

**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:

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).

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

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

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=IZDUel116000000U#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).

those customers “can still use unlimited data and can count on their speeds being restored with the start of the next billing cycle.”³⁴

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

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).

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

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.

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 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

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.

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.”).

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 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-BitTorrent 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

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”).

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).

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 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

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).

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

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.

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