

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

In the Matter of
AT&T MOBILITY, LLC.
File No. EB-IHD-14-00017504
NAL/Acct. No. 201532080016
FRN: 0018624742

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: June 3, 2015

Released: June 17, 2015

By the Commission: Commissioners Pai and O’Rielly dissenting and issuing separate statements.

I. INTRODUCTION

1. In this enforcement action, we address practices by AT&T that inhibited consumers’ ability to make informed choices about mobile broadband data services. As part of the Commission’s decade-long effort to promote and protect the Open Internet, in 2010 we adopted the Open Internet Transparency Rule, which mandates that broadband access providers disclose accurate information sufficient to enable consumers to make informed choices regarding their use of broadband Internet services and to ensure they are not misled or surprised by the quality or cost of the services they actually receive. Our action today will help ensure that consumers are accurately and adequately informed about their broadband service both when they buy it and while they use it.

2. In this Notice of Apparent Liability for Forfeiture and Order, we find that AT&T Mobility, LLC (AT&T or Company) apparently willfully and repeatedly violated the Commission’s Open Internet Transparency Rule by: (1) using the misleading and inaccurate term “unlimited” to label a data plan that was in fact subject to prolonged speed reductions after a customer used a set amount of data; and (2) failing to disclose the express speed reductions that it applied to “unlimited” data plan customers once they hit a specified data threshold. Although AT&T asserts that it has provided ample disclosures about these policies, we find that these disclosures do not cure AT&T’s apparent violations of the Open Internet Transparency Rule. AT&T’s practices deprived consumers of sufficient information to make informed choices about their broadband service and thereby impeded competition in the marketplace for such services. Consistent with the Commission’s forfeiture guidelines, and based on the seriousness of AT&T’s apparent violations, we propose a forfeiture of \$100,000,000 and a set of requirements to bring AT&T into compliance with the Transparency Rule.

II. BACKGROUND

A. Legal Framework

3. Section 8.3 of the Commission’s rules, known as the Open Internet Transparency Rule, provides that:

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 and for content, application, service, and device providers to develop, market, and maintain Internet offerings.¹

The Open Internet Transparency Rule applies to every provider of broadband Internet access services in the United States, including mobile broadband Internet access providers.² The Commission adopted the Open Internet Transparency Rule in the *2010 Open Internet Order*, and the rule has been in effect since November 20, 2011.³ On February 26, 2015 the Commission adopted the *2015 Open Internet Order*, which reaffirmed the existing Transparency Rule and adopted enhancements to the rule to ensure that end-user consumers, edge providers, and the Internet community are getting accurate and sufficient information about broadband products and services.⁴ This action is brought under the *2010 Open Internet Order*. The 2015 Order became effective on June 12, 2015; the enhancements to the Transparency Rule are not in effect as of the date of this action.⁵

4. In describing the requirements of the Open Internet Transparency Rule in the *2010 Open Internet Order*, the Commission stated its expectation that “effective disclosures will likely include some or all of the following types of information: (i) network practices, including descriptions of congestion management practices; (ii) performance characteristics, such as expected and actual access speed and latency; and (iii) commercial terms, such as monthly prices, usage-based fees, and fees for early termination or additional network services.”⁶ The Commission required that providers “prominently display” their disclosures or provide links to them on “publicly available, easily accessible website[s] that [are] available to current and prospective end users” and required that providers “disclose relevant information at the point of sale.”⁷ The information in disclosures must be in “plain language.”⁸

5. Public disclosure of broadband Internet access providers’ network management practices, performance, and commercial terms of service promotes competition, as well as innovation, investment, end-user choice, and broadband adoption by, among other things, allowing consumers to make informed choices regarding the purchase and use of broadband service.⁹ In the *2010 Open Internet Order*, the Commission explained that “[e]ffective disclosure of broadband providers’ network management practices and the performance and commercial terms of their services promotes competition.”¹⁰ The Commission specifically observed that “disclosure ensures that end users can make informed choices . . .

¹ 47 C.F.R. § 8.3.

² *Id.*

³ *See id.*; *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905 (2010) (*2010 Open Internet Order*), *aff’d in part, vacated and remanded in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

⁴ *See Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, para. 154 (rel. Mar. 12, 2015) (*2015 Open Internet Order*).

⁵ The Transparency Rule enhancements made in the *2015 Open Internet Order* will go into effect after the Commission receives Office of Management and Budget approval for the modifications. *Id.* at para. 585.

⁶ *2010 Open Internet Order*, 25 FCC Rcd at 17938–39, para. 56.

⁷ *Id.* at 17939–40, para 57. An Enforcement Advisory, issued jointly by the Office of the General Counsel and Enforcement Bureau in 2011, addressed, among other things, the Open Internet Transparency Rule’s point of sale requirement, by clarifying that “[b]roadband 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 [emphasis added], to a web address at which the required disclosures are clearly posted and appropriately updated.” *Enforcement Bureau and Office of General Counsel Issue Advisory Guidance for Compliance with Open Internet Transparency Rule*, Public Notice, 26 FCC Rcd 9411 (2011) (*2011 Joint Enforcement Advisory*).

⁸ *2010 Open Internet Order*, 25 FCC Rcd at 17938, para. 56.

⁹ *See id.*

¹⁰ *2010 Open Internet Order*, 25 FCC Rcd 17905, 17936, para. 53.

which promotes a more competitive market for broadband services and can thereby reduce broadband providers' incentives and ability to violate Open Internet principles."¹¹

6. As explained in the Enforcement Bureau's *2014 Enforcement Advisory*, the Transparency Rule can achieve its purpose of sufficiently informing consumers only if all public statements that broadband Internet access providers make about their services are accurate and consistent.¹² A provider that publicly describes or advertises its service or terms in a misleading or inaccurate way cannot defend itself against an Open Internet Transparency Rule violation by pointing to an "accurate" official disclosure posted on its website.¹³ For example, a provider cannot announce something in large type that it contradicts in fine print; such practices would be inherently misleading to consumers, and, therefore contrary to both the spirit and letter of the Open Internet Transparency Rule.

B. AT&T's Unlimited Data Plan and Maximum Bit Rate Policy

7. In June 2007, AT&T began offering unlimited data plans, which allowed customers to use unrestricted amounts of data, with no high-speed data caps or automatic speed restrictions.¹⁴ AT&T ceased offering these unlimited plans to new customers in June 2010, but continues to allow "grandfathered" customers on unlimited data plans to renew their plans on a month-to-month or term basis.¹⁵ As of October 2014, [REDACTED] customers were on grandfathered AT&T unlimited data plans.¹⁶ The Company generated approximately [REDACTED] of revenue from its unlimited data plan customers between October 2013 and October 2014.¹⁷

8. In 2011, AT&T implemented its Maximum Bit Rate (MBR) policy, under which the Company capped the maximum speed throughput that unlimited data plan customers experienced once they used a set amount of data in a billing cycle.¹⁸ AT&T applied the MBR policy to 4G LTE customers once they used five gigabytes of data during a billing cycle and to 3G and other 4G customers once they used three gigabytes of data during a billing cycle.

9. The capped speeds that unlimited data plan customers experienced under the MBR policy were orders of magnitude slower than the normal network speeds AT&T advertises.¹⁹ For instance, AT&T advertises that its 4G LTE mobile broadband network speeds typically range from approximately 5 Mbps to 12 Mbps in most markets. Yet, at the same time, AT&T capped its 4G LTE unlimited data

¹¹ *Id.* The Commission further noted that "as confidence in broadband providers' practices increases, so too should end users' adoption of broadband services—leading in turn to additional investment in Internet infrastructure as contemplated by Section 706 of the 1996 Act and other provisions of the communications laws." *Id.*

¹² *FCC Enforcement Advisory, Open Internet Transparency Rule: Broadband Providers Must Disclose Accurate Information to Protect Consumers*, Public Notice, 29 FCC Rcd 8606, 8607 (2014) (*2014 Enforcement Advisory*).

¹³ *Id.*

¹⁴ See E-mail and attachment from Jackie Flemming, AVP-External Affairs/Regulatory, AT&T Services, to Erin Boone, Attorney Advisor, Investigations and Hearings Division, FCC Enforcement Bureau at 1 (Nov. 10, 2014) (on file in EB-IHD-14-00017504) (AT&T LOI Response); see also Complaint for Permanent Injunction and Other Equitable Relief at 3, para. 27, *Fed. Trade Comm'n v. AT&T Mobility LLC*, No. 14-4785 (N.D. Cal. Oct. 28, 2014) ("FTC Complaint") at 4.

¹⁵ *Id.* at 3; see also Letter from Robert W. Quinn Jr., Senior Vice President, Federal Regulatory and Chief Privacy Officer, AT&T Mobility, to the Honorable Thomas Wheeler, Chairman, FCC, at 4 (filed Sept. 5, 2014) ("AT&T Letter").

¹⁶ *Id.* Of the [REDACTED] unlimited data plan customers, [REDACTED] customers are on term contracts and [REDACTED] are month to month. *Id.*

¹⁷ *Id.* at 18.

¹⁸ See AT&T Letter at 1-2.

¹⁹ See AT&T Broadband Information Disclosure, <http://www.att.com/gen/public-affairs?pid=20879>.

plan customers' speeds to no more than 512 kbps if they exceeded the five gigabyte set data limit during a billing cycle.²⁰ Non-LTE customers were limited to a maximum speed of 256 kbps under the MBR policy, although AT&T advertises speeds for those customers that ranges from 1.7 to 6 Mbps.²¹

10. These reduced speeds—256 kbps or 512 kbps—significantly impaired the ability of AT&T's customers to use their data service. Although a customer may be able to send an email at these speeds, he or she may find it impossible to use AT&T's data service in ways that most people today use smartphones—for instance, using mapping applications to get from one place to the next, streaming online video to catch up on television or news, or using video chat applications to stay connected with friends and family. A minimum download speed of approximately 700 kbps is necessary to use FaceTime or another video calling application, and 3.5 Mbps is necessary to watch standard-definition television.²² Further, at 512 kbps, a ten megabyte file would take nearly three minutes to download. At AT&T's widely advertised speed of 12 Mbps, it would take less than 10 seconds.²³

11. Customers who were subject to the MBR policy had their speeds reduced for an average of 12 days per billing cycle.²⁴ From implementation of the MBR policy in 2011 until mid-2014, whenever any unlimited data plan customer reached a specific threshold of data usage in a given billing cycle, AT&T intentionally slowed all subsequent data usage by that customer for the remainder of the customer's billing cycle. In late June and early July 2014, AT&T adjusted its MBR policy to make it congestion-based for a subset of its unlimited data plan customers. Under the current version of the policy, unlimited customers using 3G or 4G UMTS²⁵ smartphones who reach a three gigabyte data usage threshold are still intentionally slowed, but only during times of network congestion.²⁶ However, AT&T did not implement a congestion-based policy for unlimited data plan customers using 4G LTE devices until sometime in May 2015.²⁷ Before May 2015, once 4G LTE customers used five gigabytes of

²⁰ *Id.*; see also FTC Complaint at 4.

²¹ See *id.*

²² See <http://www.voip-sip.org/qos-for-facetime-bandwidth-requirements-and-firewall-config/>; see also http://en.wikipedia.org/wiki/Bit_rate (last visited Dec. 30, 2014).

²³ See <http://www.t1shopper.com/tools/calculate/downloadcalculator.php> (last visited Dec. 1, 2014). AT&T claims that its MBR policy was developed to address network congestion, but this claim rings hollow in several respects. See AT&T Letter at 4. Up until May 2015, if a 4G LTE customer reached AT&T's monthly data threshold, he or she was subject to dramatically reduced speeds for the remainder of the billing cycle. If this customer hit the data threshold on day 15 of his or her billing cycle, then his or her speeds were reduced for the remaining 15 days of the cycle. If the customer attempted to download a video late at night in a rural area, with no congestion on the cell tower or elsewhere, the user still was capped at a maximum speed of 512 kbps. The consumer's speed reduction in this example does nothing to alleviate network congestion because the reduction occurs independent of any congestion on the network and is based solely on the consumer having hit a specific data threshold at some earlier time. Moreover, for most of its history, the MBR policy was not congestion-based in any respect. See AT&T LOI Response at 17.

²⁴ See FTC Complaint at 7, para 27.

²⁵ See *AT&T's Congestion Magically Disappears When It's Signing Up New Customers*, Ars Technica (Sept 29, 2014) (available at <http://arstechnica.com/information-technology/2014/09/att-congestion-magically-disappears-when-its-signing-up-new-customers/>) (last visited Jan. 6, 2015). UMTS is short for Universal Mobile Telecommunications System and refers to a third-generation mobile wireless communications specification. See <http://www.3gpp.org/technologies/keywords-acronyms/103-umts> (last visited Dec. 23, 2014).

²⁶ AT&T LOI Response at 16; see also AT&T Letter at 4.

²⁷ Sometime in early May 2015, AT&T apparently changed its MBR policy to make it congestion-based for its 4G LTE customers and also adjusted its disclosures regarding the policy to reflect these changes. See AT&T Broadband Information Disclosure, <http://www.att.com/gen/public-affairs?pid=20879>. While AT&T claimed in its LOI Response that it was testing a congestion-based approach for its 4G LTE customers for possible deployment in mid-2015, it did not inform the Commission that any change actually had occurred, nor did it provide the

data in a billing cycle, they experienced significant speed reductions for all subsequent attempts to use the network for the remainder of their billing cycle, whether the network was experiencing congestion or not.²⁸

12. Before implementing the MBR policy, AT&T conducted focus group studies in 2009 and 2010, which showed that consumers had a negative reaction to the policy, and that they felt that having their data throughput intentionally slowed by their wireless carrier was inconsistent with the concept of “unlimited” data.²⁹ The research firm that conducted the study recommended that [REDACTED]

[REDACTED] The study noted that [REDACTED] ³¹ The study also revealed that customers believed AT&T should [REDACTED] ³²

13. The focus group study concluded that the more consumers talked about the MBR policy, the more they didn’t like it, and as a result, the research firm that conducted the study recommended that [REDACTED] Given these negative reactions to the concept of the MBR policy, the research firm also recommended to AT&T that it [REDACTED] At the same time, the focus group study also concluded that the [REDACTED] AT&T therefore continued to offer its “unlimited” plan to existing customers and continued to refer to it as “unlimited.”³⁵

C. AT&T’s Disclosures

14. According to AT&T, unlimited data plan customers were notified about the MBR policy through various means, including a press release and corresponding bill insert in 2011;³⁶ a “Broadband Information” webpage that can be accessed through a link at the very bottom of the AT&T Wireless website; information provided at the point of sale directing customers to the Broadband Information

Commission any detail about changes to the MBR policy made after the submission of its LOI Response. For 12 months following the date of the LOI, AT&T is required to produce “any and all documents and information that are responsive” to the Bureau’s inquiries. *See* Letter from Theresa Z. Cavanaugh, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission to Ms. Jackie Flemming, AT&T Services, at 8 (Oct. 28, 2014). The LOI specifies that AT&T “must supplement its responses” if, among other reasons, “additional responsive documents or information are acquired by or become known to [it] after the initial production.” *Id.*; *see also* AT&T LOI Response at 16.

²⁸ *See* FTC Complaint” at 4; AT&T LOI Response at 16; *see also* AT&T Letter at 4. Up until July 2014, AT&T applied its MBR policy in the same way to all of its unlimited data plan customers. Only as recently as July of 2014 did AT&T change its MBR policy to account for specific instances of congestion, and only for a subset of its customers.

²⁹ *See* FTC Complaint at 5; AT&T LOI Response at Exhibit 7.

³⁰ AT&T LOI Response at Exhibit 7.

³¹ *Id.*

³² *Id.*

³³ *See* FTC Complaint at 5, AT&T LOI Response at Exhibit 7.

³⁴ *Id.*

³⁵ *Id.*

³⁶ AT&T Letter at 7-8; AT&T LOI Response at 11–12.

webpage; and provisions of AT&T's service contract.³⁷ In addition, AT&T states that before the MBR policy was in effect, individualized emails were sent to the heaviest 3G and 4G UMTS unlimited data plan customers to explain the program.³⁸ AT&T states that, beginning in March 2012, it sent a text message to unlimited data plan customers the first time they approached the data threshold at which their speed would be reduced, to inform them that their data throughput speed would be capped when they reached the threshold and directing them to a website with more information about the MBR policy. Importantly, however, this text message was not sent subsequent times when the customer was nearing the applicable data usage threshold, even if months or years passed between instances in which the customer approached the threshold.³⁹

D. Commission's Investigation

15. Since the Transparency Rule went into effect in 2011, the Commission has received thousands of complaints from AT&T's unlimited data plan customers alleging that they have had their speeds intentionally reduced, and who claim that they purchased an unlimited data plan and are not getting the services that they paid for. Although nearly four years have passed since the MBR was implemented and since customers supposedly were fully informed about the policy, the Commission continues to receive a steady stream of complaints from AT&T unlimited plan customers who were surprised about having their speeds reduced.⁴⁰ For example, one October 2014 complaint alleges: "I entered into a contract believing I was paying for unlimited data at 4[G] speeds. Providing me less than that seems disingenuous at the least. They say this is because of overloaded networks but then offer 'double data' promotions up to 100 [gigabytes] for new customers."⁴¹ In another complaint filed in October 2014, an AT&T unlimited data plan customer alleges that AT&T "did not advertise 'throttling.' I have received text messages from AT&T stating my data would be throttled back if I went over 3GB . . . with no standard reasoning other than [I] have a unlimited data account . . . I was not told of this 'throttling' when I signed this contract."⁴² In yet another complaint, an AT&T unlimited data plan customer states: "After I purchased these plans, A[T]&T changed their policy about what 'unlimited' meant. They would begin to throttle my connection if they felt a set amount of data [was exceeded] during a specific billing cycle. I disagreed with this policy since it was not what I had signed up for."⁴³

³⁷ AT&T Letter at 7-8; AT&T LOI Response at 13.

³⁸ AT&T Letter at 7-8; AT&T LOI Response at 5-7.

³⁹ AT&T Letter at 7; AT&T LOI Response at 9. For instance, a customer could approach the data threshold in 2011 and receive a single text message, but not actually exceed the data threshold and get slowed until 2014, and no additional notifications would be sent beyond the initial text message.

⁴⁰ *See, e.g.*, Complaint No. 14-C00602599 (July 31, 2014) ("AT&T was doing this to us for over a year. [A]t just 5GB each of us in our family would get a notice that service would be slowed down and it WAS. So much so that we could hardly use the data capabilities [at home] without Wi-Fi. We felt forced to give u[p] our unlimited plan, which we had for years, for a plan offering just 20GB to share in order to stop the 'throttling.'"); Complaint No. 14-C00611163-1 (Sept. 3, 2014) ("I have a mobile cellphone with an unlimited data plan on AT&T. The speeds on my data plan were throttle[d] down to 56kb which is an unusable speed. I was told by AT&T that they are allowed to throttle my data plan because I used over 5 gigabyte[s] of data per month. . . . The data speed was reduced to an unusable data speed keeping me from using the unlimited data that I signed up for."); Complaint No. 14-C00622832-1 (Oct. 20, 2014) (alleging that data speed was reduced by 97 percent and that AT&T's plan "is no longer 'unlimited data' but 'limited data with no overcharges after an arbitrary data usage cap.' . . . While I am not incurring additional charges for data, I am not getting 'unlimited' data as promised by my carrier.").

⁴¹ Complaint No. 14-C00618176-1 (Oct. 1, 2014).

⁴² Complaint No. 14-C00625040-1 (Oct. 28, 2014).

⁴³ Complaint No. 14-C00625087-1 (Oct. 28, 2014).

16. On October 28, 2014, the Enforcement Bureau (Bureau) sent a Letter of Inquiry (LOI) to AT&T seeking additional information about the disclosures made to unlimited data plan customers who were subject to the MBR policy. The Company responded to the LOI on November 10, 2014.

III. DISCUSSION

A. AT&T's Violation of the Open Internet Transparency Rule

17. Based on the facts and circumstances before us, we find that AT&T apparently willfully and repeatedly violated Section 8.3 of the Commission's Rules by: (1) using the term "unlimited" in a misleading and inaccurate way to label a data plan that was in fact subject to prolonged speed reductions after a customer used a set amount of data; and (2) failing to disclose the data throughput speed caps it imposed on customers under the MBR policy. Although AT&T has made some disclosures concerning the MBR policy, we find that these disclosures do not cure its apparent violations of the Transparency Rule. Collectively, AT&T's apparently misleading disclosures and non-disclosures regarding its "unlimited" data plan impaired consumers' ability to make informed choices regarding the purchase and use of broadband services and impeded competition.

(1) AT&T apparently misled consumers by inaccurately using the term "unlimited" to describe its data plan

18. Although AT&T no longer offers unlimited data plans to new subscribers, it advertises to existing unlimited subscribers that they are allowed to enter into new term contracts, often two years in length, which provide for a subsidized device and assess an early termination fee if the contract is cancelled.⁴⁴ Between October 2013 and October 2014, AT&T sold approximately [REDACTED] million existing unlimited customers new term contracts for data plans labeled as "unlimited." In addition, as of October 2014, AT&T had approximately [REDACTED] customers who subscribed to "unlimited" data plans on a month-to-month basis. In total, AT&T had approximately [REDACTED] million subscribers to its unlimited data plans. All of these plans continue to be advertised as "unlimited" on each customer's monthly bill.⁴⁵

19. The imposition of set data thresholds and speed reductions is antithetical to the term "unlimited."⁴⁶ AT&T was aware that its continued use of the word unlimited to describe its data plans was likely to mislead consumers, as evidenced by the focus group studies conducted by AT&T around the time the Company implemented its MBR policy.⁴⁷ Further, since its MBR policy was implemented, the Commission and the Company itself received many complaints from AT&T unlimited data plan customers who felt misled about the services they expected to receive when they purchased unlimited data plans.⁴⁸

20. We find that AT&T's use of the term "unlimited" to label plans that were, in fact, subject to significant speed restrictions after subscribers used a specific amount of data is apparently inaccurate and misleading to consumers. As evidenced by the many complaints we have received about the MBR policy, consumers entered into contracts for these "unlimited" plans with the mistaken belief that they had unlimited amounts of high speed data sufficient to use any website or application, regardless of how much

⁴⁴ AT&T Letter at 7; AT&T LOI Response at 4; Letter from Gary L. Phillips, General Attorney and Assoc. General Counsel, AT&T Services, Inc., to Jennifer Epperson, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, at 2-3 (filed Jan. 7, 2015) ("AT&T Follow-up LOI Response").

⁴⁵ See AT&T LOI Response at Exhibit 3.

⁴⁶ The word "unlimited" is commonly defined as "not limited, unrestricted, unconfined." See <http://dictionary.reference.com/browse/unlimited?s=t> (last visited Dec. 22, 2014); http://www.oxforddictionaries.com/us/definition/american_english/unlimited (last visited Oct. 22, 2014; Black's Law Dictionary 9th ed. 2009).

⁴⁷ See FTC Complaint at 5.

⁴⁸ See *supra*, para. 15; see also AT&T LOI Response at 17.

data they used in a month. We thus conclude that every time AT&T described such a plan to a customer as “unlimited,” it misrepresented the nature of its service. It did so in every monthly billing statement for an unlimited plan and every time a term contract for an unlimited plan was renewed. The Transparency Rule requires accuracy in all statements regarding broadband provider’s network management practices, performance, and commercial terms, and providers are prohibited from “making assertions about their service that contain errors, are inconsistent with the provider’s disclosure statement, or are misleading or deceptive.”⁴⁹

21. We further find that AT&T’s apparently misleading use of the term “unlimited” to label its plan impeded competition because it prevented consumers from fully comparing AT&T’s plan to other similar plans. This inured to AT&T’s benefit and to the disadvantage of its competitors. While AT&T describes its plan as “unlimited,” its competitors describe almost identical plans as offering “unlimited talk and text” with a set amount of LTE data.⁵⁰ Without adequate disclosures, the average consumer would consider these plans to be significantly different, when in fact they are not. A consumer was likely to mistakenly assume that the AT&T “unlimited” plan offers more high-speed data than the competing plan, thus hindering fair competition between AT&T and its competitors. Continuing to offer the plan to renewing customers under the original “unlimited” label falsely advertised that the data plan was the same plan customers originally bought before the MBR policy was implemented.

(2) AT&T apparently failed to provide consumers with information about the maximum throughput speeds available under the MBR policy.

22. Under its MBR policy, AT&T established maximum data throughput speeds for unlimited data plan customers who hit a set data threshold: customers using 3G and 4G UMTS smartphones were reduced to a maximum speed of 256 kbps; customers using 4G LTE devices were reduced to a maximum speed of 512 kbps.⁵¹ However, ██████████ did not disclose these speed limitations to the public or to its unlimited data plan customers,⁵² and information about these specific limitations was never available on AT&T’s Broadband Information Disclosure webpage.⁵³ AT&T also did not disclose any information about the magnitude of the speed reductions, for instance by noting that speeds would be reduced to 2G levels or to 10 percent of advertised 4G LTE speeds.

23. Under the 2010 Transparency Rule, broadband providers are expected to disclose the “expected and actual access speed” of their services.⁵⁴ Notwithstanding the fact that the MBR policy was premised on clear and express speed reductions, AT&T apparently failed to disclose this information. Furthermore, because AT&T set firm maximum speed limits under the MBR policy, those limits could have been easily disclosed.

24. Information about specific maximum speeds could have significantly impacted the way AT&T unlimited plan customers used their service, especially because the MBR policy had a substantial impact on a large number of AT&T’s unlimited data plan customers. If they understood the potential speed reductions, unlimited data plan customers nearing their data use threshold might have decided to wait to use data-intensive applications, such as real-time, two-way video or mapping applications, or to watch a high-definition movie. These customers might, if better informed, have decided to use such applications when they were connected to Wi-Fi, or chosen to move onto a tiered data usage plan with a

⁴⁹ 2014 Enforcement Advisory at 8607; 47 C.F.R. 8.3 (requiring providers to “publicly disclose accurate information”) (emphasis added).

⁵⁰ See, e.g., <http://www.t-mobile.com/cell-phone-plans/individual.html> (last visited Jan. 5, 2015).

⁵¹ AT&T LOI Response at 16; see also FTC Complaint at 4.

⁵² *Id.* at 17.

⁵³ See AT&T Broadband Information Disclosure <http://www.att.com/gen/public-affairs?pid=20879>.

⁵⁴ 2010 Open Internet Order, 25 FCC Red at 17938, para 56.

higher data allotment, rather than being slowed down. Moreover, failure to disclose this information impeded consumers from making fully informed choices when comparing plans among AT&T and its competitive rivals. Instead of disclosing this readily available information, AT&T merely stated, in both its service contracts and in disclosures made on its Broadband Information webpage, that unlimited data plan customers subject to the MBR policy would experience “reduced speeds.”⁵⁵ This is incomplete information, as it did not allow customers to understand the extent of the speed reductions and conform their use or make purchasing decisions accordingly.

(3) Other disclosures that AT&T claims to have made regarding its MBR policy do not cure its violations of the Transparency Rule.

25. Despite its apparently misleading use of the word “unlimited” and apparent failure to provide its customers with adequate information about the maximum throughput speeds applied under the MBR policy, AT&T claims that it provided “ample information” to its unlimited data plan customers regarding the MBR policy, pointing to the following disclosures: (1) a 2011 press release about the policy; (2) a notice on the billing statement of unlimited data plan customers for one month in 2011; (3) in the first “several months” after the MBR policy went into effect, but before it was enforced, individual “grace month” emails and text messages sent to a subset of the heaviest data users on unlimited data plans; (4) a single text message to unlimited data plan customers *the first time* they neared the data threshold to let them know they could be subject to speed reductions and directing them to a website; and (5) a webpage dedicated to the MBR program.⁵⁶ AT&T also noted that since August 2012, unlimited data plan contracts have included a provision which states: “AT&T may reduce your data throughput speeds at any time or place if your data usage exceeds an applicable, identified usage threshold during any billing cycle.”⁵⁷

26. We disagree that these disclosures, either individually or together, provided enough information to consumers to overcome the Transparency Rule deficiencies detailed above. These disclosures apparently did not provide unlimited data plan customers with information sufficient to allow them to make informed decisions in purchasing or using their service.

27. A press release from 2011, and a notification printed on a bill in one month in 2011, is not relevant to customers three or four years later, particularly those whose data usage levels may have changed in the interim.⁵⁸ The “grace month” email and text messages were only sent to the “heaviest users” as of a discrete time period in 2011, and not to all unlimited data plan customers. Although text messages sent as a customer nears the data cap may be helpful, the Company sent these messages only the first time the customer neared the data threshold. If the customer neared the limit again in a subsequent billing cycle, no matter how much time had passed since the first message, no subsequent text message was sent.⁵⁹ We believe that a customer who received such a notification in the past may not remember it

⁵⁵ AT&T Broadband Information Disclosure <http://www.att.com/gen/public-affairs?pid=20879>.

⁵⁶ AT&T Letter at 6.

⁵⁷ *Id.* at 7.

⁵⁸ Additionally, AT&T’s June 2011 press release announcing reduced speeds for the top 5 percent of data users predated the Company’s revised MBR policy, announced in February 2012, in which users were slowed after they reached set data thresholds of 3GB and 5GB. Although both versions of the MBR policy established set data caps, they are distinguishable from one another and may have had differing effects on consumer behavior. The data cap under the top 5 percent policy was determined by multiple customers’ data usage and could fluctuate from month to month, whereas the 3GB and 5GB caps applied to any individual who exceeded those data limits, regardless of other users’ data consumption.

⁵⁹ AT&T Letter at 7.

months or years later when their data speed was intentionally slowed by AT&T, especially if the customer has not had their data speed slowed in the interim.⁶⁰

28. Further, we find that the disclosures AT&T provided to its unlimited data plan customers at the point of sale were apparently insufficient to fully inform the consumer of what they were buying. AT&T stated in its LOI response that it provides a “Customer Service Summary” to its unlimited data plan customers upon contract renewal that includes a link to AT&T’s Broadband Information webpage.⁶¹ However, the summary provided by AT&T does not state anything about the MBR policy, give any indication as to why the customer should visit the Broadband Information webpage, or otherwise provide any information suggesting that unlimited plan customers are subject to specific data thresholds and maximum speed restrictions. Nor does the summary indicate that customers should read the Broadband Information webpage to fully understand that if they use a certain amount of data in a billing cycle, future instances of data usage will be drastically slowed. In its LOI response, and a follow-up to that response, AT&T also provided [REDACTED]

29. AT&T claims that its unlimited data plan customers received notice about the MBR policy through a clause in their service contract, which is agreed to when customers renew their plan. Since 2012, all unlimited data plan contracts have included a provision stating that “AT&T may reduce your data throughput speeds at any time or place if your data usage exceeds an applicable, identified usage threshold during any billing cycle.”⁶⁴ However, this language is vague and insufficient to put customers on notice that their unlimited data plan may have been subject to significant throughput reductions. First, it does not specify the applicable data usage threshold or direct the customer to where they can find the applicable data usage threshold. Second, it did not clearly put the vast majority of AT&T’s unlimited data plan customers on notice that, once a speed reduction is triggered under the MBR policy, that speed reduction continued until the end of that billing cycle. Until sometime in May 2015, AT&T’s 4G LTE customers were subject to continuous speed reductions, and its 3G and 4G UMTS customers also were subject to such reductions up until July of 2014. Third, this vague disclosure is by no means an adequate substitute for fully explaining the MBR policy or pointing customers to the Company’s webpage about it, neither of which AT&T has demonstrated it has done. AT&T’s disclosures concerning its MBR program were confusing and insufficient for customers to understand whether and how the MBR policy affected them.⁶⁵

30. In sum, we find that the practices described above—using the misleading and inaccurate term “unlimited” to label a data plan that was in fact subject to prolonged speed reductions after a customer used a set amount of data, and failing to disclose the speed limitations built into the MBR

⁶⁰ For instance, an unlimited data plan customer may have exceeded a three or five gigabyte data cap in October 2012, and received a text message notice that she is subject to speed reductions. If that customer does not exceed her data cap again until October 2014, she would be subsequently slowed, with no additional notification, and likely no idea of why her service is slow. However, this customer, according to AT&T, should be on notice that she is being slowed, despite the fact that two years have passed since she had any notification about the potential for speed reductions.

⁶¹ AT&T LOI response at 12-13.

⁶² See AT&T LOI Response at 13 and Exhibit 1; AT&T Follow-up LOI Response at 2.

⁶³ See *id.* at 2.

⁶⁴ AT&T Letter at 7.

⁶⁵ E.g., Complaint No. 14-C00609299-1 (Aug. 26, 2014) (“AT&T is willfully harming high-usage customers without warning.”).

policy—taken together, constitute an apparent violation of the Transparency Rule. AT&T’s unlimited data plan customers were not given accurate, sufficient information about the MBR policy and the possibility and extent to which their unlimited data plan could be limited. Further, AT&T apparently failed to provide its unlimited data plan customers with accurate speed information concerning its MBR policy, which would have enabled them to make informed decisions about whether to purchase the service and how to use it most effectively.⁶⁶

B. Compliance and Proposed Forfeiture

31. For the reasons set forth above, we find that AT&T’s actions apparently violated the Transparency Rule. To the extent that these actions continue, AT&T remains in apparent violation of the rule.⁶⁷ We further find that, in order for AT&T to come in to compliance with the rule, it must take the following specific steps.⁶⁸ First, AT&T must correct any misleading and inaccurate statements about its unlimited data plan. For example, to the extent that its practice of labeling the plan as “unlimited” is misleading or inaccurate, it must cease that practice. In addition, in order to come into compliance, AT&T must 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. The revised disclosure statement must provide those customers with enough information to allow them to make informed choices about the purchase and use of their unlimited data plan, and must inform them that those unlimited data plan customers who choose to cancel their unlimited data plans after the revised disclosure is provided may do so without penalty. AT&T’s revised disclosure statement must include the maximum speeds to which it limits unlimited data plan customers’ service when applying the MBR policy, to the extent that any such maximum speeds remain in effect. We find that these requirements, in addition to the forfeiture penalty proposed herein, will help ensure that AT&T adheres to the Transparency Rule. In addition, by providing subscribers with an opportunity to opt out of the plan without penalty, we will prevent AT&T from continuing to reap competitive benefits and direct financial rewards from its violations of this disclosure requirement. As a separate but related matter, AT&T must file a report with the Commission within thirty (30) days of the release of this Notice of Apparent Liability regarding its progress, if any, in implementing these measures.

32. Section 503(b) of the Act authorizes the Commission to impose a forfeiture against any entity that “willfully or repeatedly fail[s] to comply with any of the provisions of [the Communications Act] or of any rule, regulation, or order issued by the Commission.”⁶⁹ Here, Section 503(b)(2)(D) of the Act authorizes us to assess a forfeiture of up to \$16,000 for each willful or repeated violation of the Transparency Rule, up to a statutory maximum of \$122,500 for a single act or failure to act, when the act or the failure to act is of a continuing nature.⁷⁰ However, neither the Commission’s forfeiture guidelines

⁶⁶ By finding an apparent violation for AT&T’s prior disclosures of the MBR policy, we do not intend to imply that AT&T’s current disclosure practices are acceptable.

⁶⁷ As noted previously, as of sometime in May 2015, AT&T apparently adjusted its MBR policy as well as its disclosures related to the policy. However, AT&T did not inform the Commission of these apparent changes, nor did it provide the Commission with any detail about the changes. *See* note 28, *supra*.

⁶⁸ *See* para. 43, *infra*. AT&T may contest these requirements if it chooses, in which case they do not take effect until we act on the forfeiture order. If AT&T does not contest, then it must take these steps, to the extent it has not done so already. However, AT&T is ordered to comply with the reporting requirements referenced in the last sentence of paragraph 31, within 30 days of the release of the NAL.

⁶⁹ *See* 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(a)(2).

⁷⁰ *See* 47 U.S.C. § 503(b)(2)(D); *see also* 47 C.F.R. § 1.80(b)(7); *Amendment of Section 1.80(b) of the Commission’s Rules, Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 23 FCC Rcd 9845 (2008). These amounts reflect inflation adjustments to the forfeitures specified in Section 503(b)(2)(D) of the Act (\$10,000 per violation or per day of a continuing violation and \$75,000 per any single act or failure to act). The Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890, as amended by the Debt Collection

nor its case law establishes a base or minimum forfeiture amount for apparent violations of the Transparency Rule.

33. In fashioning an appropriate remedy, we must consider the “nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”⁷¹ In addition to these factors, as specified in Section 503(b)(2)(E), we may consider whether AT&T’s violations were egregious, meaning that they were both intentional and repeated, caused substantial harm to its customers and the marketplace, and generated substantial economic gain for the Company.⁷² The Commission also has established forfeiture guidelines that suggest base penalties for certain violations and identify criteria that we consider when determining the appropriate penalty in any given case.⁷³

34. In determining the appropriate forfeiture in this case, we are guided by the language of the Transparency Rule itself, which requires providers such as AT&T to publicly disclose accurate information regarding the provision of broadband Internet access services “sufficient for consumers to make informed choices.”⁷⁴ Providers who violate this rule through inaccurate or inadequate disclosures harm their customers both at the time of sale as well as during use, because the customers cannot make informed choices about whether to buy or how to use the service. Consumers consequently are less able to make fully informed choices between competitors, which impedes the competitive marketplace for broadband services. Accordingly, we focus our remedy on the consumers who were harmed by AT&T’s conduct, its unlimited data plan customers.

35. As discussed above, AT&T estimates that, as of October 2014, approximately [REDACTED] million customers were on unlimited data plans. With respect to each of these customers, AT&T failed to provide information about the MBR policy sufficient to make an informed choice about the purchase and use of AT&T’s broadband service. Accordingly, for purposes of calculating the forfeiture, AT&T apparently has committed approximately [REDACTED] million individual violations of the Transparency Rule. AT&T continued to renew customers’ contracts under the pretense that the service they purchased provided “unlimited” data and without providing adequate information regarding the degree to which their data throughput speeds were reduced. Thus, AT&T did not provide sufficient disclosures to these customers regarding how the unlimited data plans were, in fact, limited by the effect of the MBR policy.

Improvement Act of 1996, Pub. L. No. 104-134, Sec. 31001, 110 Stat. 1321 (DCIA), requires the Commission to adjust its forfeiture penalties periodically for inflation. *See* 28 U.S.C. § 2461 note (4). As noted, the Commission adjusted its penalties to account for inflation in September of 2013. *See Amendment of Section 1.80(b) of the Commission’s Rules, Adjustment of Civil Monetary Penalties to Reflect Inflation*, 28 FCC Rcd 10785 (Enf. Bur. 2013); *see also Inflation Adjustment of Monetary Penalties*, 78 Fed. Reg. 49,370-01 (Aug. 14, 2013) (setting Sept. 13, 2013, as the effective date for the increases). The DCIA specifies that any inflationary adjustment “shall apply only to violations that occur after the date the increase takes effect.” 28 U.S.C. § 2461 note (6). As stated above, the Commission’s most recent adjustment to its penalties to account for inflation, effective September 12, 2013, increased the top of the forfeiture range for the violation, from \$112,500 to \$122,500. *See id.*

⁷¹ 47 U.S.C. § 503(b)(2)(E).

⁷² *See* 47 C.F.R. § 1.80(b)(8), note. The rule and note specify that “[i]n determining the amount of the forfeiture penalty, the Commission or its designee will take into account the nature, circumstances, extent and gravity of the violations and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.” The Commission and its staff also “retain the discretion to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute.” *Id.*

⁷³ *See* 47 C.F.R. § 1.80(b)(8), note; *see also The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17100, para. 27 (1997), *recons. denied*, 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*).

⁷⁴ 47 C.F.R. § 8.3.

36. We also find that AT&T knew that its disclosures were misleading from the time it implemented the MBR policy. As related above, prior to implementing its MBR policy in 2011, AT&T engaged a focus group to conduct studies about its plan to intentionally slow unlimited plan customers. Consumer reaction was negative. Nevertheless, instead of developing an alternative, AT&T chose to: (1) implement a new policy that imposed specific data thresholds triggering subsequent speed limits on its unlimited plan customers; (2) continue to call its revised offering “unlimited,” while seamlessly transitioning its unlimited plan customers to this more limited data plan; and (3) follow its focus group’s recommendation to [REDACTED] the MBR policy.

37. AT&T is one of the nation’s largest mobile broadband Internet access providers, with more than 118 million customers and tens of billions of dollars in annual revenues.⁷⁵ In this case, AT&T’s apparently unlawful actions affected millions of its customers. These actions were ongoing for several years. Further, AT&T’s apparent violations of the Transparency Rule generated substantial economic gain for the Company. AT&T estimates that it generated \$ [REDACTED] of revenue from its unlimited data plan customers between October 2013 and October 2014.⁷⁶ We assume that revenues during this period are comparable to revenues for a given year outside of the period (*i.e.*, May 2014–May 2015), and we conclude that it is reasonable for the Commission to consider these figures as one factor in assessing a forfeiture against AT&T in the manner described below.

38. For purposes of this action, we find that AT&T apparently has committed multiple violations of the Transparency Rule. Based on the large number of affected customers, there appears to be an extensive number of apparent violations in this case for which the Commission is empowered to propose a penalty. Applying the statutory amount of \$16,000 per violation in this case would lead to an astronomical figure. In previous cases in which the sheer number of violations would produce excessive penalties, the Commission has opted to impose a penalty that both protects the interests of those for whom the rule was promulgated and deters future violations of the Act.⁷⁷ Taking into consideration the facts and circumstances of this case, the factors enumerated in Section 503(b)(2)(E) of the Act, the total revenue AT&T made from its unlimited data plan customers between October 2013 and October 2014, and our forfeiture guidelines, we impose a reasonable, but still substantial, penalty upon AT&T of \$100,000,000. This number represents a small fraction—roughly [REDACTED] percent—of the revenue AT&T generated from its unlimited data plan customers during this time frame. Because this is the first Commission NAL finding an apparent violation of the Transparency Rule, we moderate our punishment in a reasonable manner.

39. In imposing a penalty of this amount, we seek to account for the gravity of AT&T’s violations, including the degree to which AT&T misled consumers and inhibited their ability to make informed choices about the purchase and use of their broadband service. We conclude that AT&T’s violations were egregious, in that they were both intentional and repeated, and caused substantial harm to AT&T’s customers and the marketplace. We also seek to impose a sufficient punishment that accounts for AT&T’s culpability and apparently clear knowledge that it was misleading consumers for such a prolonged period of time—over three years since the MBR policy was implemented. Further, we aim to deter future violations by imposing a penalty that will not be viewed by AT&T as a mere “cost of doing business.”⁷⁸ We find that a penalty of \$100,000,000 will serve as a sufficient deterrent to future violations. In addition, we conclude that it is appropriate to assess a forfeiture that represents a small

⁷⁵ See AT&T, Inc. 2013 Annual Report at 7, 10, *available at* http://www.att.com/Investor/ATT_Annual/2013/downloads/ar2013_annual_report.pdf.

⁷⁶ AT&T LOI Response at 18.

⁷⁷ See *e.g.*, *NOS Communications, Inc.*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 8133, at 8142 (2001); *STi Telecom Inc.*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 12808, at 12815 (2011); *NobelTel, LLC*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 11760, at 11768, para. 17 (2012).

⁷⁸ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17099, para. 24.

fraction of the revenue AT&T generated from its unlimited data plan customers between October 2013 and October 2014. If AT&T had provided adequate information to its unlimited data plan customers as required under the Transparency Rule, some customers would have chosen to leave AT&T for other broadband providers during this time period, and AT&T would no longer have earned revenue from those customers.⁷⁹ Therefore, we find that it is appropriate to propose a forfeiture that represents a small portion of the ill-gotten revenue AT&T earned from customers of its unlimited data plan.

IV. CONCLUSION

40. We have determined that AT&T apparently willfully and repeatedly violated Section 8.3 of the Commission's Rules. As such, AT&T is apparently liable for a forfeiture of \$100,000,000.

V. ORDERING CLAUSES

41. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended,⁸⁰ and Section 1.80 of the Commission's rules,⁸¹ AT&T Mobility, LLC is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of one hundred million dollars (\$100,000,000) for willful and repeated violations of Section 8.3 of the Commission's rules, 47 C.F.R. § 8.3.

42. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules,⁸² within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order, AT&T Mobility, LLC **SHALL PAY** the full amount of the proposed forfeiture and comply with the proposed requirements specified in paragraph 31, above ("Paragraph 31 Requirements"), or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture, and/or modification or cancellation of the proposed Paragraph 31 Requirements.

43. **IT IS FURTHER ORDERED** that regardless of whether AT&T Mobility, LLC, seeks a reduction or cancellation of the forfeiture, or modification or cancellation of the Paragraph 31 Requirements, it shall file, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order, a report of what measures, if any, it has taken consistent with paragraph 31 above. In addition, AT&T Mobility, LLC shall include in this report an account of the measures, if any, that it has taken to alleviate harm from the conduct described above to the market and damage to consumers, such as offering refunds to unlimited data plan customers whose speeds were reduced pursuant to the MBR policy, appointing an employee in a management position to oversee the offer of refunds to unlimited data plan customers whose speeds were reduced, and conducting training of all employees, including all customer service representatives, about AT&T's MBR policy, including how to adequately communicate to customers about the manner in which the policy affects their data service. Such report must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.16 and 1.80(f)(3) of the Commission's rules.⁸³ The Commission will review AT&T's report pursuant to the NAL and, in addition to making a final decision on the imposition

⁷⁹ AT&T has admitted that some unlimited data customers have chosen to leave the Company once they are put on notice that they are subject to the MBR policy. In [REDACTED]

⁸⁰ 47 U.S.C. § 503(b).

⁸¹ 47 C.F.R. § 1.80.

⁸² *Id.*

⁸³ 47 C.F.R. §§ 1.16, 1.80(f)(3).

of monetary forfeitures, may also consider whether other measures, such as damages, are lawful and appropriate to pursue in this situation.⁸⁴ The written statement must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, DC 20554, ATTN: Enforcement Bureau – Investigation & Hearings Division, and must include the NAL/Account Number referenced in the caption. The statement must also be e-mailed to Erin Boone at Erin.Boone@fcc.gov, and Jeffrey Gee at Jeffrey.Gee@fcc.gov.

44. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account Number and FRN referenced above. AT&T shall send electronic notification of payment to Erin Boone at erin.boone@fcc.gov, and Jennifer Epperson at Jennifer.Epperson@fcc.gov on the date said payment is made. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.⁸⁵ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters “FORF” in block number 24A (payment type code). Below are additional instructions that AT&T Mobility, LLC should follow based on the form of payment it selects:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

45. Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, DC 20554. If AT&T Mobility, LLC has questions regarding payment procedures, it should contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

46. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.16 and 1.80(f)(3) of the Commission’s rules.⁸⁶ The written statement must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, DC 20554, ATTN: Enforcement Bureau – Investigation & Hearings Division, and must include the NAL/Account Number referenced in the caption. The statement must also be e-mailed to Erin Boone at Erin.Boone@fcc.gov, and Jeffrey Gee at Jeffrey.Gee@fcc.gov.

47. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-

⁸⁴ See, e.g., 47 U.S.C. §§ 206-209; 47 U.S.C. § 154(i).

⁸⁵ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

⁸⁶ 47 C.F.R. §§ 1.16, 1.80(f)(3).

year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation.

48. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by first class mail and certified mail, return receipt requested, to AT&T's counsel, Jackie Flemming, AT&T Services, 1120 20th Street, N.W., Suite 1000, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *AT&T Mobility, LLC*, File No. EB-IHD-14-00017504.

“[I]t is an essential part of the justice dispensed here that you should be condemned not only in innocence but also in ignorance.” –Franz Kafka, *The Trial* (1925)

A government “rule” suddenly revised, yet retroactive. Inconvenient facts ignored. A business practice sanctioned after years of implied approval. A penalty conjured from the executioner’s imagination. These and more Kafkaesque badges adorn this Notice of Apparent Liability (*NAL*), in which the Federal Communications Commission seeks to impose a \$100 million fine against AT&T for failing to comply with the apparently opaque “transparency” rule the FCC adopted in its *2010 Net Neutrality Order*.¹ In particular, the *NAL* alleges that AT&T failed to disclose that unlimited-data-plan customers could have their data speeds reduced temporarily as part of the company’s approach to managing network congestion.

Because the Commission simply ignores many of the disclosures AT&T made; because it refuses to grapple with the few disclosures it does acknowledge; because it essentially rewrites the transparency rule *ex post* by imposing specific requirements found nowhere in the *2010 Net Neutrality Order*; because it disregards specific language in that order and related precedents that condone AT&T’s conduct; because the penalty assessed is drawn out of thin air; in short, because the justice dispensed here condemns a private actor not only in innocence but also in ignorance, I dissent.

I.

Since the *2010 Net Neutrality Order*, our rules have required that Internet service providers (ISPs) “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.”²

To meet this requirement, an ISP must “only . . . post disclosures on their websites and provide disclosure at the point of sale.”³ To do that, an ISP must “prominently display or provide links to disclosures on a publicly available, easily accessible website that is available to current and prospective end users,”⁴ and ISPs “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.”⁵ The rule specifically does not require “multiple disclosures targeted at different audiences”⁶ nor that ISPs “bear the cost of printing and distributing bill inserts or other paper documents to all existing customers.”⁷

¹ *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17936–41, paras. 53–61 (2010) (*2010 Net Neutrality Order*).

² *Id.* at 17937, para. 54; *see also* 47 C.F.R. § 8.3.

³ *2010 Net Neutrality Order*, 25 FCC Rcd at 17940, para. 59.

⁴ *Id.* at 17940, para. 57.

⁵ Enforcement Bureau and Office of General Counsel Issue Advisory Guidance for Compliance with Open Internet Transparency Rule, GN Docket No. 09-191, WC Docket No. 07-52, Public Notice, 26 FCC Rcd 9411, 9414 (2011) (*2011 Joint Enforcement Advisory*).

⁶ *2010 Net Neutrality Order*, 25 FCC Rcd at 17940, para. 58.

⁷ *Id.* at 17940, para. 59.

The FCC has also laid out certain “specifically identified” information that “will suffice for compliance with the transparency rule.”⁸ With respect to network management practices, that information includes “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 . . . ; usage limits and the consequences of exceeding them; and references to engineering standards, where appropriate.”⁹ The FCC’s Enforcement Bureau and Office of General Counsel have made clear that ISPs will not be held “liable for failing to disclose additional types of information that they may not be aware are subject to disclosure.”¹⁰

Additionally, the Commission gave ISPs substantial discretion in deciding how to craft disclosures that comply with the rule. It “decline[d] to adopt a specific format for disclosures,”¹¹ determining that “the best approach is to allow flexibility in implementation of the transparency rule.”¹² “[A]lthough we may subsequently determine that it is appropriate to require that specific information be disclosed in particular ways,” the Commission stated that it was giving providers “flexibility to determine what information to disclose and how to disclose it.”¹³

II.

At issue is whether the disclosures AT&T made with respect to its “maximum bit rate” (MBR) program complied with the transparency rule. The facts below are not in dispute.

AT&T began offering unlimited data plans in 2007. After seeing a massive increase in data usage, AT&T stopped offering unlimited data plans in 2010. However, customers who were on unlimited data plans at the time were grandfathered—they could continue to use an unlimited amount of data without paying any overages.¹⁴

In October 2011, AT&T implemented its MBR program as a way to manage network congestion created by grandfathered, unlimited-data-plan customers. Before it launched the program, AT&T had found that the top 5% of its unlimited-data-plan customers, which accounted for less than 1% of its total wireless customers, accounted for almost 25% of all smartphone data usage on AT&T’s network. Under the program, AT&T has temporarily reduced an unlimited data customer’s speeds if he or she exceeds a certain usage threshold during a billing cycle, which is typically a month. Since March 2012, the threshold has been 5 GB for 4G LTE customers and 3 GB for all other unlimited-data-plan customers. Speeds have been restored at the start of the next billing cycle.

Here is how AT&T disclosed the MBR program to consumers.

First, in July 2011, three months before it implemented the program, AT&T issued a nationwide press release that described the MBR program. It explained that unlimited-data-plan customers “may experience reduced speeds” while also noting that they could “still use unlimited data.” The press release, which was titled “An Update for Our Smartphone Customers With Unlimited Data Plans,” stated in part:

⁸ 2011 Joint Enforcement Advisory, 26 FCC Rcd at 9416.

⁹ 2010 Net Neutrality Order, 25 FCC Rcd at 17938, para. 56.

¹⁰ 2011 Joint Enforcement Advisory, 26 FCC Rcd at 9416.

¹¹ 2010 Net Neutrality Order, 25 FCC Rcd at 17940, para. 58.

¹² *Id.* at 17938, para. 56.

¹³ *Id.* at 17940–41, para. 59; *see also id.* at 17990, para. 166 (stating that the transparency “rule gives broadband Internet access service providers flexibility in how to implement the disclosure rule”).

¹⁴ This NAL involves only those grandfathered unlimited-data-plan customers and, in terms of determining any liability, involves only AT&T’s conduct between June 2014 and today, consistent with the Communications Act’s one-year statute of limitations. *See* 47 U.S.C. § 503(b)(6).

Starting October 1, 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 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. Before you are affected, we will provide multiple notices, including a grace period.¹⁵

The press release garnered widespread media coverage, generating over 2,000 news stories.¹⁶ One story that appeared on CNN emphasized AT&T's transparency: "Although it's a pain to those affected, AT&T is being transparent about the issue, giving subscribers a chance to minimize their usage before getting their data speeds choked."¹⁷

Second, in July/August 2011, about two months before it implemented the program, AT&T placed a notice on the first page of unlimited-data-plan customers' monthly bills notifying them that speeds would be reduced for certain heavy-usage subscribers but that even those subscribers could continue to use an unlimited amount of data. The notice read as follows:

Important Update for Unlimited Data Plan Customers

To 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. To avoid slowed speeds you may use Wi-Fi or choose a tiered data plan. Details @ att.com/dataplans.¹⁸

Third, beginning in September 2011 and continuing for the first several months of the program, AT&T sent individual "grace month" emails to the heaviest unlimited data plan users notifying them that their unlimited plans could be subject to speed reductions in the future, that they could continue to use unlimited data if their speeds were reduced, and that they could switch to a tiered data plan "if speed is more important to you than having an unlimited data plan." The email also read in part:

High Data Usage Alert

...

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 percent of heaviest data users. These customers can still use an unlimited

¹⁵ See AT&T Press Release, An Update for Our Smartphone Customers With Unlimited Data Plans (July 29, 2011), available at <http://www.att.com/gen/press-room?pid=20535&cdvn=news&newsarticleid=32318&mapcode=> (last visited June 4, 2015); see also Letter from Jacquelyn Flemming, AVP-External Affairs/Regulatory, AT&T Services Inc. to Marlene H. Dortch, Secretary, FCC at 3 (Feb. 13, 2015) (AT&T MBR *Ex Parte*), available at <http://apps.fcc.gov/ecfs/document/view?id=60001029374>; Letter from Gary L. Phillips, General Attorney & Associate General Counsel, AT&T Services Inc. to Erin Boone, Attorney Advisor, Investigations and Hearings Division, FCC Enforcement Bureau, EB-IHD-14-00017504, at 11 (Nov. 10, 2014) (AT&T LOI Response).

¹⁶ See, e.g., Roger Cheng, AT&T Says It Will Throttle Heavy Data Users, CNET, <http://www.cnet.com/news/at-t-says-it-will-throttle-heavy-data-users/> (July 29, 2011); Chloe Albanesius, AT&T to Throttle Mobile Users With 'Extraordinary' Data Use, PC Magazine (July 29, 2011); Jacqui Cheng, AT&T to Begin Throttling Heaviest Data Users on October 1, <http://arstechnica.com/gadgets/2011/07/att-expected-to-follow-verizon-and-begin-throttling-heavy-data-users/> (July 29, 2011).

¹⁷ Christina Bonnington, AT&T Begins Sending Throttling Warnings to Data Hogs, <http://www.cnn.com/2011/10/03/tech/web/att-throttling-warnings-data-hogs/> (Oct. 3, 2011).

¹⁸ See AT&T MBR *Ex Parte* at 7; see also AT&T LOI Response at 12.

amount of data and their speeds will be restored with the start of the next billing cycle.¹⁹

AT&T also sent those customers text messages at or about the same time as the email, informing them that their data usage placed them in the top 5% of users and directing them to a website for more information.²⁰

Fourth, from October 2011, when it implemented the program, until March 2012, AT&T sent all grandfathered, unlimited-data-plan customers a text message when their usage reached 75% of the relevant threshold. It read:

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 8663447584.²¹

And when a grandfathered, unlimited-data-plan customer reached 100% of the threshold, AT&T sent a second text message. It read:

Your data usage is among the top 5% of users. Data speeds for this bill cycle may be reduced. Visit www.att.com/dataplans or call 8663447584.²²

Fifth, starting in March 2012, AT&T sent text messages when a customer reached 95% of the applicable threshold. For grandfathered, unlimited-data-plan customers with 4G LTE handsets, the text message read:

Your data usage on your 4G LTE smartphone is near 5GB this month. Exceeding 5GB during this or future billing cycles will result in reduced data speeds, though you'll 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.²³

For other unlimited-data-plan customers, the text message read:

Your data usage is near 3GB this month. Exceeding 3GB during this or future billing cycles will result in reduced data speeds, though you'll 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.²⁴

Sixth, since August 2012, AT&T has included in its consumer contracts for grandfathered, unlimited-data-plan customers a special notice regarding the MBR program. It reads:

Unlimited Data Plan Customers. If you are a grandfathered AT&T unlimited plan customer, you agree that “unlimited” means you pay a fixed monthly charge for wireless data service regardless of how much data you use²⁵

¹⁹ See AT&T MBR *Ex Parte* at 11; see also AT&T LOI Response at 6–7.

²⁰ See AT&T LOI Response at 7.

²¹ AT&T LOI Response at 8–9.

²² AT&T LOI Response at 8–9.

²³ AT&T MBR *Ex Parte* at 8; AT&T LOI Response at 10–11.

²⁴ AT&T MBR *Ex Parte* at 8; AT&T LOI Response at 10–11. The 95% usage text message replaced the 75% and 100% usage text messages. Also, as indicated above, all of the text messages included a customer service telephone number, and AT&T states that customer service representatives would inform callers that unlimited-data-plan customers may experience reduced speeds during a billing cycle when usage exceeds the threshold.

²⁵ AT&T MBR *Ex Parte* at 12; see also AT&T LOI Response at 3.

Those contracts also note that “AT&T may reduce your data throughput speeds at any time or place if your data usage exceeds an applicable, identified usage threshold during any billing cycle.”²⁶ Every grandfathered, unlimited-data-plan customer who has renewed service with AT&T has done so pursuant to such a contract.²⁷ And customers who renewed their contracts received a “Customer Service Summary” at the point of sale as well, directing the customers to AT&T’s “Broadband Information” website.²⁸

Seventh, for several years, AT&T has maintained at least four websites that described the MBR program and its impact on unlimited-data-plan customers.

AT&T’s “Broadband Information” website explains the MBR program and the speed reductions. Under the heading “Network Practices,” it reads:

For our mobile broadband services, we’ve also developed a process that may reduce the data throughput speed experienced by a very small minority of smartphone customers who are on unlimited plans. As a result of AT&T’s network management practices, customers on 3G, 4G or 4G LTE smartphones who have exceeded 3GB of data usage for 3G/4G or 5GB of data usage for 4G LTE in a billing period may experience reduced speeds when using data services at times and in areas that are experiencing network congestion. All such customers can still use unlimited data without being subject to overage charges, 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. Customers on a tiered data or Mobile Share plans are not subject to these network management practices. For information about this process, please click here [linking to the Data Info website].²⁹

AT&T’s “Data Info” website describes the MBR program, including the fact that unlimited-data-plan customers could see reduced speeds. Under the heading “Smartphone Customers with Legacy Unlimited Data Plans,” that website states:

Do you have an unlimited data plan? If so, we have information to help you manage your account.

As a result of AT&T’s network management process, customers on a 3G or 4G smartphone or on a 4G LTE smartphone with an unlimited data plan who have exceeded 3 gigabytes (3G/4G) or 5 gigabytes (4G LTE) of data in a billing period may experience reduced speeds when using data services at times and in areas that are experiencing network congestion. All such customers can still use unlimited data without incurring overage charges, and their speeds will be restored with the start of the next billing cycle.³⁰

The Data Info website includes additional information under a heading titled “What you need to know.” That section reads:

If you have a smartphone that works on our 3G/4G or 4G LTE network and still have an unlimited data plan:

²⁶ AT&T MBR *Ex Parte* at 12; *see also* AT&T LOI Response at 2–3.

²⁷ Moreover, since at least 2007, AT&T’s service contract has notified customers that “AT&T reserves the right to . . . limit throughput or the amount of data transferred[.]” *See, e.g.*, AT&T LOI Response at 2.

²⁸ AT&T LOI Response at 12–13.

²⁹ *See* AT&T, Broadband Information, <http://www.att.com/broadbandinfo> (last visited June 4, 2015); *see also* AT&T MBR *Ex Parte* at 15.

³⁰ *See* AT&T, Data Info, <http://www.att.com/esupport/datausage.jsp> (last visited June 4, 2015).

You'll receive a text message when your usage approaches 3GB (3G/4G) or 5GB (4G LTE) in one billing cycle.

The next time you exceed that usage level, your speeds may be reduced without another text message reminder.

Each time you exceed 3GB, 5GB, or more in a billing cycle, your data speeds may be reduced for the rest of that billing cycle and then go back to normal.

You'll still be able to use as much data as you want without incurring overage charges. That won't change. Only your data throughput speed may change if you exceed 3GB in one billing cycle on a 3G or 4G smartphone or 5GB or more on a 4G LTE smartphone.

Learn more about unlimited data plans and reduced speeds [linking to the Customer Support Page website].³¹

AT&T's "Customer Support Page" website describes the impact that speed reductions may have on consumers' online experience. Among other things, it states:

You can still use an unlimited amount of data each month without incurring overage charges

That won't change. As a result of AT&T's network management process, customers on a 3G, 4G or 4G LTE smartphone with an unlimited data plan who have exceeded 3 gigabytes (3G/4G) or 5 gigabytes (4G LTE) of data in a billing period may experience reduced speeds when using data services at times and in areas that are experiencing network congestion. All such customers can still use unlimited data without being subject to overage charges, and their speeds will be restored with the start of the next billing cycle. Even with reduced speed, customers normally can still have a good experience surfing the Web, accessing email, and continuing to use an unlimited amount of data each month without incurring overage charges. Customers will likely notice the biggest difference while streaming video. Streaming video consumes the most data of all activities and is often the reason customers are treated.³²

AT&T's "Data Plans" website included information about managing data usage and provided consumers with tools for estimating their usage.³³ A link to a "Frequently Asked Questions" page provided additional information about the MBR program, including a section that provided customers with a lengthy explanation about how AT&T would "reduce the data throughput speed experienced by a small minority of smartphone customers who are still on unlimited data plans" while also noting that those customers "can still use unlimited data and can count on their speeds being restored with the start of the next billing cycle."³⁴

³¹ See AT&T, Data Info, <http://www.att.com/datainfo> (last visited June 4, 2015); see also AT&T, Data Info, "What you need to know," <http://www.att.com/esupport/datausage.jsp?source=IZDUel1160000000U#slide2> (last visited June 4, 2015); see also AT&T LOI Response at 10.

³² AT&T, Customer Support Page, <http://www.att.com/esupport/article.jsp?sid=KB410284> (last visited June 4, 2015); see also AT&T MBR *Ex Parte* at 16.

³³ AT&T LOI Response at 7–8; see also AT&T, Data Plans, <http://web.archive.org/web/20111029081904/http://www.att.com/shop/wireless/plans/data-plans.jsp> (last visited June 4, 2015).

³⁴ AT&T LOI Response at 7–8; see also AT&T, Data Plans, "Frequently Asked Questions," <http://web.archive.org/web/20120118050918/http://www.att.com/esupport/article.jsp?sid=KB410281&cv=820&ct=5900004&pv=3> (last visited June 4, 2015).

These examples are far from an exhaustive accounting. AT&T took other steps to disclose both the speed reductions and the relevant usage thresholds. For example, AT&T made additional online disclosures and tools available to customers to help them manage their usage and understand the speed reductions.

III.

So did AT&T comply with the FCC's transparency rule? Let's do what the *NAL* doesn't: Examine the disclosures in light of the rule step by step.

Did AT&T post disclosures on its website? Yes.

Did AT&T provide disclosure at the point of sale? Yes.

Did AT&T prominently display or provide links to disclosures on a publicly available, easily accessible website that is available to current and prospective end users? Yes.

Did AT&T 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? Yes.

Did AT&T go beyond the rule's requirements and send multiple disclosures targeted at different audiences? Yes.

Did AT&T go beyond the rule's requirements and include a notice in the bill of every unlimited-data-plan customer? Yes.

Did AT&T include an accurate description of its congestion management practice? Yes.

Did AT&T identify the types of traffic subject to the practice? Yes.

Did AT&T identify the purpose served by the practice? Yes.

Did AT&T explain the effect of the practice on end users' experience? Yes.

Did AT&T disclose the criteria used in the practice? Yes.

Did AT&T set out the usage limit and consequences of exceeding it? Yes.

In short, did AT&T accurately disclose the specifically identified information that suffices for compliance with the transparency rule? Yes.

Stepping back, AT&T not only publicized its MBR program through the national press and at least four separate websites, but it also disclosed the program to *every single* grandfathered, unlimited-data-plan customer and sent targeted disclosures to *every single* customer actually affected by the program. And these disclosures fit the Commission's heretofore interpretation of the transparency rule to a T.

How does the *NAL* reach the opposite conclusion?

First, it ignores undisputed evidence that cuts against its desired result. For instance, it includes no mention at all of AT&T's Data Plans website or its FAQ section, the Data Info website, or the Customer Support Page website. Instead, the *NAL* suggests that AT&T provided information about the MBR program on only a single website—the Broadband Information website. These are significant omissions. The Customer Support Page website, for example, describes how the speed reductions could impact a customer's online experience—something the *NAL* claims AT&T never described.

Or consider the text messages AT&T sent from October 2011 through March 2012 to users that hit the 75% and 100% usage thresholds. These texts reminded users of the MBR program and directed them to AT&T's Data Plans website for more information—but the *NAL* pretends they do not exist. Reaching the right result is impossible when one ignores critical, inconvenient facts.

Second, even when the *NAL* acknowledges that AT&T provided a disclosure, it repeatedly ignores the actual text of the disclosure. For example, the *NAL* mentions the Broadband Information website but never describes or analyzes the information disclosed there. Nowhere does the *NAL* mention that the page informed customers that, while they “can still use unlimited data,” the MBR program “may reduce the data throughput speed.” Nearly every other disclosure AT&T provided is treated the same way.³⁵

The *NAL*’s apparent defense is that context is irrelevant: The “imposition of set data thresholds and speed reductions is antithetical to the term ‘unlimited,’” the *NAL* declares, and so “every time AT&T described such a plan to a customer as ‘unlimited,’ it misrepresented the nature of its service.”³⁶ But the *NAL* does not marshal a single piece of evidence that AT&T ever used the term “unlimited” in connection with the quality or speed of a customer’s mobile service. If anything, the record makes clear that AT&T took pains to disabuse customers of that notion.

Every AT&T disclosure made clear that heavy-usage customers faced a temporary speed limit even though they could drive as far as they would like. For example, the AT&T service contract stated that “unlimited” means “you pay a fixed monthly charge for wireless data service regardless of how much data you use.”³⁷ And AT&T’s nationwide press release, the bill insert that went to every unlimited-data-plan customer, the “grace month” emails that went to the heaviest users, the text message that alerted users when they reached 95% of the usage threshold, the Broadband Information webpage, the Data Info webpage, the Customer Support webpage, and the Data Plans webpage’s FAQ section all repeatedly disclosed that customers can use unlimited data even when their speeds are reduced. The only thing that misrepresents the nature of AT&T’s unlimited data plan is the *NAL*’s interpretation—an interpretation that essentially means that every “unlimited” plan in the country violates the transparency rule since no mobile ISP (indeed not even a fixed ISP) can guarantee particular speeds at all times over a best-efforts network like the Internet.

Third, the *NAL* faults AT&T for not complying with a standard that the *2010 Net Neutrality Order* never imposed—namely, that an ISP must supply multiple disclosures over time. Contra the *NAL*, ISPs are not required to send customers targeted and updated disclosures on a yearly or even monthly basis, nor must point-of-sale disclosures themselves include substantive descriptions of the provider’s network management practices.³⁸ And so the Commission cannot now claim that the multiple disclosures AT&T provided in 2011 are “not relevant to customers three or four years later.”³⁹ Nor that the text messages that AT&T provided to every customer subject to a speed reduction are irrelevant because “a

³⁵ For example, the *NAL* does not mention that the notice AT&T sent to every unlimited-data-plan customer on the first page of his or her bill stated that “users can still use unlimited data but may see reduced data,” or that the FAQ section of the Data Plans site stated that the MBR program would “reduce the data throughput speed” even though customers “can still use unlimited data,” or that the text messages sent starting in March 2012 stated that the customers could see “reduced data speeds, though you’ll still be able to email & surf,” or that the AT&T service contract defined “unlimited” as “you pay a fixed monthly charge for wireless data service regardless of how much data you use,” or any number of other times that AT&T disclosed possible speed reductions for certain unlimited-data-plan customers.

³⁶ *NAL* at paras. 19–20.

³⁷ AT&T MBR *Ex Parte* at 12; see also AT&T LOI Response at 3.

³⁸ See, e.g., *2010 Net Neutrality Order*, 25 FCC Rcd at 17940, para. 58 (“[We] do not at this time require multiple disclosures targeted at different audiences.”); *id.* at 17940, para. 59 (an ISP must “only . . . post disclosures on their websites and provide disclosure at the point of sale”); *2011 Joint Enforcement Advisory*, 26 FCC Rcd at 9414 (an ISP “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”).

³⁹ *NAL* at para. 27.

customer who received such a notification in the past may not remember it months or years later.”⁴⁰ Imposing these requirements after the fact conflicts with the transparency rule the Commission actually adopted, a rule that stated that a single disclosure at one point in time is sufficient.

And contrary to the *NAL*, AT&T’s point-of-sale disclosures⁴¹ did not need to “state anything about the MBR policy, give any indication as to why the customer should visit the Broadband Information webpage, or otherwise provide any information suggesting that unlimited plan customers are subject to specific data thresholds and maximum speed restrictions.”⁴² Per the FCC’s rules, directing customers to AT&T’s website was enough.⁴³

In sum, the *NAL*’s view that the transparency rule requires something more than providing customers with a one-time, online disclosure and a point-of-sale notice that directs them to the website—or that even actual notice could become “stale” over some undefined period of time—runs directly against the Commission’s unambiguous statement in the *2010 Net Neutrality Order* that “we require *only* that providers post disclosures on their websites and provide disclosure at the point of sale.”⁴⁴ Basic principles of due process prevent the Commission from imposing this new requirement in an enforcement action.⁴⁵

Fourth, the *NAL* also conflicts with the *2010 Net Neutrality Order* in asserting that AT&T violated the transparency rule by not disclosing the specific, maximum throughput speeds that apply once a customer exceeds the usage threshold. To begin, the *2010 Net Neutrality Order* recognized that there was an ongoing debate about the level of detail that should be provided in disclosures. So, as noted above, it decided to take a flexible approach and give ISPs discretion in deciding how to present information. Specifically, it afforded ISPs “flexibility to determine what information to disclose and how to disclose it.”⁴⁶ It did not say that providers must disclose particular information in a particular way.

Moreover, the specific guidance the Commission gave ISPs concerning compliance with the rule nowhere mentions a requirement to disclose maximum throughput speeds. And as the Enforcement Bureau and Office of General Counsel later clarified, the information specifically identified in the *2010*

⁴⁰ *NAL* at para. 27; *id.* at para. 14 (“[T]his text message is not sent subsequent times the customer may be nearing the applicable data usage threshold, even if months or years pass.”); *see also id.* at para. 27 & note 60 (noting that a customer who received a text message notice one month but then exceeds the data usage threshold during a later month “likely [has] no idea of why her service is slow. However, this customer, according to AT&T, should be on notice that she is being slowed, despite the fact that two years have passed since she had any notification about the potential for speed reductions.”).

⁴¹ The point-of-sale disclosures include the Customer Service Summary as well as the relevant provisions in each consumer’s contract.

⁴² *NAL* at para. 28.

⁴³ *See, e.g., 2011 Joint Enforcement Advisory*, 26 FCC Rcd at 9414 (an ISP “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”).

⁴⁴ 25 FCC Rcd at 17940, para. 59 (emphasis added).

⁴⁵ *See, e.g., General Electric Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995) (“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.”); *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987) (“Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.”); *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (“[T]he due process clause prevents . . . the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.”).

⁴⁶ *2010 Net Neutrality Order*, 25 FCC Rcd at 17940–41, para. 59; *see also id.* at 17990 para. 166 (stating that the transparency “rule gives broadband Internet access service providers flexibility in how to implement the disclosure rule”).

Net Neutrality Order suffices for compliance with the transparency rule.⁴⁷ Thus, AT&T chose to explain the speed reduction to customers by discussing how the speed reductions would and would not impact their online experience, rather than listing a per-second speed.

This was an entirely reasonable decision, particularly since AT&T's disclosures are substantially similar to the model disclosures the Commission pointed to when it adopted the transparency rule. The *2010 Net Neutrality Order* specifically identified "the description of congestion management practices provided by Comcast in the wake of the Comcast-BiTorrent incident" and stated that that description "likely satisfies the transparency rule with respect to congestion management practices."⁴⁸ The Commission even provided links to that model disclosure.⁴⁹ Like AT&T's MBR disclosures, the cited Comcast disclosure *did not identify specific speeds that customers would experience when subject to the company's congestion management practice*. Instead, Comcast, like AT&T after it, described how a consumer's online experience would be affected by the company's practice. In Comcast's case, for example, it described how a heavy-usage customer may experience "longer times to download or upload files." For AT&T's part, it stated that a customer "may experience reduced speeds when using data services" and described how a customer "normally can still have a good experience surfing the Web, accessing email, and continued to use an unlimited amount of data," but it explained that "[c]ustomers will likely notice the biggest difference while streaming video."⁵⁰ With the Commission having pointed regulated entities to the Comcast model and emphasized that it was giving providers flexibility to determine what information to disclose, due process and fair warning precludes an abrupt, about-face proclamation that a substantially similar approach wasn't enough.⁵¹

Fifth, the Commission's decision to bring this enforcement action over three-and-a-half years after AT&T disclosed its MBR program undermines the Commission's view that AT&T violated the transparency rule. The *2010 Net Neutrality Order* stated that ISPs' "online disclosures shall be considered disclosed to the Commission for purposes of monitoring *and enforcement*."⁵² AT&T established the website required by the transparency rule over three years ago and started advertising the MBR program during that same period of time. Those disclosures included AT&T's repeated use of the term "unlimited" in connection with plans that included speed reductions—something that the *NAL* now says is a violation of the transparency rule regardless of the context. But if this is true—if the Commission is not simply adopting a new and retroactive requirement—then why did the agency wait years after AT&T's disclosures before initiating an enforcement action? The *NAL* offers no answer.

Sixth, the *NAL* places heavy reliance on irrelevant data. For example, it tries to bolster its assertion that AT&T used the term "unlimited" in a misleading manner by pointing to "focus group studies" that AT&T conducted in 2009 and 2010—*i.e.*, *before* the company rolled out the MBR program. According to the *NAL*, the focus group data show that the study participants felt that speed reductions were inconsistent with the concept of "unlimited" data. But the actual disclosures at issue in this case are the ones AT&T formulated *after* they conducted the focus group studies—disclosures that the *NAL* does not analyze and that the focus groups did not see. Thus, the focus group data does not speak to whether

⁴⁷ *2011 Joint Enforcement Advisory*, 26 FCC Rcd at 9416.

⁴⁸ *2010 Net Neutrality Order*, 25 FCC Rcd at 17938, n.177.

⁴⁹ *Id.* (citing Comcast, Network Management Update, www.comcast.net/terms/network/update; Comcast, Comcast Corporation Description of Planned Network Management Practices to be Deployed Following the Termination of Current Practices, http://downloads.comcast.net/docs/Attachment_B_Future_Practices.pdf).

⁵⁰ See AT&T, Customer Support Page, <http://www.att.com/esupport/article.jsp?sid=KB410284&cv=820> (last visited June 4, 2015); see also AT&T MBR *Ex Parte* at 16.

⁵¹ See, e.g., *General Electric Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995).

⁵² *2010 Net Neutrality Order*, 25 FCC Rcd at 17940, para. 57 (emphasis added).

AT&T transparently disclosed the terms of its MBR program. And as discussed above, the actual disclosures AT&T provided fully complied with the transparency rule.

Finally, the *NAL* offers no basis for proposing a \$100 million forfeiture. It simply asserts that “[a]pplying the statutory maximum . . . in this case would lead to an astronomical figure.”⁵³ It then proposes \$100 million without any explanation or rationale for choosing the amount.

* * *

Given the glaring defects in the Commission’s case, the real issue here doesn’t appear to be AT&T’s compliance with the transparency rule. Rather, the Commission seems to be using the rule to veto an approach AT&T uses to manage network congestion.⁵⁴ But this too is a decision that comes without warning.

At the time AT&T implemented the MBR program, the FCC had approvingly cited these types of programs on at least three separate occasions as innovative ways to manage network congestion. In the 2008 *Comcast-BitTorrent Order*, the Commission stated that “Comcast has several available options it could use to manage network traffic without discriminating as it does. Comcast could cap the average users’ capacity and then charge the most aggressive users overage fees. Or Comcast could throttle back the connection speeds of high-capacity users[.]”⁵⁵ Similarly, in the 2010 *Net Neutrality Order*, the Commission stated that carriers “could provide more bandwidth to subscribers that have used the network less over some preceding period of time than to heavier users” as a means of addressing network congestion.⁵⁶ Likewise, the 2011 *AT&T/T-Mobile Staff Report* described T-Mobile as a “pricing innovator” for its decision to limit customers who use 5 GB of data because the practice “allow[s] subscribers to continue sending and receiving data after reaching the monthly data cap without incurring expensive overage fees.”⁵⁷

In the end, this case is really just a regulatory bait and switch. The flexibility the agency promised is being replaced by previously unknown and arbitrarily selected obligations. A once-approved network management practice is now out of favor and carries with it a \$100 million penalty.

Unfortunately, this is probably a precursor. When the Commission recently voted to seize unilateral authority to regulate Internet conduct, I warned that the agency’s decision would inject tremendous uncertainty into the Internet ecosystem and leave companies guessing, like *The Trial’s* protagonist, what is and is not permitted.⁵⁸ This enforcement action only confirms my concern that the Internet is now governed not by engineers and innovators but by regulators and lawyers. Stay tuned, for

⁵³ *NAL* at para. 38.

⁵⁴ Indeed, the *NAL* asserts that AT&T’s claim that it employed the MBR program as a way to manage network congestion “rings hollow” because, the Commission says, it did not apply the speed reductions on a cell-site-by-cell-site basis. See *NAL* at note 23. But this ignores that AT&T did not have the technology in place to reduce speeds based on congestion at individual cell sites until recently, and it is now using that approach. Moreover, the *NAL*’s claim rests on the erroneous view that network congestion only occurs in the wireless access portion of the network. Although that is part of the equation, the MBR program also addresses congestion at the core of the network.

⁵⁵ *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications et al.*, WC Docket No. 07-52, File No. EB-08-IH-1518, Memorandum Opinion and Order, 23 FCC Rcd 13028, 13057, para. 49 (2008) (citations omitted, emphasis added).

⁵⁶ *2010 Net Neutrality Order*, 25 FCC Rcd at 17945–46, para. 73.

⁵⁷ *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, Staff Analysis and Findings, 26 FCC Rcd 16184, 16200, para. 24 (2011).

⁵⁸ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24 (rel. Mar. 12, 2015) (Dissenting Statement of Commissioner Ajit Pai), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A5.pdf.

the message sent to innovators by the Commission today is a loud and clear one: “Be afraid. Be very afraid.”⁵⁹

⁵⁹ Veronica Quaife, *The Fly* (20th Century Fox 1986).

**DISSENTING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: AT&T Mobility, LLC, EB-IHD-14-00017504, NAL/Acct. No. 201532080016, Notice of Apparent Liability for Forfeiture and Order.

Before us, we have an apparent violation of the transparency rule adopted in the *2010 Open Internet Order*.¹ The Commission raises objections to AT&T's disclosures regarding a certain network management practice it implemented to deal with the exploding demand for mobile data. This policy, known as the Maximum Bit Rate ("MBR") Program, results in a grandfathered unlimited-plan subscriber experiencing reduced data speeds when a certain data usage threshold is exceeded during a billing cycle.² When you compare AT&T's disclosures to the guidance provided in the *2010 Open Internet Order*, however, the violation is tenuous at best.

The *2010 Open Internet Order* created a flexible approach by which broadband providers could determine the best means to inform their subscribers of their service terms and network practices. However, here we are imposing a rigid standard that is based on a subjective opinion of what notification, in hindsight, should have been provided. This is not consistent with the word or spirit of the *2010 Open Internet Order*, which states that, "although we may subsequently determine that it is appropriate to require that specific information be disclosed in particular ways, the transparency rule we adopt today gives broadband providers some flexibility to determine what information to disclose and how to disclose it."³

For instance, the main criticism is that AT&T did not disclose the exact speeds that an affected subscriber would experience under the MBR Policy. However, the *2010 Open Internet Order* does not specifically require the disclosure of exact speeds provided under congestion management policies. Instead, the disclosure needs to describe the "practices' effects on end users' experience."⁴ Therefore, AT&T's website disclosure stating that subscribers affected by the MBR Policy would experience slower speeds that would likely be noticeable during video streaming, but would "still have a good experience surfing the Web, accessing email, and continuing to use an unlimited amount of data each month without incurring overage charges" appears to meet this requirement.⁵

The Notice of Apparent Liability ("NAL") also seems to fault AT&T for sending a text message to its subscribers who are approaching the MBR threshold for the first time, as opposed to sending them an e-mail every time a subscriber neared the threshold. This disclosure, however, is not even suggested by the rules. In fact, the *2010 Open Internet Order* only requires that disclosures are provided on a

¹ *Preserving the Open Internet*, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 (2010) ("*2010 Open Internet Order*").

² AT&T's policy has evolved over time and, currently, the highest data users only experience slower speeds during times of network congestion.

³ *Id.* at 17940-41 ¶ 59; *see also id.* at 17938 ¶ 56 ("We believe at this time the best approach is to allow flexibility in implementation of the transparency rule, while providing guidance regarding effective disclosure models.").

⁴ *Id.* at 17938 ¶ 56. Additionally, the *2010 Open Internet Order* states that "effective disclosures will likely include some or all of the following types of [suggested] information," so arguably a broadband subscriber would not have to make all the disclosures suggested in the Order. *Id.*

⁵ Letter from Jaquelyne Flemming, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, Attachment, at 10 (Feb. 13, 2015) ("AT&T Letter").

publicly available website and that the relevant information must be provided “at the point of sale.”⁶ Further, the text messages stated that, although speeds would be reduced, subscribers would be able to e-mail and surf the Web.⁷

In fact, AT&T took several steps to ensure that its unlimited data subscribers were aware of the MBR policy.⁸ Yet the Commission casts these efforts aside, and relies on a focus group study finding that consumers generally did not support the idea of intentionally slowing traffic to conclude that AT&T meant to deceive its subscribers. Would a company trying to mislead its subscribers create a website, send e-mails and text messages, and add language to its customer agreement about this very policy? I don't think so.

Further, if the Enforcement Bureau thought there were deficiencies in some of AT&T's disclosures, it should have taken steps to rectify any concerns prior to imposing a Draconian \$100 million penalty and compliance measures. The *2010 Open Internet Order* states that “[b]roadband providers’ online disclosures shall be considered disclosed to the Commission for purposes of monitoring and enforcement”⁹ and that the Commission “will monitor compliance ... and may require adherence to a particular set of best practices in the future.”¹⁰ Therefore, the Commission has been on notice of this policy since its inception in July 2011; not to mention, this policy change resulted in an AT&T press release, substantial media coverage and the filing of consumer complaints at the Commission. If we truly were monitoring this situation, believed that consumers were being harmed or did not have sufficient information, and knew that simple improvements could have been made to cure potential deficiencies in AT&T's website or customer agreement, we should have informed AT&T of our concerns years ago. In fact, the Enforcement Bureau did just that in November when it notified another provider about disclosure concerns, which resulted in the matter being rectified without official action.¹¹ Instead, we waited several years and now impose huge penalties citing the egregiousness and duration of AT&T's behavior and the number of consumers affected during this time period. This seems more than disingenuous.

I also cannot agree with the forfeiture or compliance measures that are adopted in this NAL. I have previously raised concerns that forfeiture amounts are not based on any actual metric, and that is the case here. The NAL finds that AT&T has approximately [REDACTED] million unlimited consumers and presumes that they have all been harmed, even though not all of these customers were actually affected or experienced reduced data speeds under the MBR Policy. Luckily, the NAL does determine that multiplying [REDACTED] million consumers by the statutory maximum would come out to “an astronomical figure.”¹² But, instead of coming up with a common sense metric, the Commission threw a dart and came up with a \$100 million forfeiture.

⁶ *2010 Open Internet Order*, 25 FCC Rcd at 17939-40 ¶ 57.

⁷ AT&T Letter, Attachment, at 8.

⁸ See generally AT&T Letter, Attachment. Although AT&T's disclosures in all documents are not identical, they generally state that, upon reaching certain thresholds, consumers will experience slowed data speeds, but will continue to be able to access data services. All disclosures appear to be accurate and consistent with the Enforcement Advisory which states that all disclosures made by a wireless provider about their network management practices “must be accurate.” *FCC Enforcement Advisory, Open Internet Transparency Rule, Broadband Providers Must Disclose Accurate Information to Protect Consumers*, Public Notice, DA 14-1039 (EB July 23, 2014).

⁹ *2010 Open Internet Order*, 25 FCC Rcd at 17940 ¶ 57.

¹⁰ *Id.* at 17940 ¶ 58.

¹¹ *T-Mobile Agrees to Improve Disclosures for Consumers Using Mobile Speed Tests*, News Release (Nov. 24, 2014).

¹² *Supra* ¶ 38.

Additionally, the adoption of such severe compliance measures at the NAL stage, along with a reporting requirement to inform the Commission about its progress in implementing these measures 30 days after this item is released, appears to be unprecedented. An NAL lays out the Commission's case and proposes penalties that may be implemented in a forfeiture order, but here we are setting forth compliance measures and imposing a reporting requirement before there is a final order finding a rule violation or a consent decree. Regardless, it is unlikely that I would support the requirements that AT&T must inform affected subscribers that its current disclosures are in violation of the transparency rule and allow these subscribers to cancel their plans without penalty.¹³ But to require AT&T to report on their progress implementing the compliance measures even if they challenge the alleged violation, the forfeiture and these measures is even worse.¹⁴ It is akin to requiring defendants that are contesting the charges to testify against themselves before the trial is over.

I firmly believe that the Commission must take the necessary steps to enforce its regulations. But, it is equally important that the Commission's enforcement procedures be fair and equitable. Licensees must have faith in the process and trust that the government is working in a sound and just manner, instead of vilifying them, or demanding that they incriminate themselves. This is the only way that our enforcement penalties will serve as a deterrent to future wrongdoing, while providing entities with the necessary confidence to report to and cooperate with the Commission when violations occur. I am concerned that our action today does not live up to this standard and, therefore, for all the reasons above, I must dissent.

¹³ See *id.* ¶ 31.

¹⁴ See *id.* n.68.