DISSENTING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

Re: AT&T Mobility, LLC, EB-IHD-14-00017504, NAL/Acct. No. 2015320080016, 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

---

[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).

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.

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.

[12] *Supra* ¶ 38.

[13] *See id.* ¶ 31.

[14] *See id.* n.68.