

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY
CONCURRING IN PART, DISSENTING IN PART**

Re: AT&T Inc., Parent Company of New Cingular Wireless PCS, LLC and AT&T Mobility Puerto Rico, Inc., EB-SED-13-00008891

For the Commission's enforcement process to retain credibility and actual functionality, such as it is designed to deter future incidents and justly penalize violators, the public must have faith that the calculations of forfeiture amounts are transparent and consistent. Although I have seen some improvements in determining base forfeitures, it is our implementation of upward and downward adjustments that continues to trouble me, because there has been a lack of hard justifications for the adjustment amounts. Today's Notice of Apparent Liability (NAL) fines AT&T a base forfeiture of \$128,000, which is then upwardly adjusted by 400 percent to \$640,000.

First, it appears that AT&T did potentially violate some rules. Therefore, I can support the issuance of an NAL but only concur with the proposed base forfeiture amount. Specifically, the item does not contain sufficient information about the precise violations that are within the statute of limitations. The item neither describes the exact nature of the wrongdoing, nor does it disclose when each of these violations occurred and when they were rectified. Instead, it just states that 34 licenses were not in compliance with the Commission's rules within the last year.¹ My staff and I received supplemental information from the Enforcement Bureau to try to determine the extent of the violations. This seemed to suggest violations ranging from changes in site elevation and transmitter locations to failure to update contact information, but the information is incomplete. If this NAL proceeds to a forfeiture order, I would expect a more fulsome discussion of the actual violations.

This brings me to my second point: it is hard to fathom how a 400 percent upward adjustment is warranted on so few facts. The Commission calculates this additional penalty by increasing the base forfeiture by 100 percent for each of the following: (1) "the egregiousness based on the number of licenses involved," (2) "the duration of the violation," (3) "prior violations," and (4) "AT&T's ability to pay." But, the NAL does not provide specific information to support the majority of these increases; except for the general discussion of possible violations associated with licenses acquired by AT&T from third parties between 2009 and 2012, many of which are outside the statute of limitations.

I am left to conclude that a portion of the hefty upward adjustment may, in fact, be a penalty for these additional violations that do not fall within the statute of limitations period. There is Commission precedent that allows violations that occur outside the statute of limitations period to be used to measure the culpability of the licensee and inform the forfeiture amount. But there is no discussion of prior violations by AT&T in this document. I have to ask whether the violations referenced are related to a previous consent decree entered into by AT&T, which is not even mentioned in the item, or the alleged violations of which many are outside the statute of limitations. If the upward adjustment is based on "apparent" violations that are outside the statute of limitations, I would have deep concerns as the Commission did not verify or act upon these potential violations. Given the scope of the issue at hand, it seems comparable to a traffic cop issuing a speeding ticket and then trying to increase the size of the fine because the motorist admitted to speeding last week when no cops were around. Overall, this does not appear to be aligned with the spirit and purpose of a statute of limitations.

¹ The order states that AT&T engaged in unauthorized operations on 26 point-to-point microwave licenses requiring major modification applications and failed to timely notify the Commission of eight minor modifications.

If the Commission is attempting to signal that it intends to be aggressive on enforcement actions, it also needs to be right and just.

Therefore, I concur in part and dissent in part.