or all" of which likely would need to be included in "effective

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[56] *See NAL* at 26 (Pai, C., dissenting) ("AT&T's disclosures are substantially similar to the model disclosures the Commission pointed to when it adopted the transparency rule.").

[57] *See infra* pp. 23–27.

[58] *F.A. Gray, Inc. v. Occupational Safety & Health Review Comm'n*, 785 F.2d 23, 24–25 (1st Cir. 1986) (Breyer, J.) (quoting *Cape & Vineyard Div. of New Bedford Gas v. Occupational Safety & Health Review Comm'n*, 512 F.2d 1148, 1152 (1st Cir. 1975)) (emphasis added).

[59] *NAL* ¶ 23 (quoting *2010 Open Internet Order* ¶ 56).

disclosures."[60] The indication that not all the enumerated examples were required for compliance is consistent with the emphasis in the preceding sentence of the same paragraph that "the best approach is to allow flexibility in the implementation of the transparency rule."[61] It stands in stark contrast, however, to the *NAL*'s suggestion that there is some "check list" of specific disclosures that providers must make—a list that the Commission has nowhere previously identified.

Even more to the point, contrary to the misleading impression the *NAL* gives, the reference to "expected and actual speed" comes from the Order's discussion of information that might be disclosed to "general[ly] descri[be]" the "service" provided, *not* from the separate discussion of information that should be provided as to "congestion management."[62] In discussing congestion management, the Commission notably did *not* suggest that "speed limitations" should be disclosed. Instead, it listed the "practices' effects on end users' experience" among the information "some or all" of which must be disclosed.[63]

Given that the Order does not even mention expected or actual speeds in the list of information "some or all" of which may appear in a congestion management disclosure, there is no basis for the FCC now to claim that such information is necessary for customers to make informed choices. But in all events, the *NAL* provides no factual support for any such claim. To

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[60] *2010 Open Internet Order* ¶ 56.

[61] *Id.*; *see also NAL* at 26 (Pai, C., dissenting) (*2010 Open Internet Order* "did not say that providers must disclose particular information in a particular way"). It is consistent with the Commission's representation to the Office of Management and Budget ("OMB"), in seeking approval of the transparency requirements, that they "give[ ] broadband providers flexibility to determine what information to disclose and how to disclose it." FCC, Supporting Statement to OMB, Control No. 3060-1158, ¶ 5 (Sept. 7, 2011) ("Transparency Rule OMB Submission"), *available at* http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201109-3060-014.

[62] *2010 Open Internet Order* ¶ 56.

[63] *Id.*

the contrary, although the *NAL* invokes the results of AT&T's focus group studies, it nowhere mentions the finding that **[CONFIDENTIAL BEGIN]**

[CONFIDENTIAL END][64]

Thus, for consumers seeking to determine whether to choose to use Wi-Fi or to move to another AT&T plan or a competitor's service,[65] the information AT&T provided is likely to be *more* helpful than what the *NAL* now suggests was required. This is certainly consistent with the Commission's conclusion in 2010 (and the agency's staff in 2011) that Comcast's similar disclosures about the practical impact of congestion management practices likely satisfied the Transparency Rule.

2. AT&T's Use of the Term "Unlimited" Was Not Misleading, Was Repeatedly Explained, and Was Consistent with AT&T's Obligations under the Transparency Rule.

The *NAL* cites dictionary definitions in isolation to suggest that use of the word "unlimited" to describe any data plan that includes speed reductions after a customer reaches a specified data threshold is a *per se* violation of the Transparency Rule, regardless of what else the required online disclosure says.[66] The Transparency Rule says no such thing, and the Commission's reliance on those definitions to conclude that AT&T "misrepresented the nature of

[64] AT&T should **[CONFIDENTIAL BEGIN]**

[CONFIDENTIAL END]

Focus Group Summary at 7 (emphasis added).

[65] *See NAL* ¶ 20.

[66] *Id.* ¶ 19.

its service"[67] runs afoul of the most basic principle of textual construction: context matters. "[T]extual analysis is a language game played on a field known as 'context.'"[68]

a. AT&T clearly disclosed, in precisely the location and manner required by the *2010 Open Internet Order*, how it was implementing its MBR policy. On its Broadband Information Page, AT&T described in clear, everyday language that the term "unlimited" meant that customers could use unlimited data without any overage charges but that the term did not ensure any particular speed. For example, in the section titled "Network Practices," AT&T described its attempts to ensure "a high-quality Internet experience for all of [its] customers." As part of that explanation, AT&T noted:

> For our mobile broadband services, we've also developed a process to reduce the data throughput speed experienced by a very small minority of smartphone customers who are on unlimited plans—those who use 3 gigabytes of data or more in a billing period on a 3G or 4G smartphone, or 5 gigabytes or more on a 4G LTE smartphone. These customers will experience reduced speeds once their usage in a billing cycle reaches the applicable 3 or 5 gigabyte threshold for their smartphone. They can *still use unlimited data* and their speeds will be restored with the start of the next billing cycle. We will notify customers before the first time they are affected by this process.[69]

On a related page linked to the Broadband Information Page, AT&T provided additional detail. Under the heading "Unlimited Data – Data Speeds," AT&T informed customers that if they used more than the specified data amounts—5 GB for 4G LTE, 3GB for 3G/4G—"your data speeds will be reduced for the rest of that billing cycle and **then go back to normal**."[70]

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[67] *Id.* ¶ 20.

[68] *Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

[69] March 2012 Broadband Information Page (emphasis added). As the MBR policy was updated between 2012 and now (*e.g.*, when congestion-aware elements were implemented), the page was updated to reflect those changes.

[70] AT&T, Info for Smartphone Customers with Legacy Unlimited Data Plans, http://www.att.com/datainfo ("Data Information Page"), March 2012 version attached as Exh. I to Haymons Decl.

Customers were further informed that they would "still be able to use as much data as you want."[71] As already noted, AT&T further described what users could expect if they were subject to reduced speed: "[e]ven with reduced speeds, you can still have a good experience surfing the web and doing email—but you'll see the biggest difference in the quality of streaming video."[72] Still, the page explained, "[y]ou can . . . use an unlimited amount of data each month. That won't change."[73]

b. No consumer could possibly misconstrue these disclosures as promising unlimited speeds, and the *NAL* notably does not even attempt to argue otherwise. Instead, the *NAL* claims that *other* uses of the word "unlimited," outside the context of AT&T's online disclosure, misled unlimited plan customers as to the nature of their service. It thus claims that "every time AT&T described such a plan to a customer as 'unlimited,' it misrepresented the nature of its service [and that] it did so in every monthly billing statement for an unlimited plan and every time a term contract for an unlimited plan was renewed."[74]

As discussed below, the assertion that customers were misled by the word "unlimited" in these other contexts is refuted by the evidence.[75] But, more to the point, it is legally irrelevant because the Transparency Rule does not regulate all speech, and no liability can be imposed outside the boundaries of the Rule itself.

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[71] *Id.*

[72] Wireless Support Page.

[73] *Id.*

[74] *NAL* ¶ 20.

[75] *See infra* pp. 23–30.

i. The *NAL* concludes that the Transparency Rule not only requires disclosure but also regulates all mobile broadband advertising and other public statements.[76] The *NAL* claims that, in fact, the Rule gives the Commission authority to police "all public statements that broadband Internet access providers make about their services."[77] That characterization of the Transparency Rule is unlawful.

The Transparency Rule states: "A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services . . . ."[78] By its express terms, the Rule thus requires public disclosure of certain information; it does not purport to regulate all statements broadband providers make outside the context of that public disclosure.

This is confirmed by the *2010 Open Internet Order*, which details *how* that disclosure should be made. The Order states that broadband providers must, at a minimum, "prominently display or provide links to disclosures on a publicly available, easily accessible website that is available to current and prospective end users and edge providers as well as to the Commission and must disclose relevant information at the point of sale."[79] Responding to claims that "a disclosure rule will impose significant burdens," the Commission emphasized that "we require only that providers post disclosures on their websites and provide disclosure at the point of sale,

[76] *See NAL* ¶ 20 (concluding that AT&T "misrepresented the nature of its service" "every time AT&T described such a plan to a customer as 'unlimited' ").

[77] *Id.* ¶ 6.

[78] 47 C.F.R. § 8.3; *accord 2010 Open Internet Order* ¶¶ 56–57.

[79] *2010 Open Internet Order* ¶ 57.

not that they bear the cost of printing and distributing bill inserts or other paper documents to all existing customers."[80]

Subsequent guidance issued jointly by the Commission's Office of General Counsel and Enforcement Bureau prior to the Transparency Rule's effective date (November 2011) reiterated that the Rule required only a single online disclosure. Addressing the *2010 Open Internet Order*'s requirement that disclosure be made at the point of sale, and consistent with all the other contemporaneous documents, the *2011 Enforcement Guidance* confirmed that a link to a website containing the single mandated disclosure "suffice[s] for compliance with the transparency rule."[81] "Broadband providers can comply with the point-of-sale requirement by, for instance, directing prospective customers at the point of sale, orally and/or prominently in writing, to a web address at which the required disclosures are clearly posted and appropriately updated."[82] And, in seeking OMB approval of the Transparency Rule under the Paperwork Reduction Act, the Commission represented the burden on providers would be to submit precisely one disclosure each.[83]

There is not a word in the Transparency Rule itself or any of these documents that the Transparency Rule confers on the Commission roving authority to police all statements made by broadband providers for accuracy. The Rule requires an online posting of certain information and the provision of links at the point of sale to that posting—nothing more. It is the content of this posting that must be "accessible" to end users. And it is the content of this posting that

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[80] *Id.* ¶ 59.

[81] *2011 Enforcement Guidance*, 26 FCC Rcd. at 9416.

[82] *Id.* at 9414.

[83] *See* Transparency Rule OMB Submission ¶ 12 (estimating that there are 1,477 broadband providers required to comply with the Transparency Rule and thus estimating 1,477 postings required for compliance).

"shall be considered disclosed to the Commission for purposes of monitoring and enforcement."[84]

The limits of the Transparency Rule are also manifested by the justification the Commission offered to the D.C. Circuit on review of the *2010 Open Internet Order*. In that context, the Commission defended the Transparency Rule on the basis of its statutory duty to report triennially to Congress on "market entry barriers" in information services.[85] If the Transparency Rule can be rooted in the Commission's obligation to report to Congress—and a derivative authority to " 'impose disclosure requirements on regulated entities in order to gather data needed for such a report' "[86]—then surely only a single disclosure (subject to appropriate updates) is needed. And, while the Commission also noted the Rule's salutary effect of giving "end users access to information" and, in particular, the information contemplated in the single, mandatory disclosure,[87] it nowhere claimed the astoundingly broad authority it now asserts to police any and all statements for claimed inaccuracies. Consistent with the Commission's arguments, Judge Silberman's concurrence noted that the Rule promoted the Commission's statutory duty in just those two ways, and no more.[88] The Commission's current interpretation of the Rule is untethered from the limited basis on which the Commission defended the original, single-disclosure version of the Rule, and it is unlawful.[89]

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[84] *NAL* ¶ 58.

[85] Brief for Appellee/Respondents, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (No. 11-1355), 2012 WL 3962421, at *59–60 ("FCC *Open Internet* Br.").

[86] *2010 Open Internet Order* ¶ 136 (quoting *Comcast Corp. v. FCC*, 600 F.3d 642, 659 (D.C. Cir. 2010)).

[87] FCC *Open Internet* Br., 2012 WL 3962421, at *60.

[88] *Verizon*, 740 F.3d at 660 n.3, 668 n.9 (Silberman, J., concurring in part and dissenting in part).

[89] The Commission's previous attempt to justify broad regulatory authority by reference to its reporting duties was rejected by the D.C. Circuit. *Comcast*, 600 F.3d at 659–60. On the other

ii. Notwithstanding the clear limits of the Transparency Rule, the Commission cites a *2014 Enforcement Advisory*—a two-and-a-quarter-page document authored by Commission staff—as authorizing the radical expansion of the scope of the Rule asserted in the *NAL*.[90] The *2014 Enforcement Advisory* is invalid and lacks any legal force. Even if the *2014 Enforcement Advisory* were an interpretive rule issued by the Commission (rather than a mere advisory issued by staff), it is well established that "interpretive rules do not have the force and effect of law" and as such "are not accorded that weight in the adjudicatory process."[91]

Further, an agency—and, certainly, agency staff—may not interpret a regulation in a way that is not at all "supported by the regulation's text."[92] As just discussed, the text of 47 C.F.R. § 8.3 cannot be read to grant the Commission general oversight authority over all public statements that broadband Internet access providers make about their services—particularly when doing so would allow the FCC "to impose potentially massive liability on [AT&T] for conduct that occurred well before that interpretation was announced."[93] The staff's *2014 Enforcement Advisory* is thus irrelevant to the legal analysis here.

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hand, reading the Transparency Rule as requiring a single disclosure that meets definable criteria rather than a grant to the Commission of Lanham-Act-like authority over all advertising and other speech by wireless providers, is also more consistent with section 706 of the Telecommunications Act of 1996. *See 2010 Open Internet Order* ¶¶ 117–123 (citing section 706 as authorizing the Transparency Rule). In *Verizon*, the D.C. Circuit upheld the Transparency Rule as a valid exercise of section 706 subject to "limiting principle[s]." 740 F.3d at 639. The phantom rule the Commission now claims AT&T violated is *not* the one the D.C. Circuit reviewed and upheld in *Verizon*.

[90] *NAL* ¶ 6 (citing Public Notice, FCC Enforcement Advisory, *Open Internet Transparency Rule: Broadband Providers Must Disclose Accurate Information To Protect Consumers*, 29 FCC Rcd. 8606, 8607 (2014) ("*2014 Enforcement Advisory*")).

[91] *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204, 1208 (2015) (internal quotation marks omitted).

[92] *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 94 (1995).

[93] *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012).

iii. The Commission cannot avoid these fundamental deficiencies by claiming "deference" to its interpretation of the Transparency Rule. To defer to the reading of the Transparency Rule advanced by the Commission now "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."[94] As explained, nowhere did the *2010 Open Internet Order* even hint that the Transparency Rule extends to all statements made by a broadband provider well after the point of sale,[95] and thus it cannot be said that the Commission's interpretation "spells out a duty fairly encompassed within the regulation that the interpretation purports to construe."[96]

Notably, the Supreme Court in *Christopher v. SmithKline Beecham Corp*. recently confirmed that deference in these circumstances "would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"[97] Here, as in *Christopher*, the agency was aware of the supposedly illegal conduct for years but took no enforcement action.[98] Here, as in *Christopher*, the agency adopted its "interpretation" only in the context of enforcement suits that seek to impose massive liability on the regulated party.[99] And here, as in *Christopher*, the "interpretation" was not adopted after notice-and-comment rulemaking and was therefore developed without input from those that

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[94] *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000).

[95] *Cf. Auer v. Robbins*, 519 U.S. 452, 461 (1997) (no deference owed an agency interpretation that is "plainly erroneous or inconsistent with the regulation") (internal quotation marks omitted).

[96] *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024–25 (D.C. Cir. 2000) (internal quotation marks omitted).

[97] 132 S. Ct. at 2167 (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.)) (alteration in original).

[98] *Id.* at 2168; *2010 Open Internet Order* ¶ 57 ("Broadband providers' online disclosures shall be considered disclosed to the Commission for purposes of monitoring and enforcement.").

[99] 132 S. Ct. at 2165–66.

would be subject to sanction.[100] "It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference."[101] Put simply, an agency cannot claim deference when adopting a new interpretation "to impose potentially massive liability on respondent for conduct that occurred well before that interpretation was announced."[102]

c. Even if the Transparency Rule reached beyond AT&T's website disclosure and covered "all public statements that [AT&T] make[s] about [its] services,"[103] including "every monthly billing statement for an unlimited plan,"[104] the *NAL* still fails to show that AT&T's use of the term "unlimited" misled customers. Not only did AT&T provide the online disclosures actually required by the Transparency Rule, but it further informed customers about the MBR policy in multiple other disclosures that went above and beyond what the Rule required. As discussed below in greater detail,[105] AT&T issued a Press Release that was picked up by more than 2000 news outlets and blogs,[106] and which prompted CNN to comment, "[a]lthough it's a

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[100] *Id.*

[101] *Id.* at 2168. This is particularly true when the agency's new interpretation is inconsistent with its prior views. *Christopher*, 132 S. Ct. at 2166 (no deference owed to inconsistent agency positions); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (same). The *NAL*'s reading of the Transparency Rule is directly contrary to the Commission's recognition of the limited nature of the obligation imposed by the Transparency Rule in its Paperwork Reduction Act Comments and the *2011 Enforcement Guidance*. *See supra* p. 19.

[102] *Christopher*, 132 S. Ct. at 2167; *see also Independent Training & Apprenticeship Program v. California Dep't of Indus. Relations*, 730 F.3d 1024, 1035 & n.9 (9th Cir. 2013).

[103] *NAL* ¶ 6.

[104] *Id.* ¶ 20.

[105] *See infra* Section I.B.

[106] Haymons Decl. ¶ 28.

pain to those affected, AT&T is being transparent about the issue."[107] It sent emails, prominent bill notifications, and text messages. And the various iterations of its Wireless Customer Agreement all reserved its right to engage in congestion management in order to protect network performance. Indeed, after August 2012, the Wireless Customer Service Agreement not only highlighted AT&T's right to "reduce . . . data throughput speeds at any time or place if [a customer's] data usage exceeds an applicable, identified usage threshold during any billing cycle," but actually defined the term unlimited to mean "you pay a fixed monthly charge for wireless data service regardless of how much data you use."[108] Customers were thus given ample and repeated notice that "unlimited" means protection from overage charges, regardless of usage.

That the term "unlimited" must be read as a pricing term in this context is reinforced by the realities of mobile broadband networks: the term "unlimited" makes no sense as applied to network speeds that are inherently limited. All users of AT&T's network, whether or not affected by the MBR policy, are limited by the top speed of AT&T's network at any given location. No one could plausibly suggest that Unlimited Data Plan customers facing *this* speed limit were misled.[109] Nor could one make such a claim when slower speeds are caused, not by the MBR policy, but by congestion, outages, or other events. AT&T is very careful *not* to

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[107] Christina Bonnington, *AT&T Begins Sending Throttling Warnings to Top Data Hogs*, CNN (Oct. 3, 2011), http://www.cnn.com/2011/10/03/tech/web/att-throttling-warnings-data-hogs/.

[108] August 2012 Wireless Customer Agreement § 6.2.

[109] As noted, since the release of the iPhone in 2007, AT&T consistently used the term "unlimited" to mean an unlimited amount without overage charges. Under the plans offered with that release, new subscribers chose between plans offering 200, 1500, *or unlimited* text messages; varying levels of talk time, including *unlimited* night and weekend minutes and *unlimited* mobile-to-mobile minutes; and *unlimited* data. June 2007 AT&T Plans for iPhone, attached as Exh. T to Haymons Decl.

promise service at any particular speed, because such a promise would be at odds with the nature of mobile broadband networks.

The reasonableness of AT&T's understanding of the Transparency Rule is further confirmed by the fact that Verizon, T-Mobile, and Sprint all offered unlimited data plans for years, all understood "unlimited" the way AT&T does, and all deployed congestion management plans while still offering plans marketed as "unlimited."[110]

Like AT&T, Verizon no longer offers unlimited data plans to new customers but has allowed its users with existing unlimited plans to keep them. Beginning in 2011, Verizon implemented a congestion management practice that applied to what Verizon referred to as its unlimited plan. As Verizon's Web disclosure explained, "[t]o optimize our network, we manage data connection speeds for a small subset of customers—those who are in the top 5% of data users and have 3G devices on unlimited data plans."[111] Like AT&T, Verizon labeled its plan "unlimited" and reduced the throughput speeds of its heaviest users.[112]

Sprint engaged in similar network management, also on plans it labeled "unlimited." At least as far back as 2011, the terms and conditions for its unlimited plan reserved the right, "without notice or limitation, to limit data throughput speeds or quantities or to deny, terminate, end, modify, disconnect, or suspend service . . . if Sprint, in its sole discretion, determines action

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[110] *See* Fifteenth Report, *Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, 26 FCC Rcd. 9664, ¶ 85 (2011) ("Until recently, the industry norm was one price plan per device, and this was an unlimited data plan.").

[111] *See* March 12, 2015 Archive of Verizon, Network Optimization Practices for Customers with 3G Devices on Unlimited Data Plans, https://web.archive.org/web/20150312132156/http://www.verizonwireless.com/support/network-optimization/. Verizon discontinued this program in June 2015.

[112] *See id.*

is necessary to protect its wireless networks from harm or degradation."[113] That contract made explicit that, "[i]f you subscribe to rate plans, services or features that are described as unlimited, you should be aware that such 'unlimited' plans are subject to these Sprint Prohibited Network Uses."[114] In June 2014, Sprint implemented a congestion management plan for its "unlimited" service under which "customers falling within the top 5% of data users may be prioritized below other customers . . . resulting in a reduction of throughput or speed,"[115] and its affiliates have been engaging in congestion management on unlimited plans since well before then.[116] In addition, until just last month, more than ten of Sprint's data plans—including several labeled "unlimited"—included full-time speed limits on streaming video.[117] And just this month, Sprint debuted its "All-In" plan, in which it advertised "unlimited . . . high-speed data" service even while reserving (in the fine print) the right to "limit[ ], var[y], or reduce[ ]" throughput speed in order to manage network congestion.[118]

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[113] Sprint, March 2011 Terms & Conditions, https://web.archive.org/web/20110308003258/http://shop2.sprint.com/en/legal/legal_terms_privacy_popup.shtml.

[114] *Id.*

[115] June 2014 Archive of Sprint, *Open Internet Information*, https://web.archive.org/web/20140625053611/http://www.sprint.com/legal/open_internet_information.html.

[116] *See* Roger Cheng, *So Does Sprint Throttle Its Customers or Not?*, CNET (Jan. 5, 2012), http://www.cnet.com/news/so-does-sprint-throttle-its-customers-or-not/.

[117] *See* Brian Fung, *The Internet Just Persuaded Sprint Not To Slow Online Videos to a Crawl*, Wash. Post (July 1, 2015), https://www.washingtonpost.com/blogs/the-switch/wp/2015/07/01/the-internet-just-persuaded-sprint-not-to-slow-online-videos-to-a-crawl/.

[118] Sprint Advertisement, *All-In.*, Wall St. J., July 3, 2015, at A14, Attachment 3, at 5-9.; *see also, e.g.*, Sprint, *$50 Unlimited Plan*, https://www.youtube.com/watch?v=J5FZOmiBQEw (published Feb. 27, 2015) ("Why Sprint's $50 Unlimited? Because unlimited . . . is unlimited.").

Similarly, T-Mobile continues to offer an "unlimited" data plan—indeed, one that specifies "Unlimited 4G LTE Data"[119]—and a T-Mobile print advertisement for "truly unlimited 4G LTE data" urges customers to "[s]urf, stream and post without limits."[120] Still, like the other carriers, T-Mobile's terms of service preserve its ability to protect against "competing network demands" and, as a result, state that an unlimited-plan subscriber's usage may be "de-prioritized compared to other customers" if the customer's usage exceeds a fixed usage threshold.[121] Indeed, T-Mobile confirmed just recently that "management of our network in times and places of congestion has been our policy since launching Simple Choice Unlimited 4G LTE."[122]

In short, the *NAL*'s suggestion that network management is "antithetical to the term 'unlimited'"[123] is contradicted by the practice of the mobile broadband industry. Every major carrier used the term the way AT&T did, and, in particular, Sprint and T-Mobile continue to advertise "unlimited" data—even unlimited *high-speed* data—as they, too, impose their own throughput speed limitations and reserve their rights to manage their networks.

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[119] *See* T-Mobile, *Unlimited 4G LTE Data*, http://www.t-mobile.com/cell-phone-plans/unlimited-family-data-plan.html, Attachment 3, at 10–11.

[120] T-Mobile, *Chicago's Truly Unlimited 4G LTE Data Plan*, Attachment 3, at 12.

[121] T-Mobile, *Unlimited 4G LTE Data*, *supra* n.119.

[122] Phil Goldstein, *T-Mobile: Throttling Policy for Unlimited Customers Who Hit 21GB Is OK Under Net Neutrality*, FierceWireless (June 25, 2015), http://www.fiercewireless.com/story/t-mobile-throttling-policy-unlimited-customers-who-hit-21-gb-ok-under-net-n/2015-06-25. T-Mobile's pre-paid affiliate markets "unlimited" data in the same way: the MetroPCS website advertises "[u]nlimited high-speed data" while the carrier's terms of service protect its right to "implement . . . network management practices." MetroPCS, *$60 Unlimited 4G LTE Data Plans*, https://www.metropcs.com/cell-plans/plans/details/GSM60.html (last visited July 7, 2015); MetroPCS, *MetroPCS Terms and Conditions*, https://www.metropcs.com/terms-conditions/terms-conditions-service.html; *see also* MetroPCS Advertisement, Attachment 3, at 13 ("The BEST unlimited 4G LTE plan. Period.").

[123] *NAL* ¶ 19.

d. The *NAL*'s findings are not supported by its mischaracterization of AT&T's pre-MBR focus group.[124] As Commissioner Pai properly emphasized,[125] the focus groups were conducted *before* AT&T made any of its disclosures under the Transparency Rule, so they reveal nothing about the public's perception of AT&T's disclosures. At the very most, they reveal consumer reactions to a hypothetical speed reduction *in the absence* of AT&T's disclosures explaining the terms of the plan. Unless it is the Commission's position that the term "unlimited" has a single meaning and no amount of explanation accompanying that word can clarify its meaning—a position that certainly cannot withstand judicial review—the focus groups shed no light on the relevant legal question here: whether AT&T's disclosures met the requirements of the Transparency Rule.

The *NAL* attempts to sidestep this evidentiary deficiency by hypothesizing that because the focus group customers reacted negatively to hypothetical MBR-type policies, AT&T decided that it should say as little as possible about the policy.[126] There is not a shred of evidence to support this assertion. In fact, if AT&T had set about to fly under the radar with the MBR policy, as the *NAL* theorizes, one would hardly expect AT&T to announce the program in a Press Release picked up by over 2000 news sources.[127] Nor would one expect AT&T to provide customers with emails, conspicuous bill notifications and text messages informing them of the policy, along with the disclosures required by the Transparency Rule.[128] The *NAL*'s theorizing thus defies basic common sense.

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[124] *Id.*

[125] *Id.* at 26–27 (Pai, C., dissenting).

[126] *Id.* ¶¶ 13, 19.

[127] *See* Haymons Decl. ¶ 26.

[128] *See generally infra* Section I.B.

In fact, the focus group results indicated that consumers, **[CONFIDENTIAL BEGIN]**

[CONFIDENTIAL END][129] AT&T provided just that.

The *NAL* also cites "thousands" of consumer complaints "from AT&T unlimited plan customers who were surprised about having their speeds reduced" as supporting its view that the term "unlimited" is inherently misleading in this context.[130] The facts are otherwise. Between November 2011 and June 2015, the Commission received fewer than 2,000 complaints relating in any way to the MBR policy.[131] Further, only about 3% of these complaints can plausibly be read to indicate "insufficient notice or surprise about the experience of being throttled."[132] In fact, many of the complaints were promoted by one of the many notices sent to customers *by AT&T* about its policy.[133] Far from demonstrating a transparency problem, these complaints prove just the opposite.

In all events, a complaint from a customer who claims to have been throttled without proper notice does not establish that such notice was not provided. In this regard, the *NAL* does not cite a single complaint from a subscriber that claimed to have read AT&T's website

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[129] Focus Group Summary at 2. The Commission misconstrues (and misquotes) these results at Paragraph 13 of the *NAL*. **[CONFIDENTIAL BEGIN]**

[CONFIDENTIAL END]

[130] *NAL* ¶ 15.

[131] Declaration of Mark Israel ¶ 29 ("Israel Decl.") (Attachment 2).

[132] *See id.* ¶ 31.

[133] *Id.* ¶ 30.

disclosure and still renewed under the misimpression that the customer would be able to consume as much data as the customer desired without any speed reductions.[134]

While the *NAL*'s loose references to "thousands" of complaints provide no support for a Transparency Rule violation, economic analysis confirms that AT&T's customers were, in fact, adequately informed about the MBR policy. As explained in the attached declaration of Dr. Mark Israel, a standard way to analyze whether consumers experience unpleasant surprises due to an "event" that occurs while they are consuming a particular service is to observe their propensity to continue purchasing the good or service after the event.[135] If consumers experience an unpleasant surprise, the value they expect to receive from future purchases of the good will be lower, and therefore, they will be less willing to continue purchasing.[136]

As Dr. Israel shows, over the relevant time period, AT&T customers exhibited the behavior of consumers making "informed choices" about the MBR policy, not of consumers who were unpleasantly surprised.[137] Specifically, the churn rate for subscribers that were never throttled was similar to or *higher* than the churn rates of Unlimited Data Plan subscribers who exceeded the usage thresholds and were thus eligible for "throttling."[138] Even Unlimited Data Plan customers who experienced reduced speeds as a result of the MBR policy for the first time in 2014 (and thus had no direct experience with the policy) were no more likely to switch providers or to change from an unlimited plan to a tiered plan than were users who never faced

[134] *See NAL* ¶ 15; *see also* Israel Decl. ¶ 31.

[135] Israel Decl. ¶ 14.

[136] *Id.*

[137] *Id.* ¶¶ 15–28.

[138] *See id.* ¶ 20.

reduced speeds.[139] These results are robust even after controlling for a number of subscriber-specific factors, including geography and other demographic variables.[140] Thus, far from being "unpleasantly surprised" by the MBR policy, Unlimited Data Plan customers demonstrated the opposite when they decided to remain on the Unlimited Data Plan.

e. Finally, the Commission's assertion now that it is inherently misleading to limit the speed of high-demand customers when offering "unlimited" data plans is belied by its own actions. As noted, the Commission repeatedly endorsed "throttling" as an appropriate and reasonable congestion management practice.[141] The Commission made those findings at a time when providers overwhelmingly offered "unlimited" data plans, before widespread adoption of "tiered" data plans.[142] Indeed, "throttling" is not necessary in connection with tiered plans because usage-based charges that apply to high data usage provide the incentive for customers to moderate their usage. Nowhere did the Commission even hint at the possibility that a provider that undertook the network management practices it was recommending could no longer offer "unlimited" data services that then were the industry standard. Nowhere did the Commission indicate that such practices were inconsistent with the concept of an unlimited data service.

Further, while the Commission has been fully on notice since 2011 of the numerous disclosures AT&T has made about the MBR policy,[143] it "never initiated any enforcement actions with respect to" those disclosures "or otherwise suggested that it thought the industry was

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[139] *Id.* ¶ 21-23.

[140] *Id.* ¶ 27 & App. C.

[141] *See supra* pp. 5–6.

[142] Haymons Decl. ¶ 6.

[143] Not only did the Commission find that "providers' online disclosures shall be considered disclosed to the Commission for purposes of monitoring and enforcement," *2010 Open Internet Order* ¶ 57, but AT&T issued a press release describing its MBR policy in detail that in turn generated widespread media coverage, Haymons Decl. ¶ 28.

acting unlawfully."[144] Had the Commission believed that AT&T was misreading the requirements of the Transparency Rule by using the term "unlimited" without disclosing precise numerical speeds, it had ample time to alert AT&T to that fact—rather than waiting for several years to issue an *NAL* claiming that AT&T is potentially liable for tens of billions of dollars in forfeiture penalties and proposing a $100 million forfeiture and severe injunctive requirements. The Commission's abrupt shift in position demonstrates that the claim that AT&T has been providing "inherently" misleading disclosures cannot be sustained.

B. AT&T Went Well Beyond The Requirements Of The Transparency Rule.

1. By posting the required Broadband Information Page, and providing customers with a link to that page at the point of sale, AT&T complied fully with the Transparency Rule. But AT&T went beyond those requirements, and took numerous, additional steps to inform its customers about the MBR policy, its effects on their service, and easy ways to avoid unwanted speed reductions, including by connecting to readily available, free Wi-Fi networks.

AT&T first announced the MBR policy three months before its implementation, in a July 2011 Press Release.[145] The Press Release explained that, "[s]tarting October 1, [2011], smartphone customers with unlimited data plans may experience reduced speeds once their usage in a billing cycle reaches the level that puts them among the top 5% of heaviest data users. These customers can still use unlimited data and their speeds will be restored with the start of the

[144] *Christopher*, 132 S. Ct. at 2168.

[145] Press Release.

next billing cycle."[146] As noted, the Press Release was reported in over 2000 news outlets and blogs.[147]

In July and August 2011, AT&T sent its Unlimited Data Plan customers a second notification, prominently featured on the first page of their monthly bill.[148] The Bill Notification stated that, "[t]o provide the best possible network experience, starting 10/01/11, smartphone customers with unlimited data plans whose usage is in the top 5% of users can still use unlimited data but may see reduced data speeds for the rest of their monthly billing cycle."[149]

AT&T also sent an additional notice specially targeted to high-DEMAND Unlimited Data Plan customers—*i.e.*, those likely to be affected by the MBR policy—in advance of the program first taking effect. In September 2011, AT&T sent emails to the highest-volume Unlimited Data Plan users in ten pilot markets (the "Grace Month Email") disclosing the details of the program.[150] The Grace Month Email said, in part: "Smartphone customers with unlimited data plans may experience reduced speeds once their usage in a billing cycle reaches the level that puts them among the top five percent of heaviest data users. These customers can still use unlimited data and their speeds will be restored with the start of the next billing cycle."[151] No customers' speeds were reduced in September 2011. Rather, the Grace Month Email provided advanced notice that, "[b]eginning with your next billing cycle," the MBR policy would be in

[146] *Id.* As explained, the MBR policy came to be triggered by national thresholds of three and five gigabytes, rather than by inclusion within the top 5% of users.

[147] *See* Haymons Decl. ¶ 28.

[148] Sample Bill Notification, attached as Exh. D to Haymons Decl. ("Bill Notification").

[149] *Id.*

[150] Sample Grace Month Email, attached as Exh. G to Haymons Decl. ("Grace Month Email").

[151] *Id.*

place.[152] The Grace Month Email also provided users with information about alternative ways to access high-speed data. It explained that "Wi-Fi offers great speeds and doesn't add to your wireless data usage."[153]

In March 2012, AT&T published a website dedicated to providing several different types of information "for smartphone customers with legacy unlimited data plans."[154] Like the Broadband Information Page, the "Data Information Page" describes the MBR policy by listing the usage thresholds that trigger the program, explaining that users may experience reduced data speeds until the end of the billing cycle and reiterating that the "unlimited" pricing model still applied.[155]

The Data Information Page also provides additional information useful to consumers. To assist customers that might not know whether they are high- or low-volume data users, AT&T provides a chart demonstrating how much data particular activities consume when engaged in over particular lengths of time (for example, nine hours of streaming music consumes approximately one gigabyte of data) and provides a link to a more granular data usage estimator.[156] The page also explains that "speeds are not reduced if you are connected via Wi-Fi" and offers users a link to AT&T's "Smart Wi-Fi" app, which helps users locate free

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[152] *Id*.

[153] *Id*.

[154] Data Information Page. Like the Broadband Information Page, this page has been periodically updated to reflect alterations to the MBR policy, such as its inclusion of congestion-aware elements.

[155] *Id*.

[156] *Id*.; *see also* AT&T, Data Calculator, http://www.att.com/att/datacalculator (allowing users to "[e]stimate your monthly usage" by entering the time spent on various activities, such as web surfing or streaming video).

AT&T Wi-Fi hotspots near their location.[157] And the page links to the Wireless Support Page, which, as discussed, provides additional information about the effect of the MBR policy.

AT&T also sent at least one text message to every customer affected by the MBR policy. When the program was first implemented, speed reduction was triggered by data usage that put a customer in the top 5% of data consumption within a particular geographic region. Under this iteration of the program, AT&T sent a text message to every user that reached 75% of the applicable usage threshold in their geographic region.[158] The message said: "Your data use is approaching the top 5% of users. Avoid reduced data speeds—use Wi-Fi where available. Visit www.att.com/dataplans or call 8663447584."[159] The link was to yet another (now retired) website providing information about the MBR policy—and that site also included a calculator to help customers understand the consumption volume of various activities. The telephone number was to a special division of AT&T Customer Care, specially trained to inform users about the details of the MBR policy.[160]

In March 2012, AT&T updated the MBR policy. Since that date, eligibility for speed reductions has been triggered by usage that exceeds national thresholds of three gigabytes (on the 3G and 4G networks) and five gigabytes (on the 4G LTE network). Before any customer's speed was reduced under the updated MBR policy, the customer received a text message the first time his or her usage approached 95% of the applicable usage threshold.[161] The 95% Text

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[157] Data Information Page.

[158] Top 5% Text Messages, attached as Exh. L to Haymons Decl.

[159] *Id.*

[160] Under this version of the MBR policy, customers that reached the applicable usage threshold received a second text message stating that "[y]our data use is among the top 5% of users. Data speeds for this bill cycle may be reduced." This message also linked to the website and Customer Care number.

[161] *See* 95% Text Message, attached as Exh. N to Haymons Decl.

Message originally read: "Your data usage is near 3GB [or 5GB, for users of 4G LTE devices] this month. Exceeding 3GB [5GB] during this or future billing cycles will result in reduced data speeds, though you will still be able to email & surf the Web. Wi-Fi helps you avoid reduced speeds. Visit www.att.com/datainfo, or call 866-344-7584 for more info."[162] The link was to the aforementioned Data Information Page website, and the telephone number, again, reached a special division of AT&T Customer Care trained to inform users about the details of the MBR policy. (When the MBR policy was updated to include "congestion-aware" speed reductions, the text message was revised to say that exceeding the applicable threshold "may"—not "will"—result in reduced speeds.)

In May 2015, AT&T revised its text message alerts once again. Now, in each month that an Unlimited Data Plan customer exceeds 75% of the applicable national threshold, AT&T sends the user a text message that reads: "Your data has reached 75% of the [3 or 5] GB network management threshold. If you exceed [3 or 5] GB this month, you may experience reduced data speeds at times and in areas that are experiencing network congestion. Wi-Fi helps you avoid reduced speeds. For more info visit att.com/datainfo or att.com/broadbandinfo."[163] The links are to AT&T's Data Information and Broadband Information pages.

In addition to these several notifications, every Unlimited Data Plan customer subscribed to and renewed the plan under a Wireless Customer Agreement that reserved to AT&T the right to engage in congestion management as necessary to protect the performance of the network and other customers' use of the network. In 2007, the Wireless Customer Agreement reserved AT&T's right to "limit throughput or amount of data transferred, deny Service and/or terminate

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[162] *Id.*

[163] AT&T, *Info for smartphone customers with legacy unlimited data plans*, http://www.att.com/esupport/datausage.jsp?source=IZDUel1160000000U (last visited July 15, 2015).

Service, without notice, to anyone . . . whose usage adversely impacts its wireless network or service levels or hinders access to its wireless network and . . . protect its wireless network from harm," even if such protection impacts "legitimate data flows."[164]

From 2008 to 2012, AT&T's Wireless Customer Agreement reserved to AT&T the right to "deny, disconnect, modify, and/or terminate Service, without notice, to anyone it believes is using the Service in any manner prohibited or whose usage adversely impacts its wireless network." Those agreements (which remained substantially the same throughout the relevant period) further authorized AT&T to deny, disconnect, modify and/or terminate Service "after sessions of excessive usages" and to "otherwise protect its wireless network from harm, compromised capacity or degradation in performance."[165] The Agreement explained that such protective steps by AT&T "may impact legitimate data flows."[166]

Beginning in August 2012, AT&T modified its Wireless Customer Agreement to highlight AT&T's right to "engage in any reasonable network management" (as permitted by the Commission), to "reduce network congestion," and to "reduce . . . data throughput speeds at any time or place if [a customer's] data usage exceeds an applicable, identified usage threshold during any billing cycle."[167] *The August 2012 Wireless Customer Agreement also specifically defines the term "unlimited"*: "'unlimited' means you pay a fixed monthly charge for wireless data service regardless of how much data you use."[168] AT&T's definition of the term was and is

[164] November 2007 Wireless Customer Agreement, attached as Exh. U to Haymons Decl.

[165] August 2011 Wireless Customer Agreement § 6.2.

[166] *Id*.

[167] August 2012 Wireless Customer Agreement § 6.2.

[168] *Id*.

consistent with what "unlimited" means in telecommunications[169] and in other contexts, including all-you-can-eat buffets (which do not promise that particular items will be replenished at any particular speed).

The unmistakable terms of the August 2012 Wireless Customer Agreement governs the substantial majority of Unlimited Data Plan customers that the *NAL* asserts were impacted by AT&T's allegedly defective disclosures.[170] Because AT&T's renewals have a two-year term, by August 2014, *every Unlimited Data Plan subscriber under a term contract* was provided this definition of "unlimited." (A very small minority of Unlimited Data Plan subscribers retain the plan on a month-to-month basis under the terms of an older contract, but these customers, lacking the two-year contract term, are always at liberty to leave AT&T for a wireless carrier.)

2. The *NAL* asserts that these additional disclosures do not "cure" AT&T's violations of the Transparency Rule. But, as explained above, there is no violation to "cure" because AT&T's website disclosure by itself fully complied with the Transparency Rule.

In all events, the fact that AT&T went beyond the requirements of the Transparency Rule is highly relevant—it provides additional grounds for the Commission to cancel its proposed finding of liability and forfeiture. *First*, as explained above, the Commission's findings regarding AT&T's use of the term "unlimited" rest primarily upon statements made by AT&T in contexts other than the website disclosure required by the Transparency Rule. While, as explained above, this is an unlawful reading of the Transparency Rule, even if that were not the

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[169] *See supra* pp. 25–27.

[170] Israel Decl. ¶ 39 n.31. The *NAL* focuses on AT&T's customer base as of October 2014. By that time, approximately **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** of AT&T's unlimited data plan subscribers had agreed to the operative language of the 2012 Wireless Customer Agreement. *Id.* Further, by May 2015, approximately **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** of AT&T's customers had subscribed to that operative language. *Id.*

case, the Commission cannot focus on AT&T's use of the term "unlimited" in some statements, such as in customer bills, without considering the multiple other statements AT&T made explaining the term, which demonstrate that AT&T went to significant lengths to inform consumers and provided more than enough information for consumers to make informed choices.[171]

Second, the Commission asserts forfeiture authority based on findings that AT&T's conduct was "willful" and "egregious."[172] Even if the Commission concludes that AT&T's website disclosures were inadequate, such findings of willfulness and egregiousness could not be sustained in light of the repeated and extensive disclosures that AT&T has made.

C. Imposing Liability On AT&T Here Would Violate Due Process.

Even assuming *arguendo* that the Commission could reimagine the Transparency Rule to impose the new obligations that form the basis of the *NAL*'s findings of liability, imposing liability on AT&T for failure to comply with those new obligations would violate the Due Process Clause.

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[171] The *NAL* blithely dismisses all of these disclosures with statements such as "a customer who received such a notification in the past may not remember it months or years later," and "the Company sent [text] messages only the first time the customer neared the data threshold. If the customer neared the limit again in a subsequent billing cycle, . . . no subsequent text message was sent." *NAL* ¶ 27. But the Commission did not require *any* of these disclosures. The suggestion that AT&T's actions did not go far enough *beyond* the letter of the law is not even a colorable basis for imposing liability.

[172] *Id.* ¶¶ 2, 17, 33, 39. The Commission's past interpretation of "willful" as encompassing any act taken on purpose, *see* Memorandum Opinion and Order, *Application for Review of S. Cal. Broad. Co., Licensee, Radio Station KIEV(AM) Glendale, Cal.*, 6 FCC Rcd. 4387, ¶ 5 (1991) (citing 47 U.S.C. § 312(f)), deprives the term of all meaning and cannot be the basis for the imposition of a forfeiture penalty. Indeed, the Commission's view of what constitutes a "willful" violation contrasts sharply with the settled meaning of the term in the context of civil liability. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007) ("willful" requires a knowing violation or reckless disregard of a law).

Liability can be imposed only if the Commission afforded AT&T fair warning that its actions would be deemed to violate the law.[173] In this context, when an agency seeks to impose liability on a regulated entity based on the agency's interpretation of its regulations, the D.C. Circuit has repeatedly held that liability is unlawful unless the regulated entity would have been "'able to identify, *with ascertainable certainty*, the standards with which the agency expects parties to conform.'"[174] "In the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability."[175]

"This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment."[176] Fair notice is necessary to ensure "that regulated parties . . . know what is required of them so they may act accordingly."[177] But it also serves a broader interest: "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."[178]

And where, as here, the government is attempting to regulate speech, particularly "rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill

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[173] *See FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) ("*Fox II*") ("A fundamental principle in our legal system is that laws must give fair notice of conduct that is forbidden or required.").

[174] *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (emphasis added) (quoting *General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995)).

[175] *Gen. Elec.*, 53 F.3d at 1328–29.

[176] *Fox II*, 132 S. Ct. at 2317.

[177] *Id.*; *see also Gen. Elec.*, 53 F.3d at 1329 ("elementary fairness compels clarity in the statements and regulations setting forth the actions with which the agency expects the public to comply").

[178] *Fox II*, 132 S. Ct. at 2317.

protected speech."[179] The "standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[180] These principles apply with full force in the commercial speech context.[181]

Measured against these principles, imposition of liability here would flout due process. To begin with, no "regulated party acting in good faith" could possibly have "identif[ied]," based on the Commission's discussion of the Transparency Rule in the *2010 Open Internet Order* (or the text of the Rule itself), that the Rule could be applied to regulate all speech, including speech outside the context of the mandated online disclosure, such as the content of customer bills—let alone identified such obligations with "ascertainable certainty."[182] To the contrary, as detailed above, the Commission emphasized that it "*only*" intended to require "that providers post disclosures on their websites and provide disclosure at the point of sale."[183] "The Commission . . . cannot punish a member of the regulated class for reasonably interpreting the Commission rules,"[184] much less for interpreting those rules to mean what they actually say.

The Commission's failure to provide the required notice of the conduct it now seeks to sanction is confirmed by its impermissible reliance on the staff's *2014 Enforcement Advisory*. As explained, the *2014 Enforcement Advisory* is entitled to no weight because it is completely

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[179] *Id.*

[180] *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 604 (1967); *see Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871–72 (1997) ("The vagueness of [a content-based regulation] . . . raises special First Amendment concerns because of its obvious chilling effect on free speech.").

[181] *Jacobs v. The Fla. Bar*, 50 F.3d 901, 907 (11th Cir. 1995).

[182] *Gen. Elec.*, 53 F.3d at 1329.

[183] *2010 Open Internet Order* ¶ 59.

[184] *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987).

unmoored from the Transparency Rule it purports to interpret.[185] Worse, the July 23, 2014 Advisory was issued *only 13 days* before the Commission initiated its investigation of AT&T's MBR policy.[186] It is readily apparent that the *2014 Enforcement Advisory* was rushed into print precisely because the Enforcement Bureau recognized that AT&T was *not* in violation of the terms of the Transparency Rule as set forth in the *2010 Open Internet Order*. Accordingly, the Bureau had to rewrite the Rule, under the guise of interpreting it, in order to launch its "investigation." But the Commission itself has no authority to retroactively revise its rules,[187] and *a fortiori* the agency's staff acts at the height of illegitimacy in issuing an "Advisory" document to support a specific planned investigation. In all events, the staff issued the *2014 Enforcement Advisory* years after the *2010 Open Internet Order*. Such "notification" is patently insufficient to ensure "that regulated parties . . . know what is required of them *so they may act accordingly*."[188]

Nor could any regulated carrier have anticipated that the Commission would require AT&T to list the specific data transfer speeds that would result from AT&T's congestion

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[185] *See supra* pp. 21–22.

[186] *See* Letter from FCC Chairman Wheeler to Ralph de la Vega, President and CEO (Aug. 6, 2014) (directing AT&T to "justify" its policy under the Transparency Rule); *2014 Enforcement Advisory*, 29 FCC Rcd. at 8606.

[187] *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

[188] *Fox II*, 132 S. Ct. at 2317 (emphasis added). Moreover, even if the *2014 Enforcement Advisory* could somehow change the scope of the Transparency Rule prospectively—which it cannot do since there was no notice and comment and no Commission-level decision—it could not be applied retroactively. The *2014 Enforcement Advisory* was released on July 23, 2014, and provides no grace period for coming into compliance with a new rule, while the period covered by the *NAL* extends back to June 17, 2014. *See NAL* at 1. With respect to the five weeks between those two dates (and any reasonable period of time to comply with a new rule), the *NAL* seeks to impose retroactive liability based on a novel and unlawful reading of the Rule, a clear violation of due process. Because adopting the logic of the *2014 Enforcement Advisory* retroactively would raise this serious constitutional problem, the Commission cannot rely upon it here. *Cf. Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

management policies.[189] To the contrary, as discussed above, the *2010 Open Internet Order* stressed the "flexibility" providers would have in their disclosures and required only that they describe the "effects on end users' experience" of their network management practices.[190] And the Commission specifically pointed to the "description of management practices provided by Comcast" as "likely satisf[ying] the transparency rule."[191] Like the AT&T disclosures that the *NAL* now finds insufficient, those Comcast disclosures did *not* provide precise numerical speeds but instead described the "effects on the end users' experience."[192]

In short, the Commission has alleged that AT&T violated the Transparency Rule; accordingly, AT&T's conduct must be measured *against that Rule* and the Commission's contemporaneous explanation of its requirements in the *2010 Open Internet Order*. Any attempt to impose liability on AT&T on the basis of a subsequent, made-for-enforcement "interpretation" of the Transparency Rule that would impose additional and different obligations would violate due process.

II. THE *NAL*'S PROPOSED REMEDIES EXCEED THE COMMISSION'S AUTHORITY.

Even if, notwithstanding the foregoing, the Commission had a basis for finding that AT&T violated the Transparency Rule, such a finding could not remotely support the extraordinarily punitive sanctions the *NAL* proposes. Those sanctions are patently excessive and arbitrary, and each is also beyond the Commission's legal authority to adopt.

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[189] *Cf. Trinity Broad.*, 211 F.3d at 630–32 (regulated entity must be able to determine regulatory requirements with "ascertainable certainty").

[190] *2010 Open Internet Order* ¶ 56.

[191] *Id.* ¶ 56 n.177.

[192] *Id* ¶ 56.

A. The *NAL* Is Barred By The Statute Of Limitations.

The Communications Act provides a one-year statute of limitations for forfeiture actions.[193] Congress added this provision to ensure that the forfeiture process was "rapid,"[194] and to provide repose to regulated parties.[195] The *NAL* alleges that AT&T violated the Transparency Rule by inadequately disclosing its MBR policy. But AT&T disclosed that policy in 2011, four years before the *NAL* was issued; any violation of the Transparency Rule occurred at that point. The *NAL* is therefore time-barred.

The *NAL* never explains how AT&T can be penalized for conduct occurring four years ago. Instead, it attempts to evade the statute of limitations by recharacterizing AT&T's alleged fault as **[CONFIDENTIAL BEGIN]** **[CONFIDENTIAL END]** individual failures to make adequate disclosures to individual customers. But the Transparency Rule is quite clear: AT&T was required only to make a *single*, public disclosure on its website; even if that disclosure was flawed (and it was not), the Commission was required to issue any *NAL* within a year of AT&T's posting.

1. The Forfeiture Penalty Is Barred by the Statute of Limitations.

The Communications Act forbids imposition of a forfeiture penalty on AT&T when "the violation charged occurred more than 1 year prior to the date of issuance of the . . . notice of apparent liability."[196] The *NAL* here was issued on June 17, 2015. A forfeiture penalty may be recovered, therefore, only for conduct alleged to have occurred on or after June 17, 2014.

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[193] *See* 47 U.S.C. § 503(b)(6)(B).

[194] *N.J. Coal. for Fair Broad. v. FCC*, 580 F.2d 617, 619 (D.C. Cir. 1978).

[195] *See* Hearing Before Comm'cns Subcomm., at 73 (86th Cong., 2d Sess. Aug. 10, 1960) ("Senate Hearing").

[196] 47 U.S.C. § 503(b)(6)(B); *see also* 47 C.F.R. § 1.80 ("no penalty shall be imposed if the violation occurred more than 1 year prior to the date on which the appropriate notice is issued").

At the time AT&T implemented its MBR policy in 2011, it posted a disclosure regarding that policy on its website.[197] The *NAL* does not dispute this.[198] AT&T has made no changes since then relevant to the violation alleged in the *NAL*.[199] Nor does the *NAL* dispute that AT&T provided all unlimited plan customers a link to this online disclosure.[200] Under the Transparency Rule, this "online disclosure[ ] [was] considered disclosed to the Commission for purposes of monitoring and enforcement."[201] The Commission's one-year window in which to challenge the disclosure therefore began to run in 2011 and expired in 2012. Even assuming the *NAL* were otherwise valid, which it is not, it would be three years too late.

The *NAL* does not explain how AT&T can be held liable for an allegedly deficient disclosure made four years ago. Instead, it attempts to evade the statute of limitations by asserting that AT&T committed a violation for every customer who allegedly failed to receive adequate disclosures.[202] The Rule, however, is quite explicit: A service provider must "*publicly disclose* accurate information . . . sufficient for consumers to make informed choices."[203] Thus, the action required of AT&T was a single "public" disclosure of its MBR policy—not private disclosures to individual customers. The online statement was, in the Commission's own words, "disclosed to the Commission for purposes of monitoring and enforcement" at that point, and, if

[197] *See supra* pp. 7–8.

[198] *See NAL* ¶ 28.

[199] Haymons Decl. ¶ 33.

[200] *See NAL* ¶ 28.

[201] *2010 Open Internet Order* ¶ 58.

[202] *NAL* ¶ 35.

[203] 47 C.F.R. § 8.3 (2011) (emphasis added).

there was any violation, section 503 required the Commission to bring any action within a year of that date.[204]

In this regard, the Commission emphasized that the Transparency Rule did not require "multiple disclosures targeted at different audiences," but instead that the Rule could be satisfied "through a *single* disclosure."[205] Individual customers would then be provided links to this website at the point of sale, where they could read the broadband provider's "single" online disclosure.[206] The Commission's Enforcement Bureau and General Counsel confirmed this reading of the Transparency Rule shortly after it was issued, emphasizing that "providers can comply with the point-of-sale requirement by . . . directing prospective customers at the point of sale . . . to a web address at which the required disclosures are clearly posted and appropriately updated."[207]

The *NAL*'s atextual reading of the Transparency Rule would effectively and impermissibly evade section 503's statute of limitations altogether. As the Supreme Court emphasized recently in *Gabelli v. SEC*, the purpose of statutes of limitations is to achieve "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities."[208] Repose is particularly important in the context of forfeitures and other penalties, which are designed to "go beyond compensation, are intended to

[204] *See, e.g.*, *Gabelli v. SEC*, 133 S. Ct. 1216, 1220 (2013) ("the 'standard rule' is that a claim accrues 'when the plaintiff has a complete and present cause of action'").

[205] *2010 Open Internet Order* ¶¶ 57, 58 (emphasis added).

[206] *Id.* ¶¶ 57–59.

[207] *2011 Enforcement* Guidance, 26 FCC Rcd. at 9414; *see also id.* at 9413–14 (Transparency Rule "does not compel the distribution of disclosure materials in hard copy" at point of sale).

[208] 133 S. Ct. at 1221.

punish, and label defendants wrongdoers."[209] Indeed, "[i]t 'would be utterly repugnant to the genius of our laws' if [agency] actions for penalties could 'be brought at any distance of time.'"[210]

The *NAL*'s reading of the Transparency Rule exposes AT&T and other broadband providers "to Government enforcement action . . . for an . . . uncertain period into the future" and thus deprives section 503's statute of limitations of all effect.[211] In this case, the Commission waited to impose forfeiture until years after AT&T had "publicly disclose[d]" its MBR policy on its website,[212] and thus "disclose[d] [that same information] to the Commission for purposes of monitoring and enforcement."[213] During the intervening years AT&T, reasonably relying on the Commission's apparent blessing of its disclosures, directed customers to those disclosures in connection with millions of sales. Permitting imposition of forfeiture years after AT&T made its disclosures available to both the public and the Commission would "thwart[ ] the basic objective of repose underlying the very notion of a limitations period."[214] Indeed, under the *NAL*'s reading of the Transparency Rule, the Commission could bring an enforcement action *decades* after a broadband provider posts its disclosures online.[215] Nothing in the text of section 503 "even hints

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[209] *Id.* at 1223; *see also Johnson v. SEC*, 87 F.3d 484, 492 (D.C. Cir. 1996) ("'[I]t would scarcely be supposed, that an individual would remain forever liable to a pecuniary forfeiture.'" (quoting *Adams v. Woods*, 2 Cranch 336, 341 (1805) (Marshall, J.))).

[210] *Id.* (quoting *Adams*, 2 Cranch at 342).

[211] *Gabelli*, 133 S. Ct. at 1223.

[212] 47 C.F.R. § 8.3 (2011).

[213] *2010 Open Internet Order* ¶ 57.

[214] *Gabelli*, 133 S. Ct. at 1223.

[215] Permitting such tardy suits could massively expand the scope of a broadband provider's liability. As a provider expands its customer base over time and the provider gives each new customer the disclosures it believes the Commission has accepted, it would (under the Commission's perpetual violation theory) be exposed to progressively greater liability even where, as here, the provider had not materially altered its initial website disclosures.

at the possibility that a fresh violation occurs every day until the end of the universe" if a provider posts inadequate disclosures on its website.[216] "*Gabelli* tells us not to read statutes in a way that would abolish effective time constraints on litigation."[217]

The perpetual cloud of uncertainty which the *NAL* would create is all the more unwarranted in light of one of the purposes given by the Commission for the Transparency Rule: ensuring that any "harmful practices . . . will be *quickly* remedied . . . privately or through Commission oversight."[218] The Commission has a wide array of tools to learn about potential violations and rapidly bring enforcement actions.[219] Further, as here, the Commission can require "public" disclosures of certain practices. "[A]rmed with these weapons," the Commission does not need the never-ending limitations period the *NAL*'s reading of the Transparency Rule would confer.[220]

Furthermore, Congress enacted section 503's statute of limitations to prevent precisely the type of tardy enforcement action at issue here. During the Senate hearings on the amendments that resulted in the adoption of section 503's forfeiture provision, Senator Pastore proposed adding a statute of limitations to the forfeiture provision to prevent the Commission, when confronted with an ongoing practice that violates the Act, from "go[ing] back for a period of 3 years, if it wants to, and impos[ing] a fine . . . for each day in 3 years."[221] Chairman Ford

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[216] *United States v. Midwest Generation, LLC*, 720 F.3d 644, 647 (7th Cir. 2013).

[217] *Id.*

[218] *2010 Open Internet Order* ¶ 53 (emphasis added); *see also* FCC, About the Bureau, https://www.fcc.gov/enforcement-bureau (last visited July 13, 2015) (the Enforcement Bureau's "mission is to investigate and respond *quickly* to potential unlawful conduct") (emphasis added).

[219] FCC, Enforcement Primer, https://www.fcc.gov/encyclopedia/enforcement-primer (last visited June 24, 2015).

[220] *Gabelli*, 133 S. Ct. at 1222.

[221] Senate Hearing at 41.

agreed that a statute of limitations was appropriate "so no liability would attach after the lapse of [the limitations period], unless within such time a notice of apparent liability was given."[222] Seeking forfeiture after a lengthy period of Commission acquiescence, both Senator Pastore and Chairman Ford agreed, would be "arbitrary and capricious."[223] Furthermore, such a lengthy delay would raise the prospect that the Commission was guilty of "laxness for not having prosecuted for an act committed some time ago."[224] The one-year limitations period thus guarantees that forfeiture proceedings are brought "rapid[ly],"[225] not years after the fact.

In sum, because the Rule demands a single, public disclosure, any alleged violation of the Transparency Rule would necessarily have occurred when AT&T posted its disclosure online. AT&T posted its disclosure in 2011; the Commission therefore had only until 2012 to challenge that disclosure. The *NAL* is time-barred.

2. The Injunctive Relief Proposed by the *NAL* Is Barred by the Concurrent Remedy Doctrine.

Just as section 503's statute of limitations applies to bar the *NAL*'s proposed forfeiture, it also bars the proposed injunctive relief. While section 503 refers on its face simply to forfeitures, courts have long held that "equity will withhold its relief in . . . a case where the applicable statute of limitations would bar the concurrent legal remedy."[226] This principle has been applied to prevent federal agencies from seeking injunctive relief when, as here, the statute

[222] *Id.*

[223] *Id.* at 29; *see also id.* (Chairman Ford explaining that he "can't imagine the Commission doing" something like bringing an enforcement action after a delay of 3 years).

[224] *Id.* at 73.

[225] *N.J. Coal.*, 580 F.2d at 619.

[226] *Cope v. Anderson*, 331 U.S. 461, 464, (1947).

of limitations for concurrent civil penalties had run.[227] Indeed, the principle has most force in a situation, like *Williams* and this case, in which Congress has expressly limited the government's power to impose penalties after a period of time. Congress is unlikely to give enforcement power with one hand while it takes away enforcement power with the other.[228]

Permitting injunctive remedies in this case would vitiate section 503's statute of limitations just as surely as permitting forfeiture would. AT&T's justified reliance on the Commission's apparent approval of its disclosures would be upended as much, if not more, by the injunctive relief demanded by the *NAL* as by the claimed forfeiture. For example, the *NAL*'s demand that AT&T wear a "scarlet letter" by confessing wrongdoing to all its Unlimited Data Plan customers is just as much a penalty as the proposed forfeiture. Likewise, the demand that AT&T permit Unlimited Data Plan customers to break their contracts without paying the contractual penalty is as fiscally damaging as the straightforward demand that AT&T pay a sum certain. The Commission may not evade the consequences of its excessive delay in waiting to seek forfeiture by circumventing the limitations period through demands for injunctive relief.

B. The Proposed Forfeiture Is Unlawful, Excessive, And Arbitrary.

Even assuming a violation of the Transparency Rule by AT&T within the applicable statute of limitations, the Commission's unprecedented proposed $100 million forfeiture penalty is unlawful and cannot be imposed for multiple other independent reasons.

1. The *NAL* simply presumes that AT&T committed "per customer" violations such that the Commission would have authority to impose a $16,000 forfeiture penalty for every unlimited customer AT&T has—a proposition that, the Commission apparently calculates, would

[227] *See FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996).

[228] In all events, as explained below in Section II.C., the Commission does not have statutory authority to issue the injunctive relief specified in the *NAL*.

result in a potential forfeiture amount of tens of billions of dollars.[229] The absurd suggestion that the conduct at issue here could generate a statutory maximum so concededly "astronomical" and patently "excessive"[230] should have itself alerted the Commission to the fact that it must have committed a fundamental error of interpretation or judgment to get to that point. And the Commission did commit such an error, because the relevant provision of the Transparency Rule imposes no such "per customer" obligation. To the extent that AT&T's website was found not to satisfy the Transparency Rule's requirements, that would be a *single* violation of the Rule permitting the agency to impose, at most, a $16,000 forfeiture penalty—and not the $100 million forfeiture proposed in the *NAL* (or the multi-billion dollar presumptive forfeiture the Commission concludes Congress intended to authorize).[231] As shown above,[232] the text of the Transparency Rule and the Commission's description in the *2010 Open Internet Order* confirm that providers had only a "single" obligation and not one that would subject them to virtually limitless liability based on the happenstance of how many customers they had.

By contrast, the Commission's "per-customer" calculation does not measure the number of "*violation[s]*" of the disclosure rule, as the statute directs,[233] but instead defines the universe of customers that could potentially have been *affected* by a violation of the disclosure rule. But while the Commission may consider, *inter alia*, the number of affected customers when

[229] *See NAL* ¶¶ 35, 38.

[230] *Id.*

[231] *See* 47 U.S.C. § 503(b)(2)(C); 47 C.F.R. § 1.80(b)(7).

[232] *See supra* pp. 18–20, 46.

[233] *See* 47 U.S.C. § 503(b)(2)(D).

adjusting a forfeiture penalty, it has no damages authority in a forfeiture proceeding and may not exceed the statutory maximum per violation.[234]

Even if there were ambiguity on the question (and there is not), any such ambiguity would have to be resolved against a reading of the Transparency Rule and section 503(b) that would give the Commission what it claims here—limitless authority to impose any forfeiture penalty it wishes. Here—as in other recent enforcement actions[235]—the Commission asserts a reading of section 503(b) that would authorize staggering penalties on the claimed grounds that there have been separate and discrete violations for each individual customer interaction. Having set a "base" forfeiture amount that, in the Commission's own words, is "astronomical," the Commission then asserts it has discretion to pick a "reasonable" penalty anywhere below that "astronomical" limit.[236] But this approach nullifies the scheme adopted by Congress, which set a strict dollar limit on forfeiture penalties and did not provide an open-ended grant of authority to the Commission to impose whatever level of penalties it wishes.[237]

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[234] *See id.* Indeed, although the *NAL* briefly and without any analysis implies otherwise in an ordering clause, *see NAL* ¶ 43, the Commission has no authority to award damages on these allegations in *any* kind of proceeding. The provisions of Title II that permit awards of damages do not apply here because the Commission correctly deemed AT&T's service an "information service" during the relevant period. *See id*. ¶ 3.

[235] For example, the Commission has issued an *NAL* finding that failure to adequately protect customer records on a computer server permitted imposition of a statutory forfeiture penalty under section 503(b) with regard to *each* of the *over* 300,000 customers that had documents containing proprietary information located on the server. Notice of Apparent Liability for Forfeiture, *TerraCom, Inc. and YourTel America, Inc.*, 29 FCC Rcd. 13325, ¶ 50 (2014) (asserting "base" forfeiture of $9 billion); *see also NAL* ¶ 38 n.77 (noting cases where the Commission's approach to determining base forfeiture amounts would result in "excessive penalties").

[236] *NAL* ¶ 38.

[237] *Cf. BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring) ("Requiring the application of law, rather than decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself.").

Indeed, allowing the Commission to set virtually limitless "per customer" damages in these circumstances raises three additional, separate, and significant constitutional due process concerns. *First*, it invites arbitrary enforcement by giving the Commission undue settlement leverage. Without any meaningful constraint on the forfeiture amounts it can propose, the agency has strong incentives to propose an excessive amount to induce the regulated company to abandon meritorious defenses and settle in order to avoid the potential of even greater liability.[238]

Second, statutory damages awards that are "'grossly excessive'" "or 'so severe and oppressive as to be wholly disproportioned to the offense'" violate due process.[239] In this regard, courts have specifically recognized that "a statutory scheme that imposes minimum statutory damage awards on a per-consumer basis" can raise "due process concerns" to the extent "the statutory damages come to resemble punitive damages."[240] A regime under which the

[238] *Accord AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (noting that in the face of significant "potential damages liability" a defendant may be forced to "settle and to abandon a meritorious defense"); *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (potential for "enormous" damages can produce "an *in terrorem* effect on defendants, which may induce unfair settlements"). There is reason to be concerned that the Commission's approach has already forced such settlements. In the face of an NAL that would have imposed a $10 million forfeiture based on an aggressive "per-customer" violation theory similar to what the *NAL* asserts here, *see supra* n.235, TerraCom and YourTel agreed to settle and pay a $3.5 million penalty, Order, *In the matter of TerraCom, Inc. and YourTel Am., Inc.*, DA 15-776, File Nos. EB-TCD-13-00009175, EB-IHD-13-00010677 (rel. July 9, 2015).

[239] *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 280–81 (1989) (Brennan, J. concurring) (quoting *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909) and *St. Louis, I.M. & S. Ry. v. Williams*, 251 U.S. 63, 66–67 (1919)); *accord State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor . . . . To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property."); *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 453–54 (1993) (plurality) (Due Process "imposes substantive limits beyond which penalties may not go").

[240] *Parker*, 331 F.3d at 22. Relatedly, the Commission's approach also raises concerns under the Eighth Amendment's Excessive Fines Clause. The D.C. Circuit has recognized that the

Commission could impose literally tens of billions of dollars as a forfeiture penalty on a broadband provider even in the absence of any significant demonstrated harm to broadband consumers would by any measure be "grossly excessive."

Third, the Commission's approach makes it impossible to anticipate the sanction for violating its rules. "[E]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, *but also the severity of the penalty that a State may impose*."[241] The Commission's asserted authority to order any sanction lower than an "astronomical" number eliminates any semblance of notice and predictability from its forfeiture process.

2. Even assuming that Congress vested the Commission with authority here to pick a penalty level between $0 and tens of billions of dollars, the Commission cannot simply pull a number out of a hat. The Commission must still provide a valid, non-arbitrary basis for the forfeiture penalty it adopts.[242] "Like any agency, the FCC must provide a rational basis when setting a number for a standard."[243] Thus, the Commission is required to demonstrate a "rational

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Commission must exercise its forfeiture authority consistent with the Eighth Amendment, and may not impose forfeitures under section 503 that are "indefinite" and "disproportionate to the offense." *Grid Radio v. FCC*, 278 F.3d 1314, 1322 (D.C. Cir. 2002) (citing *United States v. Bajakajian*, 524 U.S. 321, 334–40 (1998)). But that is precisely what the Commission's approach here allows—the *NAL* asserts authority to impose "astronomical" penalties while vesting the Commission with vast discretion to choose whatever amount it deems appropriate. The Commission is in no meaningful way applying the section 503 statutory penalties but instead has adopted an approach that allows it to pick whatever level of penalties it wants.

[241] *Campbell*, 538 U.S. at 1520 (emphasis added) (citation omitted) (internal quotation marks omitted).

[242] *See U.S. Tel. Ass'n v. FCC*, 188 F.3d 521, 525 (D.C. Cir. 1999); *WJG Tel. Co. v. FCC*, 675 F.2d 386, 388–389 (D.C. Cir. 1982).

[243] *WorldCom, Inc. v. FCC*, 238 F.3d 449, 461 (D.C. Cir. 2000).

connection between the facts found and the choice made."[244] It must further give careful consideration to all of the relevant statutory factors and a failure to do so is reversible error.[245]

For multiple reasons, the Commission's forfeiture analysis fails these standards.

a. Foremost, the *NAL* disregards the applicable statute of limitations and seeks to impose forfeiture penalties based on conduct that occurred outside the limitations period. As shown above,[246] the entire proposed forfeiture is barred by the statute of limitations. But even under an unjustifiably expansive reading of the Transparency Rule, the disclosures required of broadband providers were required to be made only on a broadband provider's website and "at the point of sale."[247] Thus, even accepting the Commission's theory that application of AT&T's allegedly faulty disclosure to each of **[CONFIDENTIAL BEGIN]** **[CONFIDENTIAL END]** customers constituted **[CONFIDENTIAL BEGIN]** **[CONFIDENTIAL END]** distinct violations, any claimed deficiency in these disclosures must have occurred no later than when each customer renewed an unlimited plan.

The *NAL* simply ignores section 503's strict statute of limitations, and offers no theory consistent with that statute as to how forfeiture may be imposed on the basis of disclosures made to customers who renewed their plans more than a year before the *NAL* issued. Certainly,

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[244] *Motor Vehicle Mfrs.*, 463 U.S. at 43 (citation omitted).

[245] *See, e.g., Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004) (agency action is "arbitrary and capricious" if the agency fails to consider factors "it must consider under its organic statute").

[246] *See supra* pp. 44–49.

[247] *See 2010 Open Internet Order* ¶ 59 ("[W]e require only that providers post disclosures on their websites and provide disclosure at the point of sale"); *see also id.* ¶ 57 ("broadband providers must, at a minimum, prominently display or provide links to disclosures on a publicly available, easily accessible website . . . , and must disclose relevant information at the point of sale"); *2011 Enforcement Guidance*, 26 FCC Rcd. at 9413 ("The *Open Internet Order* requires broadband providers to disclose network management practices . . . 'at the point of sale.'") (quoting *2011 Open Internet Order* ¶ 57).

because the Transparency Rule imposed no post-sale obligations, there can be no "continuing violation" that extends the statute of limitations. "In a continuous violation . . . there exists a continuing or persistent legal duty that the violator steadily fails to fulfill."[248] In *WIYN*, the Commission sought forfeiture under section 503 from a radio station for failing to provide notice to the subject of a personal attack aired by the station. The court explained that such failure was not a continuing violation because the relevant regulation required notification of the personal attack within a week; the violation occurred when the station failed to provide notification within a week as required, and the subject's continuing ignorance of the personal attack was not a continuing violation but simply the continuing effects of the station's earlier violation.[249] Courts construing the Truth in Lending Act's similar disclosure requirements have reached the same conclusion.[250] Courts have also emphasized that "enduring consequences of acts that precede the statute of limitations are not independently wrongful."[251]

Nor can the Commission avoid the statute of limitations by asserting that AT&T's inclusion of the word "unlimited" on customers' bills is a separate violation.[252] As explained above, the Transparency Rule does not apply to such post-sale conduct.[253] The Commission may

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[248] *United States v. WIYN Radio, Inc.*, 614 F.2d 495, 497 (5th Cir. 1980).

[249] *See id.*

[250] *See, e.g.*, *Moor v. Travelers Ins. Co.*, 784 F.2d 632, 633 (5th Cir. 1986) (nondisclosure violation "'occurs' when the transaction [for which adequate disclosures were required] is consummated. Nondisclosure is not a continuing violation for purposes of the statute of limitations."); *see also Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1045 (9th Cir. 2011) ("the one-year period for a TILA claim begins when the violation occurred").

[251] *Midwest Generation*, 720 F.3d at 648; *Garcia v. Brockway*, 526 F.3d 456, 462 (9th Cir. 2008) (en banc) ("[A] continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation.").

[252] *NAL* ¶ 20.

[253] *See supra* pp. 21–23.

not evade section 503's statute of limitations on the basis of post-sale conduct to which the Transparency Rule does not apply.

Rather than even attempting to abide by section 503's statute of limitations, the *NAL* determined the amount of the proposed forfeiture by considering *all* **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** AT&T customers on unlimited plans as of October 2014—regardless of when those customers renewed their plans.[254] It also considered *all* revenue attributable to unlimited plans from October 2013 to October 2014, without determining what portion of that revenue was attributable to purchases of unlimited plans on or after June 17, 2014, let alone the revenues attributable to any customer with a plausible claim of harm.[255]

In fact, only approximately **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** customers renewed unlimited plans—and, as such, had a point-of-sale interaction—with AT&T in the year preceding the *NAL*.[256] And of those, over half had already been eligible for throttling previously and there is no plausible basis for supposing these customers were uninformed about the MBR policy when they renewed.[257] Of the remaining subset, most did not have usage that would have made them eligible for throttling after renewal—in fact, only approximately **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** such customers were eligible for throttling.[258] This subset of customers that could even be theoretically impacted by AT&T's alleged "violations" amounts to only about 4% of the **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]**

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[254] *NAL* ¶ 35.

[255] *Id.* ¶ 37.

[256] Israel Decl. ¶ 37.

[257] *Id.*

[258] *Id.* ¶ 38.

customers the *NAL* deemed impacted, and this subset of customers generated data revenues approximately 98% lower than the nearly **[CONFIDENTIAL BEGIN]** **[CONFIDENTIAL END]** figure assumed in the *NAL*.[259] The inflated forfeiture amount proposed by the *NAL* thus is largely based on alleged violations and revenue attributable to sales occurring outside the statute of limitations.[260]

But even the substantial majority of this small subset of customers could not have been harmed by any "violation" by AT&T. Most of this subset of customers had signed a Wireless Customer Agreement that expressly made clear that "unlimited" was a pricing term.[261] Although all of AT&T's wireless customer agreements squarely protected its right to engage in network management such as the MBR policy, it is particularly implausible that a customer that signed this agreement could claim to be misled by a billing insert that used the same term. In addition, because AT&T had switched to congestion-aware capacity management policies, even many customers that had usage that could potentially subject them to throttling would not have experienced it during the relevant statute of limitations period.[262] Relatedly, there can be no claim of harm for failure to disclose maximum speed to the extent AT&T implemented congestion-aware speed reductions, because there has been no maximum speed to disclose.[263] Under the congestion-aware scheme, the speed reduction, if any, varies depending on the level of

[259] *Id.* ¶¶ 38, 40.

[260] *See, e.g.*, *Cal. Energy Comm'n v. Dep't of Energy*, 585 F.3d 1143, 1150 (9th Cir. 2009) (decision is arbitrary and capricious "when the agency . . . relied on a factor that Congress did not intend it to consider").

[261] Israel Decl. ¶ 39; *see also supra* n.170.

[262] *See id.* ¶¶ 18, 38, 41.

[263] As noted above, *see supra* at n.20, AT&T implemented congestion-aware throttling for 3G and 4G (non-LTE) devices starting in July 2014 and for 4G LTE devices in May 2015.

congestion at the specific time and in the specific location a customer is using his or her device.[264]

b. The *NAL*'s principal justification for the forfeiture penalty is that AT&T's conduct "impede[d] the competitive marketplace for broadband services" and "harmed" consumers.[265] But the *NAL* cites no evidence that there was any harm to competition as a result of AT&T's alleged violations. Nowhere does the Commission identify any customer that would have chosen a different provider or different plan if AT&T had not used the term "unlimited" and had disclosed precise numerical speeds, let alone make findings that there was a systemic and material impact on competition.[266] Harm to competition simply cannot be presumed from what are, at most, technical violations of the Transparency Rule, particularly where AT&T provided multiple disclosures beyond those required by the Rule (including Internet postings, emails, and text messages)[267] and AT&T's competitors engaged in similar network management practices (and made similar disclosures of those practices).[268] Imposing a staggering and unprecedented $100 million forfeiture where the "violation" has no impact on the Rule's central objective would be the epitome of arbitrary agency decisionmaking.

Ultimately, the Commission's analysis boils down to the proposition that because some customers left AT&T after their data speed was reduced, they were harmed by AT&T's asserted

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[264] Haymons Decl. ¶¶ 22–23.

[265] *NAL* ¶ 34.

[266] Citing no evidence, the *NAL* vaguely asserts that "[i]f AT&T had provided adequate information to its unlimited data plan customers . . . some customers would have chosen to leave AT&T for other broadband providers." *Id.* ¶ 39. This is mere *ipse dixit*, and provides no factual basis for finding that competition was harmed, let alone harmed to a degree warranting a $100 million forfeiture. *See Ill Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 562 (D.C. Cir. 1997); *Ind. Sugars, Inc. v. ICC*, 694 F.2d 1098, 1100 (7th Cir. 1994).

[267] *See supra* pp. 7–11, 15–17, 32–38.

[268] *See supra* pp. 13, 25–27.

failure to provide the notice allegedly required by the Transparency Rule.[269] But this is a *non sequitur*. Customers switch providers for a host of reasons, and the mere fact that a customer left AT&T after experiencing a reduced speed does not remotely establish that AT&T's disclosures were insufficient to alert customers to the MBR policy. Moreover, the fact that the overwhelming majority of AT&T customers did *not* switch after experiencing a reduced speed is strong evidence that there was no disclosure problem at all. Indeed, as explained in detail above, an economic analysis of relevant churn data confirms that AT&T's customers were not "unpleasantly surprised" when their data usage was slowed—in fact, throttled customers renewed AT&T's service at a comparable rate as customers who were never throttled.[270]

c. That the Commission's forfeiture analysis is arbitrary is reinforced by the relevant statutory factors and the Commission's implementing rules.[271] Here, appropriate consideration of the "nature, circumstances, extent, and gravity" of the alleged violation and the "degree of culpability" foreclose the massive penalty proposed in the *NAL*.[272] As just discussed, the evidence confirms that AT&T's customers were not "surprised" by the MBR policy, and the vast majority have no conceivable claim of harm in the relevant limitations period. Likewise, as explained above, AT&T went above and beyond the requirements in the Transparency Rule in numerous respects, not only providing detailed disclosures on multiple websites, but also providing additional disclosures in a press release, bill notifications, email notifications, text

[269] *NAL* ¶ 39 & n.79.

[270] *See supra* pp. 30–31; Israel Decl. ¶¶ 20–28.

[271] *Cf. NAL* ¶ 33.

[272] *See* 47 U.S.C. § 503(b)(2)(E) (requiring the Commission to consider, *inter alia*, the "nature, circumstances, extent and gravity of the violation," the "degree of culpability," and "any history of prior offenses"). AT&T has no history of prior offenses of the Transparency Rule. *See id*. More broadly, AT&T has never violated any of the Commission's Open Internet requirements.

notifications, and specific language in its Wireless Customer Agreement.[273] Further, AT&T's website disclosure—the only disclosure required by the Transparency Rule—closely tracks the disclosure provided by Comcast that the Commission indicated would satisfy the Rule.[274] And AT&T's disclosures are also comparable to those of other providers, none of whom have been sanctioned by the Commission.[275]

These same facts also foreclose the *NAL*'s conclusion that AT&T's conduct was "egregious."[276] As explained above, AT&T's customers did not find the company's disclosures inadequate or troubling, and the Commission has provided no evidence that "competition" was adversely impacted by any deficiency in AT&T's disclosures. Whatever ambiguity the Commission may perceive in the term "unlimited" in AT&T's bills and other statements, it cannot be disputed that AT&T informed customers—in multiple ways that went beyond what the Transparency Rule required—that the term "unlimited" was a pricing term and not an offer of service without any limits.[277] And, similarly, even assuming the Transparency Rule required AT&T to provide specific speed information, it cannot be disputed that AT&T informed customers that they would experience speed reductions after using a certain amount of data in a month and described in real-world terms how those reductions would impact customers. Rather than being "egregious," AT&T's website disclosures were comparable to those made by other providers—including the disclosures that the *2010 Open Internet Order* cited as "likely

[273] *See supra* pp. 7–11, 15–17, 32–38.

[274] *See supra* pp. 5–6, 11–13.

[275] *See supra* pp. 13, 25–27.

[276] *Cf. NAL* ¶ 33 (violations are egregious where they "cause[ ] substantial harm to . . . customers and the marketplace").

[277] *See supra* pp. 7–8, 15–17, 23–27, 32–38.

satisf[ying]" the Transparency Rule.[278] The Commission's own rules and precedents clearly foreclose a massive forfeiture penalty in such circumstances.[279]

Indeed, the *NAL*'s "egregiousness" finding is belied by the agency's own inaction. The Commission has been aware of AT&T's disclosures for years; the *Open Internet Order* specifically stated that those disclosures would be "considered disclosed" to the Commission for enforcement purposes at the time that they were made,[280] but the Commission did not so much as hint at that time they were lacking in any respect. The Commission's own conduct not only contradicts the *NAL*'s findings that AT&T's conduct was "egregious," but also provides strong evidence that the Commission viewed AT&T's disclosures as *lawful* until 2014.

In short, the *NAL* ignores that AT&T, at the very least, made a good faith effort to comply with the Commission's requirements—even if the Commission now considers those efforts to be inadequate—and the *NAL*'s finding that AT&T's conduct was "egregious" strips the word of any content.

C. The Commission's Non-Forfeiture Remedies Exceed Its Authority.

In addition to imposing an unprecedented forfeiture penalty, the *NAL* sets forth a variety of "specific steps" that AT&T "must take" to "come in to compliance with the rule."[281]

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[278] *2010 Open Internet Order* ¶ 56 n.177.

[279] *See, e.g.*, 47 C.F.R. § 1.80 (2010) (listing good faith as one of downward adjustment criteria for purposes of determining amount of forfeiture); *In the Matter of ACS Wireless, Inc.*, 30 FCC Rcd. 97 (2015) (reducing amount of forfeiture due to carrier's good faith efforts to comply with regulations prior to being notified of violation); *see also United States v. Rust Commc'ns Group, Inc.*, 425 F. Supp. 1029, 1033 (E.D. Va. 1976) (defendant "quite reasonably interpreted the section differently from the Commission, and cannot be punished within the bounds of the Constitution for such interpretation").

[280] *NAL* ¶ 57.

[281] *Id.* ¶ 31.

Tellingly, the *NAL* cites no statutory authority to order AT&T to undertake any of these actions. That is because no such authority exists.

Contrary to the *NAL*'s apparent assumption, the Commission "'has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.'"[282] "If there is no statute conferring authority, a federal agency has none."[283] Accordingly, any claimed authority "must come from Congress, not from . . . the Commission's own conception of how [a] statute should be rewritten . . . ."[284]

This limitation on the Commission's authority extends to its remedial powers. The Commission "is not a court, and cannot rely for its action on the powers of a court of equity."[285] On the contrary, "administrative agencies . . . are creatures of statute, bound to the confines of the statute that created them, and lack the inherent equitable powers that courts possess."[286]

The Commission itself has previously recognized that Congress never vested it with the powers of a court sitting in equity. For example, in rejecting a request that it order attorneys' fees in connection with a licensing action, the Commission explained that "the 'foundation' for this practice in the courts is 'the original authority of the chancellor to do equity in a particular situation,' . . . and the Commission has no such equitable authority. Instead, the Commission

[282] *Am. Library Ass'n. v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005) (citation omitted).

[283] *Michigan v. EPA*, 213 F.3d 663, 695 (D.C. Cir. 2000).

[284] *MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186, 1195 (D.C. Cir. 1985); *see also Sw. Bell Corp. v. FCC*, 43 F.3d 1515, 1519 (D.C. Cir. 1995) ("[T]he mandates of the [Communications] Act are not open to change by the Commission.").

[285] *Trans-Pac. Freight Conference of Japan*, 302 F.2d at 880.

[286] *U.S. Fid. & Guar. Co.*, 641 F.3d at 1135.

must find its authority in its enabling statutes."[287] The Commission further emphasized that the courts had expressly "reject[ed] the Commission's argument that its general inherent powers justified a novel regulatory practice."[288] "[S]pecific statutory authority, rather than general inherent equity power, should provide the agency with its governing standards."[289]

These authorities by themselves foreclose the *NAL*'s free-ranging assertion of broad equitable power. But it is also the case that each of the three injunctive mandates that the Commission proposes to order would be independently unlawful for additional reasons.

Termination of valid contractual provisions. Buried within a supposed "disclosure" requirement, the *NAL* states that the Commission intends to order that AT&T "must inform [customers] that those unlimited data plan customers who choose to cancel their unlimited data plans . . . may do so without penalty."[290] This is unlawful for multiple reasons. Foremost, nothing in the Communications Act generally "authoriz[es] the Commission to regulate (*i.e.* supervise in the public interest) privately negotiated contracts,"[291] or permits it "to authorize unilateral changes in agreements."[292] Thus, the D.C. Circuit has squarely held that "the Commission lacks authority to invalidate licensees' contracts with third parties and to abrogate state-law contract remedies."[293]

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[287] *In Re Application of Radio Station Wsnt, Inc., Sandersville, Ga. for Renewal of License of Station WSNT, Sandersville, Ga. Request of Richard Turner et al. for Reimbursement of Expenses*, 45 F.C.C.2d 377, 382 (1974), *aff'd, Turner v. FCC*, 514 F.2d 1354 (D.C. Cir. 1975).

[288] *Id.* at 382 n.11; *cf. also AT&T Corp. v. Bell Atl. - Penn.*, 14 FCC Rcd. 556, 566 (1998) (rejecting position that failed to "cite[ ] specific authority for equitable defenses to a Section 208 complaint").

[289] *Am. Tel. & Tel. Co. v. FCC*, 487 F.2d 865, 872 (2d Cir. 1973).

[290] *NAL* ¶ 31.

[291] *Bell Tel Co. of Pa. v. FCC*, 503 F.2d 1250, 1279 (3d Cir. 1974).

[292] *MCI Telecomms. Corp. v. FCC*, 665 F.2d 1300, 1302 (D.C. Cir. 1981).

[293] *Cellco P'ship*, 700 F.3d at 543.

And while the Commission may have some limited authority under the *Sierra-Mobile* doctrine to modify contracts in regulating a common carrier when it has Title II authority over the services at issue,[294] that only serves to underscore the Commission's lack of authority here.[295] The contracts here involve information services, which were not subject to Title II regulation during the relevant time period. In addition, the Commission's narrow authority to modify contracts under the *Sierra-Mobile* doctrine extends only to contracts between carriers, and not to state-law contracts between information service providers and retail customers.[296] The Commission is thus asserting, without any statutory basis, remedial authority over information services that is even greater than the authority Congress provided it over common carriers.

Relatedly, requiring AT&T to allow customers to terminate service contracts without agreed-to early termination fees effectively constitutes a "damages" order against AT&T that the Commission lacks authority to impose. The reason AT&T's contracts provide for early-termination fees is that the fees serve to compensate AT&T for the fact that it has provided the customer with a smart phone at a steep discount (or even a loss) in exchange for the customer's agreement to sign a long-term service contract.[297] Eliminating customers' obligation to pay the termination fees thus denies AT&T its bargained-for compensation, effectively requiring AT&T

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[294] *See W. Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 & n.2 (D.C. Cir. 1987); *see also FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956); *United Gas Pipe Line Co. v. Mobile Gas Svc. Corp.*, 350 U.S. 332 (1956).

[295] *Accord Turner*, 514 F.2d at 1355.

[296] Mem. Op. & Order, *IDB Mobile Commc'ns, Inc. v. Comsat Corp.*, 16 FCC Rcd. 11474, ¶ 14 (2001) ("Under the *Sierra-Mobile* doctrine, the Commission may revise the terms of a private contract between two carriers concerning communications services"); Mem. Op. & Order, *ACC Long Distance Corp. v. Yankee Microwave, Inc.*, 10 FCC Rcd. 654, ¶ 16 (1995) (same); *see also Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1231 (D.C. Cir. 1999) (the doctrine applies to "all contracts filed with the FCC" pursuant to Section 211 of the Communications Act, which requires filing of certain contracts between carriers).

[297] Haymons Decl. ¶ 10.

to make a payment of damages. And the impact on AT&T could be devastating: if a significant percentage of AT&T's customer base took advantage of the opportunity to avoid their contractual commitment without paying early termination fees, the potential loss of revenues could be worth **[CONFIDENTIAL BEGIN] [CONFIDENTIAL END]** of dollars.

That possibility, moreover, exposes yet another problem with the remedy. By its nature, the injunction applies across the board and would thus allow customers that have suffered *no* possible cognizable harm to walk away from their contractual obligations, including customers: i) who were never impacted by AT&T's MBR policy; ii) who never viewed the supposedly "misleading" disclosures; and iii) who fully understood the MBR policy and renewed their contract anyway.[298] Such a one-size-fits-all approach is grossly overbroad and arbitrary.[299] The Commission has cited no authority for its ability to compel crippling damages in such a manner, and there is none. While the Commission has some authority to award damages under Title II in a complaint proceeding, no such authority exists as to the information services at issue here. The Commission cannot "'blend or pick and choose at will'" among different statutory provisions in an effort to wrench authority from one part of its governing legislation to apply it in another.[300]

Finally, any doubt that the Commission has no authority to abrogate retail contracts is put to rest by the fact that such authority would raise significant constitutional concerns. "Within the

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[298] *See generally* Israel Decl. ¶¶ 34–42 (quantifying customers that could have no economically cognizable theory of harm).

[299] *See, e.g.*, *Nat'l Mining Ass'n v. Babbitt*, 172 F.3d 906, 913 (D.C. Cir. 1999) (vacating regulation after the court had "no difficulty concluding that this regulation is both arbitrary and capricious because it is irrationally overbroad"); *cf. also Clifton Power Corp. v. FERC*, 88 F.3d 1258, 1271 (D.C. Cir. 1996) (rejecting agency action that contravened congressional intention that "the Commission tailor each penalty to the circumstances of a particular operator and its violation").

[300] *Ill Bell Tel. Co. v. FCC*, 966 F.2d 1478, 1482 (D.C. Cir. 1992).

bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions."[301] This is such an order. There can be "no dispute that [AT&T's] . . . agreements are property for purposes of the Takings Clause."[302] And there can be no dispute that the proposed injunctive relief would destroy a valuable property right by eliminating an important contractual provision designed to compensate AT&T for subsidizing smart phones, a deprivation of property interests that implicates the Fifth Amendment.[303] Because the Commission's interpretation of its statutory authority would bestow wide-reaching takings power on the Commission, such authority simply cannot be inferred here.[304]

Mandatory changes in customer communications. The *NAL* states that, "to the extent that [AT&T's] practice of labeling the plan as 'unlimited' is misleading or inaccurate, it must cease that practice."[305] This requirement is doubly impermissible. To begin with, the Commission has no authority to order AT&T to "cease" doing anything based upon alleged violations of the Transparency Rule.

While the *NAL* cites no authority for this mandate, the Commission's only "cease and desist" authority resides in 47 U.S.C. § 312(b). Section 312 authorizes cease-and-desist orders only when, among other things, someone "has violated or failed to observe any rule or regulation of the Commission authorized *by this chapter*." 47 U.S.C. § 312(b) (emphasis added). This

[301] *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

[302] *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1152 (Fed. Cir. 2014).

[303] *See, e.g.*, *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1370 (Fed. Cir. 2005) (cognizable property interest in contract rights, "if abrogated by legislation or regulatory action, may form the basis of a takings claim").

[304] *Bell Atl. Tel. Cos.*, 24 F.3d at 1445–47.

[305] *NAL* ¶ 31.

"chapter" is the Communications Act, which is codified as Chapter 5 of Title 47.[306] The Transparency Rule, however, was upheld pursuant to the Commission's authority under section 706 of the Telecommunications Act of 1996,[307] which has been codified outside of the Communications Act as part of Chapter 12 of Title 47.[308] As such, the Transparency Rule is not a "rule or regulation of the Commission authorized by [Chapter 5]." Indeed, the existence, but non-applicability, of section 312 doubly underscores that the Commission has no authority here, because it highlights the fact that "Congress has not hesitated in other circumstances to authorize [cease-and-desist orders] explicitly when it has determined such authorization to be warranted,"[309] but has not done so here.

In all events, the Commission cannot order AT&T to cease-and-desist from an action that does not violate any actual requirement of the Transparency Rule. As explained above, the Transparency Rule does not govern all of AT&T's speech and, moreover, there is nothing misleading regarding AT&T's use of the term "unlimited," particularly in the context of the detailed explanation that AT&T provided its customers regarding the MBR policy and the

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[306] *See* 47 U.S.C. § 609.

[307] *See Verizon*, 740 F.3d at 635.

[308] *See* 47 U.S.C. § 1302. One of the judges in *Verizon* also concluded that the Transparency Rule could be justified based on the Commission's statutory obligations to report to Congress. *Compare Verizon*, 740 F.3d at 660 n.3, 668 n.9 (Silberman, J., concurring in part and dissenting in part) (stating that the transparency obligations "appea[r] to be reasonably ancillary" to the Commission's reporting duties), *with 2010 Open Internet Order* ¶ 136 (citing 47 U.S.C. §§ 154(k), 257); *see also supra* p. 20. To the extent the Transparency Rule exists to facilitate congressional reporting obligations, however, that statutory justification has no bearing on and cannot support the remedies proposed here. None of the injunctive remedies proposed in the *NAL*, particularly the abrogation of AT&T's contracts or compelling AT&T to make false statements, are reasonably ancillary to—or, indeed, have anything to do with—enabling the Commission's reports to Congress.

[309] *Turner*, 514 F.2d at 1355.

undisputed fact that AT&T's "unlimited" customers never incurred usage charges regardless of their level of usage.[310]

Compelled speech to customers. Finally, the *NAL* announces that the Commission will require "AT&T [to] individually inform all of its unlimited data plan customers, via bill insert or other similar method, that AT&T's disclosures *were in violation of the Transparency Rule*, and that AT&T is correcting, or has corrected, *its violation of the rule* with a revised disclosure statement."[311] Because the Commission lacks authority to impose a conduct-stopping injunction, the Commission even more clearly lacks authority to impose *affirmative* conduct obligations—a power that is severely circumscribed even for courts sitting in equity.[312]

Even beyond the Commission's lack of statutory authority to impose such an obligation, the proposed requirements would violate the First Amendment. The First Amendment protects both "the right to speak freely and the right to refrain from speaking at all."[313] Even in the unusual circumstance in which an agency has authority to order remedial speech, the First Amendment requires such measures to "go no further . . . than is reasonably necessary to accomplish the remedial objective"[314] Here, compelling AT&T to state that the prior disclosures

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[310] *See supra* pp. 16–17, 23–27, 32–38.

[311] *NAL* ¶ 31 (emphasis added).

[312] *See, e.g.*, *Morrison v. Work*, 266 U.S. 481, 490 (1925) ("A mandatory injunction, like a mandamus, is an extraordinary remedial process, which is granted, not as a matter of right, but in the exercise of a sound judicial discretion."); *Communist Party of Ind. v. Whitcomb*, 409 U.S. 1235, 1235 (1972) (Rehnquist, J., in chambers) ("usage and practice suggest that [mandatory injunction is an] extraordinary remedy be employed only in the most unusual case"); *United States v. EME Homer City Generation, L.P.*, 727 F.3d 274, 291–96 (3d Cir. 2013) (rejecting government's argument that catch-all statutory provision allowed EPA to impose affirmative injunctive remedies for completed violations).

[313] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

[314] *Beneficial Corp. v. FTC*, 542 F.2d 611, 619 (3d Cir. 1976); *see also TrafficSchool.com v. Edriver, Inc*., 653 F.3d 820, 830 (9th Cir. 2011).

"were in violation of the Transparency Rule,"[315] is not necessary to achieve any valid governmental interest. Any interest in notifying consumers that the disclosure is being corrected could be achieved simply by requiring a statement to that effect. The only other purpose that could be served by such a compelled "scarlet letter" is to humiliate the company, which is not a valid governmental interest in this context.

The compelled "correction" is grossly overbroad in another dimension. It implies a fundamental deficiency with AT&T's disclosures when the *NAL* has identified, at most, two minor technical violations. Again, this highlights the Commission's purpose of attempting to humiliate the company rather than addressing any real public interest concern.[316]

The required timing of this compelled disclosure renders it even more constitutionally defective. The *NAL* provides that if AT&T challenges the non-forfeiture requirements (as it is doing), then they will "take effect" at the time the FCC "act[s] on the forfeiture order."[317] Thus, unless the FCC grants a stay as requested below, it will require AT&T to tell its customers that it has violated the Transparency Rule before AT&T has an opportunity to challenge that finding in court.

This is putting the verdict first and the trial second. AT&T is entitled to judicial review of the FCC's holdings.[318] AT&T will demonstrate there, as it has here, that its disclosures were *not* in violation of the Transparency Rule. AT&T cannot constitutionally be compelled to make

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[315] *NAL* ¶ 31

[316] *See Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc) (compelled statements cannot be "one-sided or incomplete"); *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014) (similar); *CTIA-Wireless Ass'n v. City and Cty. of S.F.*, 494 F. App'x 752, 754 (9th Cir. 2012) (government cannot "compel[ ] statements that are . . . misleading and controversial").

[317] *NAL* ¶ 31 n.68.

[318] *See* 47 U.S.C. § 504(a); 47 U.S.C. § 402(a); *AT&T Corp. v. FCC*, 323 F.3d 1081 (D.C. Cir. 2003).

a statement that is directly contrary to AT&T's own views, and that AT&T believes to be incorrect.[319] And as explained below, compelling AT&T to state that it has violated the Transparency Rule would cause it irreparable harm, which could not be undone if a reviewing court later holds, as AT&T expects it will, that no such violation occurred.

D. The FCC Should, At A Minimum, Stay The Injunctive Requirements.

Finally, the Commission's remedial approach is exactly backwards. While formally labeling its action a notice of "apparent" liability, the Commission makes no effort to hide the fact that its mind is already made up. The *NAL* demands that AT&T file a report within 30 days detailing "what measures, if any, it has taken consistent with paragraph 31" ordering the injunctive relief described above—and, in a coercive effort as unsubtle as it is inappropriate, announces that in conjunction with the Commission's "review [of] AT&T's report pursuant to the *NAL*," the Commission, "in addition to making a final decision on the imposition of monetary forfeitures, may also consider whether other measures, such as damages, are lawful and appropriate to pursue in this situation."[320] In other words, AT&T apparently would be well-advised immediately to begin implementing the injunctive remedies and report on its progress, even as it contests the allegation that it should be held liable in the first place. Remedies, however, are supposed to follow liability determinations, not precede them.[321]

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[319] *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 15–16 n.12 (1986) (plurality opinion) (the First Amendment does not leave the state "free to require corporations to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views."); *Am. Meat Inst.*, 760 F.3d at 27 (companies cannot be compelled to make statements when they "disagree with the truth of the facts required to be disclosed"); *see Nat'l Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 164 (7th Cir. 1977) (company cannot be "require[d] . . . to argue the other side of the controversy, thus interfering unnecessarily with the effective presentation of [its] position").

[320] *NAL* ¶ 43.

[321] *See, e.g.*, *Hills v. Gautreaux*, 425 U.S. 284, 294 (1976) (recognizing "necessary predicate" of finding a constitutional violation before court may undertake equitable duty to tailor the remedy).

For that reason and many others, although the Commission has no authority to impose the injunctive requirements at any point, the Commission should, at a minimum, stay imposition of these measures pending judicial review. Each of the proposed measures would force affirmative changes to AT&T's conduct that could not be undone easily or at all and would cause AT&T irreparable harm. AT&T would, for example, need to change all documentation to scrub the word "unlimited," to tell its customers it has violated the law while simultaneously arguing the opposite through administrative and judicial channels, and to permit customers to break contracts that could not then be automatically reinstated when AT&T's defense prevails.[322]

These are classic examples of irreparable harm warranting a stay. There would be no way to recapture lost customers that switched to other competitors, or to undo the inevitable effects of announcing to customers that AT&T has violated the law. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[323] The loss of customers and goodwill that would result from this compelled speech also constitute irreparable injury to AT&T, particularly because sovereign immunity would prevent AT&T from obtaining any monetary damages for these injuries.[324]

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[322] *NAL* ¶¶ 31, 43.

[323] *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)); *see Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) ("Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed."); *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 72 (2d Cir. 1996) ("[b]ecause compelled speech contravenes core First Amendment values," it satisfies the irreparable harm requirement for injunctive relief).

[324] *The Miss Am. Org. v. Mattel, Inc.*, 945 F.2d 536, 546 (2d Cir. 1991) ("loss of customers and goodwill can constitute irreparable harm"); *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 770–71 (10th Cir. 2010) ("Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury.").

The Commission has properly issued stays in analogous situations before,[325] and, if it continues to seek to impose the injunctive mandates described, it should do so again here.

CONCLUSION

For the reasons stated above, the *NAL* should be withdrawn and cancelled, including the proposed injunctive requirements. At a minimum, the forfeiture penalty should be reduced to under $16,000.

Respectfully submitted,

Peter D. Keisler
C. Frederick Beckner III
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

Michael K. Kellogg
Benjamin S. Softness
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036

Christopher M. Heimann
Gary L. Phillips
David L. Lawson
D. Wayne Watts
AT&T MOBILITY LLC
1120 20th Street, N.W.
Suite 1000
Washington, D.C. 20036

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[325] *E.g.*, *In the Matter of Paragon Cable Manhattan, NY, NY*, 10 FCC Rcd. 6662 (1995) (ordering stay when party "could suffer irreparable harm if it were required to comply with the requirements of the [relevant] Order during the pendency of its [review]").