Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Ensuring Fair Notice, Consistency, and	)	RM –
Government Accountability in FCC	)	
Enforcement	)	

PETITION FOR RULEMAKING

Umair Javed
Scott K. Bergmann
Mike Beirne
CTIA – The Wireless Association®
1400 Sixteenth Street, NW
Washington, DC 20036
(202) 736-3200
www.ctia.org

Russell Hanser
Loretta Polk
NCTA – The Internet & Television Association
25 Massachusetts Avenue, NW
Washington, DC 20001
(202) 222-2300
www.ncta.com

Angela Simpson
Alexandra Mays
Competitive Carriers Association
601 New Jersey Avenue, NW, Suite 820
Washington, DC 20001
(202) 747-0711
www.ccamobile.org

Nirali Patel
USTelecom – The Broadband Association
601 New Jersey Avenue, NW, Suite 600
Washington, DC 20001
(202) 326-7300
www.ustelecom.org

Mike Saperstein
Stephen Keegan
WIA – The Wireless Infrastructure Association
2111 Wilson Blvd., Suite 210
Arlington, VA 22201
(703) 739-0300
www.wia.org

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PETITION FOR RULEMAKING

By this Petition, CTIA – The Wireless Association®, Competitive Carriers Association, NCTA – The Internet & Television Association, USTelecom – The Broadband Association, and the Wireless Infrastructure Association ("Petitioners")[1] respectfully request that the Federal Communications Commission ("Commission" or "FCC") initiate a rulemaking to reform its enforcement rules and procedures to more closely align with the fundamental due process principles of fair notice, consistency, and government accountability, pursuant to Section 1.401 of the Commission's rules.

In recent years, these due process principles have been in short supply across the Commission's enforcement process, in Letters of Inquiry ("LOIs"), Notices of Apparent Liability ("NALs"), Forfeiture Orders, and Consent Decrees. But these principles are not at odds with the Commission's enforcement objectives and responsibilities. The FCC can—and should—continue to protect the public and root out violations of law while simultaneously adhering to these fundamental principles. This Petition identifies shortcomings that have emerged in FCC enforcement practices in recent years and proposes specific reforms to achieve

[1] More information about each of the Petitioners can be found in the Appendix.

these dual ends, aligning FCC practice with other federal agencies and the Federal Rules of Civil Procedure as appropriate.

I. INTRODUCTION AND SUMMARY.

The Commission created the Enforcement Bureau ("Bureau") over 25 years ago as part of an effort to ensure Commission-wide consistency, lawfulness, and predictability in enforcement actions, and it is time to return the agency's enforcement regime to those admirable roots.[2]

The Supreme Court's decision in *SEC v. Jarkesy* renders the Commission's current enforcement process unconstitutional, as the decision clearly indicates that it violates the Seventh Amendment right to a jury trial for the Commission to impose civil monetary penalties through its in-house enforcement process.[3] Indeed, the Fifth Circuit just confirmed this: applying *Jarkesy*, the court's decision in *AT&T, Inc. v. FCC* invalidated an FCC Forfeiture Order for imposing a civil fine without the opportunity for a jury trial.[4] Based on the *Jarkesy* decision and this other precedent, the Commission may not continue to impose fines or assess monetary forfeitures. But lack of a right to a jury trial is not the only shortcoming in the FCC's

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[2] While the Enforcement Bureau is responsible for the great majority of enforcement activity, the Media Bureau also has enforcement authority. *See* 47 C.F.R. § 0.61. Although some of the points made in this Petition are specific to the Enforcement Bureau, to the extent that there is overlap in the processes of the two Bureaus, both should be reformed.

[3] *SEC v. Jarkesy*, 603 U.S. 109 (2024). President Trump recently directed all agencies to prioritize review of, and take action to immediately repeal, regulations that are unlawful under *Jarkesy* and other Supreme Court cases. *Directing the Repeal of Unlawful Regulations*, The White House (Apr. 9, 2025), https://www.whitehouse.gov/presidential-actions/2025/04/directing-the-repeal-of-unlawful-regulations; *see also* Exec. Order No. 14219, 90 Fed. Reg. 10583 (Feb. 19, 2025) (requiring agencies to review and rescind unlawful regulations including those that conflict with *Jarkesy*).

[4] *AT&T, Inc. v. FCC*, No. 24-60223, 2025 WL 1135280, *9 (5th Cir. Apr. 17, 2025) (holding FCC forfeiture process unconstitutional under *Jarkesy* and rejecting claims that availability of federal district court review of agency's factual findings satisfies defendants' Seventh Amendment rights).

enforcement program, and the Commission itself can and should take action to fix an enforcement regime that has in recent years gone awry. As then-Commissioner Carr observed in dissent from a post-*Jarkesy* enforcement action, "it is time for the FCC to start the process of fundamentally reforming our enforcement practices—lest the courts step in, including in cases where bad actors deserve accountability."[5]

There is much the Commission should do to ensure fair notice, consistency, and government accountability, as deficiencies in the agency's enforcement process run deep:

- *Fair Notice*. When the Commission uses enforcement actions to make new policy rather than following clear precedent, parties are deprived of fair notice in conflict with established due process principles set forth in cases such as *Trinity Broadcasting*.[6] In addition, parties should not be in the dark about why they are being investigated, what evidence the agency may possess, whether they have been exonerated, and how any penalties will be calculated.[7]
- *Consistency*. In recent years, the Bureau's process has lacked consistency. As former FCC General Counsel Tom Johnson observed last year, the Bureau "wields. . . significant discretion" and frequently "issues overly broad discovery demands, seeks significant tolling of the statute of limitations, forgoes providing parties with the procedural protections of formal hearings . . . , threatens massive forfeitures that

[5] *Cunningham Broadcasting Corporation*, *Ultimate Parent of Licensee Stations WEMT, Greenville, Tennessee; WMYA, Anderson, South Carolina; WPFO, Waterville, Maine; WTTE, Columbus, Ohio; WYDO, Greenville, North Carolina; KTXD-TV, Greenville, Texas*, et. al., Forfeiture Order, FCC 24-88, at 39 (rel. Sept. 6, 2024) (Statement of Commissioner Brendan Carr, dissenting); *see also id.* at 40 (Statement of Commissioner Nathan Simington, dissenting) (noting that the Commission's authority to assess monetary forfeitures is unclear in light of *Jarkesy* and calling on Commission to initiate an NOI to determine the "new constitutional contours of Commission enforcement authority").

[6] *See Trinity Broadcasting of Fla., Inc. v. FCC*, 211 F.3d 618, 619, 628 (D.C. Cir. 2000) (requiring "ascertainable certainty" as to the standards with which parties must comply); *see also Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (holding that a regulated party acting in good faith must be able to identify with ascertainable certainty the standards with which the agency expects parties to perform).

[7] *See* Exec. Order No. 13892, 84 Fed. Reg. 55239 (Oct. 15, 2019) (reinstated by Exec. Order No. 14148, 90 Fed. Reg. 8237 (Jan. 28, 2025), revoking Exec. Order. 13992, 86 Fed. Reg. 7049 (Jan. 25, 2021)) (stating that "[w]hen an agency takes an administrative enforcement action, engages in adjudication, or otherwise makes a determination that has legal consequence for a person, it may apply only standards of conduct that have been publicly stated in a manner that would not cause unfair surprise").

cannot be effectively challenged in court until paid, and leverages that threat to force agreement to a Consent Decree."[8] Another former FCC General Counsel, Chris Wright, also noted last year that "the Commission's practice of using creative arithmetic to calculate forfeitures has recently gone into overdrive," with unprincipled penalty amounts that "might as well have been picked out of a hat."[9]

- *Government Accountability.* Far too much of the Commission's enforcement process is unaccountable. There is no process either internal to the agency or at the courts for parties to seek review of procedural abuses during investigations. This leaves the procedures, methods, and scope of investigations within the discretion of the Bureau itself. Non-final enforcement decisions have been shielded from court review but are treated as precedential for future enforcement activity. These problems are heightened because Commission enforcement places entities being investigated at an inherent power and informational disadvantage. As a result, regulated entities are often forced to accept unfair processes and unjust penalties. And the lack of standards around Commission investigations limits Congress's ability to assess the effectiveness of the agency's enforcement process.

In light of these problems, the Commission should commence a rulemaking that evaluates FCC rules and practices involving investigations and LOIs, NALs, and final decisions such as Forfeiture Orders and Consent Decrees. It should seek to codify by rule a prohibition on imposing new substantive legal obligations in an enforcement action. Next, it should fix the investigative process, as LOIs are in desperate need of clear and dependable guardrails, and it should adopt a mechanism for independent review of LOIs to ensure they do not place unreasonable demands on target entities. Further, the Commission should be transparent and consistent about the bases and amount for penalties when an NAL is issued, and should not allow NALs to remain open indefinitely. The agency should also ensure that it will not misuse non-

[8] Thomas M. Johnson, Jr., *White Paper on FCC Enforcement Bureau Reform* at 21 (Jan. 29, 2024), https://comms.wiley.law/8/5148/uploads/white-paper-on-fcc-enforcement-bureau-reform-01.29.2024-tj.pdf (Johnson White Paper).

[9] Christopher Wright, *The FCC Must Reform its Enforcement Procedures to Provide Fair Notice* (July 14, 2024), https://hwglaw.com/2024/07/17/the-fcc-must-reform-its-enforcement-procedures-to-provide-fair-notice.

final enforcement matters in contexts outside of an investigation. Finally, the Commission should adopt enforcement-related metrics to encourage accountability.

FCC enforcement reform is a vital step and fully consistent with President Trump's call for "lawful enforcement" across the government that de-prioritizes enforcement based on anything other than "the best reading" of a statute,[10] and that is transparent and free from "unfair surprise."[11] To that end, the Commission should examine every facet of the enforcement process and ensure that practices and procedures embody basic fairness and due process principles.

II. IN RECENT YEARS, THE COMMISSION'S APPROACH TO ENFORCEMENT HAS BECOME UNPREDICTABLE, INCONSISTENT, AND UNACCOUNTABLE.

The American system of government embodies fundamental values associated with the right to due process when imposing penalties on private parties,[12] but the FCC's enforcement system has veered off course in recent years. Petitioners urge the Commission to engage in reform to right these wrongs. Adapting best practices from peer agencies and courts will help remedy these shortcomings and align Commission enforcement with due process values.

A. How It Operates: At Each Step, the Enforcement Process Lacks Adequate Protections.

In recent years, targets of the Commission's enforcement system have found themselves on a playing field tilted to the agency's advantage, where it serves as investigator, prosecutor, judge, and jury, with no meaningful recourse.[13]

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[10] *See* Exec. Order No. 14219, 90 Fed. Reg. at 10584, Sec. 3.

[11] *See* Exec. Order No. 13892, 84 Fed. Reg. at 55240, Sec. 4.

[12] *See, e.g.*, U.S. CONST. amend. V, XIV.

[13] *AT&T*, 2025 WL 1135280, *9.

At the outset, although the Communications Act ("Act") sets out two paths for Commission enforcement action, hearings and NALs,[14] the agency rarely pursues the more rigorous trial-like hearing proceeding before an Administrative Law Judge ("ALJ"),[15] whose decision can be appealed to the full Commission, with that decision, in turn, subject to review by a federal court of appeals without having to pay any imposed forfeiture first.[16] Instead, the Commission almost always resorts to the use of NALs, which act as "the FCC's charging document, akin to the filing of a complaint in a civil action."[17]

In recent years, the investigative process preceding an NAL has been deeply flawed, and wracked with arbitrary, standardless processes. Indeed, an Enforcement Bureau overview of the investigative process is more notable for what it does *not* say than for what it does.[18] Many of the details of the investigative process are left undefined, leaving decisions to the discretion of

[14] *See* 47 U.S.C. § 503(b). Because the statute does not provide any principle whatsoever to guide the Commission in choosing its path, it may also violate the nondelegation doctrine. *Jarkesy v. SEC*, 34 F.4th 446, 460-61 (5th Cir. 2022), *aff'd and remanded*, 603 U.S. 109 (2024). In the event that Congress does not act, at a minimum the Commission should adopt rules that explicitly delineate the circumstances in which it will use the ALJ process versus the NAL process.

[15] *See* 47 C.F.R. § 1.80(h); *see also AT&T, Inc.*, 2025 WL 1135280, *1 (noting that the ALJ versus NAL choice is "entirely up to the Commission" and that "[u]nsurprisingly," the "Commission typically opts to investigate and adjudicate violations itself"). While the hearing process appears to afford more due process than the NAL process, as Justice Gorsuch recognized, ALJs "remain servants of the same master—the very agency tasked with prosecuting individuals," and the results of such adjudications at the Securities and Exchange Commission demonstrate that agencies are heavily favored to win such a proceeding. *Jarkesy*, 603 U.S. at 142 (Gorsuch, J., concurring).

[16] *See* 47 U.S.C. § 503(b)(3); 47 C.F.R. §§ 1.80(h)(1)-(2), 1.276.

[17] *Enforcement Overview*, Federal Communications Commission Enforcement Bureau, at 15 (Apr. 2020), https://www.fcc.gov/sites/default/files/public_enforcement_overview.pdf ("Enforcement Overview").

[18] *See id.* at 7-10.

the individual agency staff conducting the investigations and leaving parties being investigated in the dark about how their particular case will be conducted.

Unlike federal court proceedings or even enforcement matters at other federal agencies, the Commission's enforcement framework does not provide basic rules or other mechanisms for meaningful oversight regarding the number, scope, or timing of the inquiries and discovery requests the FCC can issue. In the past, parties under investigation have been required to respond to LOIs that include dozens or even hundreds of broad, far-reaching interrogatories and document requests, under unreasonable deadlines, including items outside of the Commission's substantive authority, with no ability to challenge those demands with anyone other than the very staff that issued them.

For instance, one provider received nine different LOIs in connection with an Enforcement Bureau investigation into the company's customer proprietary network information and security practices. Those LOIs, including subparts, contained 580 requests for information with initial response deadlines as short as 15 days. Similarly, another provider received six LOIs or supplemental LOIs over the last four years with response deadlines of less than 30 days, some as few as 14 days. A third provider had to respond to an LOI containing nearly 60 multipart questions, but then immediately received a supplemental LOI that included more than 60 additional questions and required a response within 7 days, effectively forcing the provider to agree to toll the statute of limitations in exchange for having sufficient time to respond. In another matter, a company responded to an initial LOI with dozens of requests and subparts, only to receive a supplemental LOI more than a year later with 55 new requests with 134 subparts.

Some LOIs fail to even disclose why the recipient is being investigated, and parties may be unaware that they are the target of an investigation or the precise nature of the allegations

until either shortly before or contemporaneously with the issuance of an NAL. And even where the Bureau does disclose the subject of the investigation, in recent years the Bureau has demanded sensitive, non-public information beyond the scope of the investigation and the Commission's statutory authority. In many parties' experiences, the FCC's investigative stage has only grown more unpredictable in recent years.

Although there is a statute of limitations that applies from an alleged violation to issuance of an NAL,[19] tolling agreements are often negotiated in exchange for relief from unreasonable LOI response deadlines, as there are no guidelines or parameters on appropriate response deadlines. In fact, this dynamic can result in the negotiation of tolling agreements that are two or even three times longer than the extension relief it grants for the LOI response.[20] This behavior allows the Bureau to force on a target an inequitable "agreement" to waive the Congressionally-mandated deadline for issuance of an NAL.

Further, parties typically do not know if or when an investigation is over, as the Bureau does not routinely provide any affirmative indication that it has decided not to seek a penalty following issuance of an LOI.[21] Parties may be able to guess at when an investigation is closed based on the statutory deadline for issuance of an NAL (accounting for any extensions), but are in the dark when they do not know the incident for which they are being investigated or whether the investigation relates to an ongoing business practice.

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[19] *See* 47 U.S.C. § 503(b)(6).

[20] In that regard, another party to a deadline extension negotiation was informed that the Bureau "requires" a tolling period twice as long as the extension. Not only is that "requirement" not memorialized in the Enforcement Overview (or elsewhere), but if anything, it contravenes the Enforcement Overview's assertion that "the tolling period should be as short as possible under the specific circumstances of an individual case." Enforcement Overview at 23. This exchange exemplifies the effective lack of guardrails even where standards nominally govern.

[21] *Id.* at 10.

While the Commission can take months to develop the legal theories and evidence set forth in an NAL, the subject of the NAL must scramble to respond to all allegations, typically within a 30-day deadline.[22] An NAL is released publicly and generally includes information gathered from the enforcement target during the LOI process, and in some instances, information provided by third parties that the enforcement target has no access to and learns of only through the NAL. Notably, the NAL does not typically reflect the accused party's position regarding the validity of the allegations. That is, the NAL is an entirely one-sided, preliminary presentation of the Commission's case. Indeed, the Bureau itself has acknowledged that NALs, at least in theory, merely constitute the "FCC's preliminary conclusions on matters of fact and law."[23] Crucially, because the Commission is not forthcoming during its investigative process, the NAL released to the public often represents the first opportunity for the enforcement target to see exactly what potential rule violations are being alleged and what evidence the Commission purports to possess in support of its findings.

As an NAL is non-final, it cannot be appealed,[24] yet there is *no* deadline for the agency to follow up with a Forfeiture Order. The agency can thus leave an NAL hanging over a company for years or even decades, creating significant legal and financial uncertainty for enforcement targets. In one example, a provider was subject to a $100 million NAL in 2015, and a decade later, that NAL remains outstanding. And the Commission waited four years after releasing

[22] *See* 47 C.F.R. § 1.80(g)(3).

[23] Enforcement Overview at 15.

[24] 5 U.S.C. § 704; 47 U.S.C. § 503(b)(4); 47 C.F.R. § 1.80(f), (g).

NALs before issuing Forfeiture Orders in several cases regarding the alleged disclosure of consumer location information.[25]

The Commission has inappropriately relied on NALs as precedent for certain policy and enforcement actions, despite former Commissioner Michael O'Rielly's observation that "[a]n NAL is not even a final decision of the Commission" and thus "cannot and [does] not provide notice of how the Commission might act in a future case."[26] For instance, the Commission's December 2023 *Data Breach Order* inappropriately and repeatedly leveraged the *TerraCom* NAL[27] in an effort to show that the Commission had already adopted a new expansive reading of carriers' duties under Sections 201 and 222 of the Communications Act.[28] In fact, the *Data Breach Order* cites *only* the *TerraCom* NAL (no Forfeiture Order was issued in that proceeding) to support the proposition that "recent enforcement actions have affirmed that carriers' duty to

[25] *See AT&T, Inc.*, Forfeiture Order, 39 FCC Rcd 4216, 4224-29 (2024) ("*AT&T LBS Forfeiture Order*"), *rev'd*, *AT&T, Inc.*, 2025 WL 1135280; *Sprint Corp.*, Forfeiture Order, 39 FCC Rcd 4305, 4314-19 (2024) ("*Sprint LBS Forfeiture Order*"); *T-Mobile USA, Inc.*, Forfeiture Order, 39 FCC Rcd 4350 (2024) ("*T-Mobile LBS Forfeiture Order*"); *Verizon Communications*, Forfeiture Order, 39 FCC Rcd 4259, 4267-72 (2024) ("*Verizon LBS Forfeiture Order*"); *AT&T, Inc.*, Notice of Apparent Liability for Forfeiture and Admonishment, 35 FCC Rcd 1743 (2020); *Sprint Corp.*, Notice of Apparent Liability for Forfeiture and Admonishment, 35 FCC Rcd 1655 (2020); *T-Mobile USA, Inc.*, Notice of Apparent Liability for Forfeiture and Admonishment, 35 FCC Rcd 1785 (2020); *Verizon Communications*, Notice of Apparent Liability for Forfeiture and Admonishment, 35 FCC Rcd 1698 (2020). *But cf. BellSouth Telecommunications, LLC, d/b/a AT&T Southeast*, Order, 35 FCC Rcd 8940 (2020) (cancelling an NAL and proposed forfeiture four years after its issuance because the original NAL was issued outside the statute of limitations).

[26] *Touch-Tel USA, LLC*, Memorandum Opinion and Order, 31 FCC Rcd 12139, 12150 (2016) (Statement of Commissioner Michael O'Rielly, dissenting).

[27] *TerraCom, Inc. and YourTel America, Inc.*, Notice of Apparent Liability For Forfeiture, 29 FCC Rcd 13325 (2014).

[28] *Data Breach Reporting Requirements*, Report and Order, 38 FCC Rcd 12523, ¶¶ 5 n.8, 16 n.49, 20 n.64, 73 n.298, 120 n.427, 124 & nn.442-43 (2023) ("*Data Breach Order*"); *see also Protecting Consumers from SIM Swap and Port Out Fraud*, Notice of Proposed Rulemaking, 36 FCC Rcd 14120, 14130 ¶ 22 n.66 (2021) (citing *TerraCom* in describing carriers' duties under Section 222).

protect customer information extends beyond [customer proprietary network information]."[29] Similarly, in a 2014 NAL, the Commission cited to a 2007 NAL as the sole legal support to find that inaccurate submissions to the Telecommunications Relay Service Fund administrator constituted "continuing" violations.[30]

Similar infirmities persist in the next stage of the enforcement process as well, including Forfeiture Orders. The penalties set forth in Forfeiture Orders have been in recent years arbitrary and capricious, with no predictable, objectively measurable basis.[31] While both Section 503 of the Communications Act and the Commission's rules delineate maximum forfeiture penalty amounts,[32] the Commission has applied the Section 503 factors for determining the amount of forfeitures to give it virtually unbounded discretion – or, in the words of the Bureau, "significant flexibility."[33] As such, both proposed and final penalties routinely exceed the statutory maximum amounts set forth in the Act.

The Bureau's role is to ensure compliance with the Communications Act and Commission rules, not to generate attention-grabbing headlines.[34] However, the Commission has all too often defined enforcement success based on the dollar value of proposed and final penalties, creating dangerous incentives to use its perceived flexibility to increase penalties

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[29] *Data Breach Order* ¶ 120 n.427.

[30] *Purple Communications, Inc.*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 5491, 5506 ¶ 34 n.87 (2014) (citing *VCI Company*, Notice of Apparent Liability for Forfeiture and Order, 22 FCC Rcd 15933, 15940 ¶ 20 (2007)).

[31] *See, e.g.*, *Touch-Tel USA, LLC*, 31 FCC Rcd at 12151 (Statement of Commissioner Michael O'Rielly, dissenting) (observing that the underlying fines "seem to be calculated to achieve a preordained result and headline, with no basis in fact or law").

[32] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(b).

[33] Enforcement Overview at 17.

[34] *See* 47 C.F.R. § 0.111.

regardless of whether doing so is justified. Press releases concerning enforcement actions typically highlight dollar amounts in their headlines.[35] And the discussion of consumer-related enforcement actions in the Commission's 2024 Annual Performance Report is predominantly focused on the amount of fines.[36]

The Commission can extract Consent Decrees that preclude judicial review, often with the threat of exorbitant penalties if the accused party does not agree to a settlement. In doing so, the agency uses Consent Decrees as a vehicle to pressure parties to accept obligations that the Commission lacks legal authority to impose.[37]

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[35] *See, e.g.*, Press Release, Federal Communications Commission, FCC Fines Man Behind Election Interference Scheme $6 Million for Sending Illegal Robocalls That Used Deepfake Generative AI Technology (Sept. 26, 2024), https://docs.fcc.gov/public/attachments/DOC-405811A1.pdf; Press Release, Federal Communications Commission, AT&T to Pay $950,000 to Resolve FCC Investigation Into August 2023 Outage and Compliance With 911 Call Delivery and Outage Notification Rules (Aug. 26, 2024), https://docs.fcc.gov/public/attachments/DOC-405007A1.pdf; Press Release, Federal Communications Commission, Verizon Wireless to Pay Over $1 Million to Settle FCC Investigation Into 911 Outage in Six States (June 25, 2024), https://docs.fcc.gov/public/attachments/DOC-403450A1.pdf; Press Release, Federal Communications Commission, FCC Proposes Fines Totaling More than $3.5 Million Against Five Miami-Area Pirate Radio Operators (Jan. 25, 2024), https://docs.fcc.gov/public/attachments/DOC-400020A1.pdf; Press Release, Federal Communications Commission, Tracfone to Pay $23.5 Million to Resolve Investigation Into Violations Involving Two Major FCC Programs (Nov. 29, 2023), https://docs.fcc.gov/public/attachments/DOC-398791A1.pdf; *see also* Press Release, Federal Communications Commission, FCC Recaps Its Efforts on National Security, Public Safety, and Protecting Consumers (Jan. 15, 2025), https://docs.fcc.gov/public/attachments/DOC-408863A1.pdf (highlighting the Bureau's work over the previous four years by referencing the Bureau's "Issuing [of] Record-Breaking Enforcement Monetary Actions" and describing various fines levied by the Commission).

[36] *Fiscal Year 2024 Annual Performance Report*, Federal Communications Commission, at 23-27 (2024), https://docs.fcc.gov/public/attachments/DOC-408995A1.pdf ("FCC 2024 Annual Performance Report"); *see also Touch-Tel USA, LLC*, 31 FCC Rcd at 12149 (Statement of Commissioner Ajit Pai, dissenting) (expressing the concern that "[w]hen it comes to enforcement . . . the Commission is more interested in seeking headlines than respecting the rule of law").

[37] *See, e.g.*, *Cellco Partnership d/b/a Verizon Wireless*, Order, 30 FCC Rcd 4590 (EB 2015); *Sprint Corporation*, Order, 30 FCC Rcd 4575 (EB 2015); *T-Mobile USA, Inc.*, Order, 29 FCC Rcd 15111 (EB 2014); *AT&T Mobility LLC*, Order, 29 FCC Rcd 11803 (EB 2014) (collectively adopting hundreds of millions in "consumer redress" penalties).

Each layer of the enforcement process at the Commission is set against the backdrop of the significant power the agency has over regulated entities. Those entities are dependent on the Commission for the licenses and authorizations they need to operate. Spurning agency enforcement could threaten those licenses and authorizations. For reputable businesses that routinely have matters before the Commission, accepting whatever enforcement outcomes the Commission wants is often the most pragmatic choice, no matter how unlawful or unreasonable the process or result. At the same time, scofflaws like high-volume scam robocallers can evade paying Commission fines.[38] This disparity, in which responsible businesses are often punished excessively precisely because of their responsibility while wrongdoers get away, heightens the urgency of rationalizing the Commission's enforcement process.

B. Why It's Broken: Enforcement Practices Are Inconsistent with Core Due Process Values and Governing Law.

Independent of the serious Seventh Amendment concerns raised by *Jarkesy* and *AT&T*, the Commission's enforcement process also raises significant Fifth Amendment concerns. Pursuant to the Fifth Amendment, "[n]o person shall be . . . deprived of life, liberty, or property without due process of law."[39] As Justice Gorsuch observed, "'due process of law' generally implie[s] and include[s] . . . [a judge], regular allegations, opportunity to answer, and a trial

[38] Johnson White Paper at 7; *see also Affordable Enterprise of Arizona, LLC*, Forfeiture Order, 35 FCC Rcd 12142, 12173 (2020) (Statement of Commissioner Geoffrey Starks) (expressing concern, in the context of an enforcement action against a telemarketer, "about [the FCC's] track record of actually collecting these large forfeitures we assess."); *John C. Spiller* et. al., Notice of Apparent Liability For Forfeiture, 35 FCC Rcd 5948, 5976 (2020) (Statement of Commissioner Geoffrey Starks) (noting that "[t]he threat of large fines as a deterrent means nothing if we systematically fail to actually collect on them.").

[39] U.S. CONST. amend. V.

according to some settled course of judicial proceedings."[40] The Commission's processes fall far short of this ideal and the principles that underlie the Constitution's guarantee of due process. Examples of this problem abound.

Fundamentally, due process requires fair notice—regulated entities must know what the law requires before they can be penalized for violating the law.[41] The Government must "give fair notice of conduct that is forbidden or required."[42] And a failure to provide fair notice "justifies setting aside [an] imposed fine."[43] The obligation is on the Government to give the public fair notice. It is not on the public to "predict an agency's actions with 'extraordinary intuition or with the aid of a psychic.'"[44]

The Commission's enforcement process undermines fair notice principles when it is used to create new (and sometimes dubious) legal interpretations, punishing regulated entities that had no way to know what the Commission expected of them.[45] The Commission's recent imposition of fines on the largest wireless providers exemplifies this problem. In those enforcement actions,

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[40] *Jarkesy*, 603 U.S. at 150 (Gorsuch, J., concurring) (quoting *John Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 280 (1855)).

[41] *See Trinity Broadcasting*, 211 F.3d at 619, 628.

[42] *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

[43] *Emp. Sols. Staffing Grp. II, LLC v. Off. of Chief Admin. Hearing Officer*, 833 F.3d 480, 489 n.7 (5th Cir. 2016).

[44] *Inhance Techs., L.L.C. v. United States Env't Prot. Agency*, 96 F.4th 888, 894 (5th Cir. 2024) (quoting *Wages & White Lion Invs., L.L.C. v. Food & Drug Admin.*, 90 F.4th 350, 374 (5th Cir. 2024)); *see also Morton v. Ruiz*, 415 U.S. 199, 232 (1974) (explaining that Congress enacted the Administrative Procedure Act to ensure that "administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations"); *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.").

[45] *See* Exec. Order No. 13892, 84 Fed. Reg. at 55239 (stating that "[r]egulated parties must know in advance the rules by which the Federal Government will judge their actions").

the Commission posited a novel and plainly incorrect theory that the statutory term "customer proprietary network information" includes a device's location without regard to whether a customer is placing a voice call or also using wireless data services on that same device.[46] Despite the unforeseeable nature of the purported legal obligation, the Commission imposed almost $200 million in fines.[47] The providers have appealed that statutory construction and resulting penalty in court,[48] and the Fifth Circuit recently vacated the forfeiture that the FCC issued to AT&T on constitutional grounds,[49] but the providers should not have been made to undergo the cost, reputational harm, and risk involved. As then-Commissioner Carr called out in his dissent:

> The services at issue in these cases plainly fall outside the scope of the FCC's section 222 authority. . . .[W]ithout providing advance notice of the new legal duties expected of carriers (to the extent we could adopt those new duties at all), the FCC retroactively announces eye-popping forfeitures totaling nearly $200,000,000. These actions are inconsistent with the law and basic fairness. . . . The massive forfeitures imposed in these Orders offend basic principles of fair notice.[50]

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[46] *See AT&T LBS Forfeiture Order*, 39 FCC Rcd at 4224-29; *Sprint LBS Forfeiture Order*, 39 FCC Rcd at 4314-19; *T-Mobile LBS Forfeiture Order*, 39 FCC Rcd at 4359-63; *Verizon LBS Forfeiture Order*, 39 FCC Rcd at 4267-72.

[47] Press Release, Federal Communications Commission, FCC Fines AT&T, Sprint, T-Mobile, and Verizon Nearly $200 Million For Illegally Sharing Access to Customers' Location Data (Apr. 29, 2024), https://docs.fcc.gov/public/attachments/DOC-402213A1.pdf.

[48] *See Sprint Corp. v. FCC*, No. 24-1224 (D.C. Cir. 2024); *T-Mobile USA, Inc. v. FCC*, No. 24-1225 (D.C. Cir. 2024); *Verizon Communications Inc. v. FCC*, No. 24-1733 (2d Cir. 2024).

[49] *AT&T*, 2025 WL 1135280, *9.

[50] *T-Mobile LBS Forfeiture Order*, 39 FCC Rcd at 4399-4400 (Statement of Commissioner Brendan Carr, dissenting); *see also TerraCom, Inc.*, 29 FCC Rcd at 13349 (Statement of Commissioner Ajit Pai, dissenting) (criticizing the Commission for violating due process by not following the "fair warning rule" and inventing a legal obligation while seeking to impose a substantial financial penalty); *see also Lingo Telecom, LLC*, Notice of Apparent Liability for Forfeiture, 39 FCC Rcd 6027, 6044 (2024) (Statement of Commissioner Brendan Carr, concurring) (stating that the FCC may be undertaking "rulemaking by enforcement" by "creating new, substantive obligations that go beyond the standards set forth in our existing rules"); *Id.* (Statement of Commissioner Nathan Simington) (stating that the NAL is "engaged in

In another example of the Commission punishing entities with novel rule interpretations, in December 2024 the Enforcement Bureau issued a Consent Decree with a company imposing a penalty of over $1 million in connection with the temporary removal of some of its EAS encoder/decoder devices from service. The company removed this equipment from service in order to upgrade it to comply with new FCC EAS requirements and asserted throughout this process that it believed in good faith that the upgrades were subject to section 11.35(b) of the Rules, which permits EAS participants to operate for 60 days without EAS Devices that have "become defective" – in this case because of the adoption of new rules – while such devices are repaired. This enforcement case represented the first time the FCC interpreted section 11.35(b) in this way, and the agency should have issued a Declaratory Ruling rather than issuing this new interpretation through an enforcement action.

Beyond resulting in unfair punishments, the adoption of new requirements through enforcement also harms third parties, who are not a target of the action and do not have the opportunity to comment on the development of new requirements to which they may then be subject themselves. And it harms the Commission itself, which is deprived of a multi-stakeholder record with which to develop informed policy.

The extent to which the Commission penalizes regulated companies based on previously unannounced theories and interpretations is even greater than it seems at first blush. Parties subject to an investigation or NAL often settle through Consent Decrees because of their unequal position vis-à-vis the regulator. If a case settles, the Commission never has to explain the theory

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a back-door rulemaking through enforcement" by using an enforcement mechanism to declare new standards).

underlying its conclusion that a party should be penalized.[51] Thus, the Commission is able to impose significant penalties based on legal theories that may be novel, incorrect, or both, and without regard to the strength of its evidence.[52]

Beyond fair notice, the Commission's approach to enforcement often lacks reasonableness and consistency. In recent years, decisions and penalties have been arbitrary and unpredictable, with Commissioners rightly noting that "forfeiture amounts are not based on any actual metric,"[53] and are "plucked out of thin air rather than determined through the use of a rational methodology."[54] And last year, Commissioner Simington criticized the Commission's "arbitrary and capricious finding . . . that a single, systemic failure to follow the Commission's rules . . . may constitute however many separate and continuing violations the Commission chooses to find."[55]

Nor has the Commission been consistent in whether its enforcement actions are based on expectations of and adherence to a reasonable standard of care in complying with the Communications Act and Commission rules. In some cases, it suggests that forfeitures are

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[51] Press Release, Office of Commissioner Michael O'Rielly, Statement of Commissioner Michael O'Rielly on TerraCom/YourTel Settlement (July 9, 2015), https://docs.fcc.gov/public/attachments/DOC-334315A1.pdf (stating that the settlement "highlights the problem of making policy through enforcement actions" and noting that "[o]ther interested parties had no opportunity to comment . . . on the substance of the Commission's claims or legal theories").

[52] Problems with fair notice extend to the penalty context as well. The 11th Circuit recently vacated a Commission Forfeiture Order where the agency found that conduct was "egregious" and thus subject to upward adjustments despite failing to provide notice of this finding in the NAL. *Gray Television, Inc. v. FCC*, 30 F.4th 1201, 1223-24 (11th Cir. 2025).

[53] *AT&T Mobility*, *LLC*, Notice of Apparent Liability for Forfeiture and Order, 30 FCC Rcd 6613, 6643 (Statement of Commissioner Michael O'Rielly, dissenting).

[54] *Lyca Tel, LLC*, Forfeiture Order, 30 FCC Rcd 11792, 11801 (2015) (Statement of Commissioner Ajit Pai, dissenting).

[55] *Verizon LBS Forfeiture Order*, 39 FCC Rcd at 4304 (Statement of Commissioner Nathan Simington, dissenting).

connected to a lack of reasonable efforts to comply.[56] On other occasions, it appears that no matter how much effort a party has undertaken, any alleged noncompliance justifies a significant penalty.[57] As a result, regulated entities cannot determine how best to prioritize resources toward compliance.

Even where parties are *not* penalized, they are often robbed of certainty because the Commission typically does not provide notice that it has ended its investigation without taking action. Finality is critical to provide predictability and certainty to stakeholders and to avoid problems of stale evidence that can arise with undue delays. Elements of our justice system such as statutes of limitations and the Speedy Trial Clause of the Sixth Amendment reflect the importance of the certainty that flows from finality.

Further, the Commission's enforcement system does not provide sufficient accountability or oversight. The inability to obtain a jury trial before the Commission imposes a civil fine pursuant to a final Forfeiture Order cannot be reconciled with *Jarkesy*.[58] In other elements of the enforcement process, from LOIs to NALs to Consent Decrees, there is no opportunity for meaningful review whatsoever. Enforcement targets lack the ability to contest overbroad requests in LOIs or alleged violations that reflect novel interpretations of FCC rules. Lack of

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[56] *See, e.g.*, *Truphone, Inc.*, Notice of Apparent Liability for Forfeiture, 37 FCC Rcd 5393, 5402 ¶ 22 (2022) (stating that "Truphone violated the standard of care appropriate to seeking approval").

[57] *See, e.g.*, *AT&T LBS Forfeiture Order*, 39 FCC Rcd at 4258 (Statement of Commissioner Nathan Simington, dissenting) (criticizing the majority for "sending a strong market signal that any alleged violation of Commission rules regarding CPNI safekeeping (whether or not the rules actually were violated) can and will result in an outsize fine").

[58] *See Jarkesy*, 603 U.S. at 140; *see also AT&T*, 2025 WL 1135280, *10 ("No one denies the Commission's authority to enforce laws requiring telecommunications companies . . . to protect sensitive customer data. But the Commission must do so consistent with our Constitution's guarantees of an Article III decisionmaker and a jury trial.").

independent review allows the agency to avoid accountability and is particularly egregious given the agency's dual role as prosecutor and adjudicator.[59]

The Commission also has evaded accountability by punishing parties in other proceedings based on non-final actions such as NALs and investigations. In multiple instances, Commission staff have informally advised parties to a transaction that a license transfer cannot be approved due to a pending enforcement matter. This approach robs parties of the opportunity to contest the Commission's assertions prior to its reliance upon them. Section 504(c) of the Act precludes using NALs to the detriment of the subject entity, stating that:

> In any case where the Commission issues a notice of apparent liability looking toward the imposition of a forfeiture under this chapter, that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has become final.[60]

Yet the Commission has posited that it nonetheless could "use the facts underlying" an NAL against a party, even if it cannot "use the mere issuance" of the NAL.[61] This sophistry elides that an NAL contains only factual *allegations* that the subject entity has had no opportunity to contest, not adjudicated factual *findings*. Thus, the Commission's frequent practice of imposing consequences in transactions or new proceedings based only on NALs or investigations—or

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[59] *AT&T*, 2025 WL 1135280, *9 (explaining that in adopting a Forfeiture Order, the Commission "has already found the facts, interpreted the law, adjudged guilt, and levied punishment").

[60] 47 U.S.C. § 504(c).

[61] *Commission's Forfeiture Policy Statement & Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17103 ¶ 34 (1997). The Senate Report accompanying enactment of Section 504(c) confirmed that the Commission could only use a factual allegation in an NAL in another proceeding where the subject entity "has the right to cross-examine the witnesses introducing it, and the further right to offer evidence to rebut it." S. Rep. No. 86-1857, at 11 (1960).

based on the factual assertions it develops in those contexts—violates Section 504(c), as well as basic principles of accountability and due process.

Regardless of whether the Commission enforcement process leads to a proposed monetary penalty, responding to LOIs and engaging with enforcement processes is highly costly for subject entities. Responding can require, among other things, hiring counsel, maintaining and producing documents, and distracting internal employees from their primary tasks, such as planning deployments or serving customers. Providers also suffer reputational harm, even if the Commission merely issues an NAL or publicly announces an investigation but never reaches a finding of wrongdoing. Creating this sinkhole of time and money by applying unpredictable and inconsistent practices undermines a commitment to basic fairness and the rule of law.

C. What Can Be Done to Fix It: Enforcement Reform Should Incorporate Due Process Practices from Courts and Other Agencies.

As explained above, based on the *Jarkesy* decision and other precedent, the Commission may no longer impose fines or assess monetary forfeitures. But even beyond that, the Commission should act now to update its enforcement process to align more closely with fundamental principles of due process by embracing practices from the courts and from other federal agencies that promote fair notice, consistency, finality, and accountability.

The procedural rules used by federal courts can be instructive in many respects. The Federal Rules of Civil Procedure ("FRCP") are intended to "secure the just, speedy, and inexpensive determination" of a case.[62] Among other things, the FRCP provide guardrails to

[62] Fed. R. Civ. P. 1.

ensure against unwieldy and intrusive discovery and set consistent and clear timeframes for responses.[63]

The Commission also can look to other federal agencies for improved processes. For instance, the Commission should be required to place parties on notice of what violations are being investigated, which is the intent of the "Wells Notice" process used by the Securities and Exchange Commission ("SEC") and Commodity Futures Trading Commission ("CFTC").[64]

The Commission can promote accountability and expedient processes through mandated "meet and confers," such as those conducted by the Federal Trade Commission ("FTC"), which occur between agency staff and an enforcement target after the agency has sent a Civil Investigative Demand ("CID") seeking information, documentation, or other tangible things.[65] Importantly, the FTC also has formal challenge processes so that targets can petition the full Commission to modify or set aside CIDs issued by the staff.[66]

The Commission should also consider multiple agencies' processes for alerting targets that an investigation is over, thereby promoting transparency and finality. The SEC issues termination letters "at the earliest opportunity" after SEC enforcement staff have made the determination not to take enforcement action.[67] The FTC takes a different tack, relieving FTC

[63] *See* Fed. R. Civ. P. 30, 33.

[64] *See* 17 C.F.R. § 202.5(c); 17 C.F.R. pt. 11, app. A.

[65] *See* 16 C.F.R. § 2.7(k).

[66] 15 U.S.C. § 57b-1(f); 16 C.F.R. § 2.10; 12 CFR § 1080.6(e). Unlike in the FCC enforcement context, Congress granted the FTC statutory authority to enforce a CID in federal district court. 15 U.S.C. § 57b-1(e).

[67] *Enforcement Manual*, Securities and Exchange Commission Division of Enforcement, at 27 (Nov. 28, 2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf; *see also* 17 C.F.R. § 202.5(d).

enforcement targets from the obligation to preserve evidence after 12 months without contact from FTC staff. [68]

Further, to promote accountability, the Environmental Protection Agency ("EPA") separates its prosecution function from the judicial function through the use of an independent Environmental Appeals Board, which both hears appeals of initial decisions from lower agency officials and approves Consent Decrees negotiated between the EPA and enforcement targets.[69]

The Commission should adapt safeguards like these into its own processes, as discussed in detail below.

III. THE COMMISSION SHOULD ISSUE A RULEMAKING PROPOSING CLEAR-CUT STEPS TO ALIGN THE ENFORCEMENT PROCESS WITH PRINCIPLES OF DUE PROCESS.

The Commission should re-evaluate its entire approach to enforcement, from investigation, to NAL, to final penalty (barring a consent decree along the way), to ensure fair notice, consistency, and government accountability.

A. Codify a Prohibition Against Using Enforcement to Adopt New Interpretations or Requirements.

The Commission should establish through a codified rule that neither the Commission nor any Bureau will promulgate new interpretations of statutes and/or regulations, adopt new obligations, or issue sub-regulatory guidance through the enforcement process in NALs, Consent Decrees, Forfeiture Orders, or other enforcement decisions.

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[68] 16 C.F.R. § 2.14(c). The CFPB similarly maintains a rule requiring it to close investigative matters "[w]hen the facts disclosed by an investigation indicate that an enforcement action is not necessary or would not be in the public interest." 12 C.F.R. § 1080.11(b); *see also Policies and Procedures Manual*, Consumer Financial Protection Bureau Office of Enforcement, Version 3.2, at 95-97 (Feb. 2021), https://files.consumerfinance.gov/f/documents/cfpb_enforcement-policies-and-procedures-memo_version-3.2_2022-02.pdf).

[69] 40 C.F.R. § 22.4(a)(1).

The D.C. Circuit's ruling in *Trinity Broadcasting* requires the Commission to ensure that regulated entities are "able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform" before attempting to enforce such requirements.[70] Yet the Bureau "often uses Notices of Apparent Liability and Consent Decrees to create new duties or redefine substantive provisions of the Communications Act."[71] Codifying a rule prohibiting this practice would serve to underscore that enforcement penalties may be based only on existing requirements and interpretations that are "ascertainably certain."[72]

B. Overhaul the Investigative Process.

The FCC's current process for investigating potential violations suffers from a lack of fair notice, transparency, consistency, and accountability and leads to exploding costs for investigation targets. The Commission should reform the LOI process, as detailed below.

1. Adopt Clear and Dependable Guardrails for Letters of Inquiry.

The LOI process has ventured far beyond the modest mandate envisioned by the Communications Act, which merely provides a mechanism for the FCC to investigate alleged violations of the Act on its own motion, without waiting for complaint or petition.[73] Nowhere does the Act envision that the Commission would use LOIs as tools to extend the applicable statutes of limitations, extract behavioral conditions and penalties via consent decrees, or impose substantial and unpredictable costs on regulated parties without transparency or meaningful

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[70] *Trinity Broadcasting*, 211 F.3d at 628.

[71] Johnson White Paper at 11-12; *see also M.C. Dean, Inc.*, Notice of Apparent Liability for Forfeiture, 30 FCC Rcd 13010, 13033-34 (Statement of Commissioner Ajit Pai, dissenting) (criticizing the Commission for failing to provide notice of a legal obligation before taking an enforcement action and relying on two Bureau-level Consent Decrees as alleged notice).

[72] *See* 5 U.S.C. § 553.

[73] *See* 47 U.S.C. § 403.

judicial review. The Commission should adopt a comprehensive framework for LOIs that transforms them from a standardless black box into a tool for justified and evenhanded investigation, as Congress originally intended.

Investigations should be approved outside of the Enforcement Bureau before being initiated. Although a single LOI can cost an enforcement target significant time and resources to adequately respond, there is currently no process to prevent the Bureau from engaging in wide-ranging investigatory fishing expeditions in the first instance. Therefore, to avoid overzealous investigations, the Chair of the Commission should designate a specific senior official outside the Bureau to review and approve all LOIs before they are issued. The senior official should be required to evaluate whether the burdens of the LOI are justified with reference to factors such as the gravity of the suspected violation and whether the enforcement target exercised an appropriate standard of care despite the suspected violation. This oversight process has parallels to the CID process at the FTC.[74]

Parties are entitled to know why they are being investigated. The Commission should establish by rule that each LOI must clearly describe the alleged underlying misconduct and specifically state which statutory provision or rule the staff believe may have been violated. The Enforcement Overview merely says that an LOI "will typically" identify the potential violations and provide a brief summary of the factual and legal background of the investigation.[75] But not all LOIs include this information. The Commission therefore should codify a procedure that requires the Bureau to inform enforcement targets of the factual and legal predicate for an investigation. To allow parties to provide a full response, LOIs should be tethered to specific

[74] *See* 16 C.F.R. § 2.7(a).

[75] Enforcement Overview at 8.

conduct and include information describing the alleged violations being investigated, the relevant law, the evidence that led the agency to issue the LOI, and a detailed itemization of the potential penalties if it finds the party liable. The agency should make clear that an order of the full Commission (or an ALJ) articulating the attendant exceptional circumstances is necessary before the Bureau can depart from this process. By providing notice of allegations at the LOI phase, the Commission would give enforcement targets the ability to prepare defenses and (if applicable) promptly remedy any noncompliance, rather than ambushing them with unforeseen allegations in an NAL.

Discovery practices must be subject to reasonable constraints. While the FRCP constrain the extent of civil discovery, Bureau discovery through LOIs is unconstrained. For instance, FRCP 33 limits a party to no more than 25 written interrogatories, including all discrete subparts, unless stipulated or ordered otherwise.[76] Commission LOIs, by contrast, often include multiples of that number of questions. The Commission should follow the FRCP and establish 25 questions and/or requests for information as the presumptive limit for LOIs. As is the case with the FRCP, question subparts would be permissible, but count towards the 25-question limitation. If the Bureau wishes to exceed this limit, it should be required to make a showing and obtain approval from the discovery ombudsman official discussed below. That showing must demonstrate that additional questions are necessary in proportion to the needs of the case, considering the importance of the issues at stake in the action, the possible penalty at issue, the target's relative access to relevant information, its resources, the importance of the information in resolving the issues, and whether the burden or expense outweighs the likely benefit.[77]

[76] Fed. R. Civ. P. 33.

[77] Fed. R. Civ. P. 26(b)(1), 33(a)(1).

Realistic and standardized LOI response times are needed. The Commission should standardize the response deadlines for LOIs and follow-up letters in a way that accounts for the complexity of the response. For many years, a 30-day response date was typical and parties often negotiated longer periods when 30 days was clearly insufficient to respond to a request. In recent years, the Bureau has often insisted on shorter turnarounds regardless of the breadth of the LOI, and has refused to negotiate for additional time even when posing complex and numerous questions. The FRCP generally call for a 30-day response period for interrogatories,[78] which in most cases does not begin until after the defendant has received and responded to the complaint and had an opportunity to investigate the claims against it. The Commission should establish by rule a presumptive deadline of no fewer than 30 days for LOIs with the standard number of 25 questions and/or requests or fewer, and a presumptive deadline of at least 60 days for LOIs with additional questions with the ability to extend these deadlines for good cause shown. Standardized deadlines would let parties know what to expect and would require the Bureau to justify shorter deadlines in particular cases and allow more time for an LOI with additional questions.

Requests for information and documents must be relevant to the subject matter of the inquiry. The Commission should also codify a rule that requires the Bureau to limit interrogatories and document requests in LOIs to only those areas that are directly related to the subject matter of the inquiry. As detailed herein, the LOI response process is already burdensome and time consuming for LOI recipients. The Bureau should not have the discretion to engage in overbroad inquiries any time that an LOI is issued.

[78] Fed. R. Civ. P. 30(b)(2).

Reasonable extensions for LOI responses should be granted upon request. The Commission should recognize that some LOIs will nevertheless require more than the standard amount of time to respond. Today, the Bureau sometimes grants extensions to respond, but there is no standard or consistency regarding such decisions. The Commission should adopt a rule requiring the Bureau to grant an extension for a response deadline where a reasonable request is made and good cause is shown.

Any tolling agreement requested in exchange for an extension of an LOI response date must be limited to the length of the extension. The Bureau routinely requires parties to sign tolling agreements in exchange for extending the response time for an LOI, even if the original response time could not reasonably be met. The Enforcement Overview states that when the Bureau enters into tolling agreements, "[t]o avoid creating backlogs and unnecessary delays, the tolling period should be *as short as possible* under the specific circumstances of an individual case."[79] Yet experience shows that many LOI extensions are granted with two-for-one tolling (two days of tolling for each day of extension), and some even with three-for-one tolling. Anything beyond one-for-one tolling reflects the unequal power of the Commission and discourages prompt discharge of government duties during an investigation. The Commission should codify a maximum one-for-one tolling period.

The Commission should promptly share evidence with the party under investigation. The Commission should promptly turn over all evidence in its possession to the party subject to investigation, whether turning over that evidence helps or hurts the party in question.[80] The

[79] Enforcement Overview at 23 (emphasis added).

[80] In doing so, the Bureau would necessarily need to protect any confidentiality concerns by, for instance, ensuring that sensitive data in the Commission's possession is not turned over to a competitor.

Commission's investigatory role is prosecutorial in nature, and prosecutors have this same duty as a matter of both criminal procedure and constitutional law.[81] Evidence that the Commission must turn over would include things such as third-party complaints or allegations, any responses to third-party inquiries, and Universal Service Administrative Company Reports. Today, a party may learn about third-party evidence only if the Commission refers to it in an NAL, meaning they typically only have the 30-day NAL response time in which to conduct a responsive investigation and provide responsive facts and arguments.[82] This simply is not enough, especially given that the Commission may have been able to evaluate the evidence for months or longer. Providing this information promotes fair notice and consistency.

Parties should know when an investigation has been closed. Last, to promote finality and certainty in the enforcement process, the Commission should adopt a rule that requires the Bureau to issue non-public closing letters to LOI recipients. The Enforcement Overview states that as a general matter, the Bureau closes a case "by making a notation in its records *without notifying the target*."[83] The Bureau notes that "[t]here *may* be circumstances, however, where the Bureau *may* notify the target."[84] In reality, notification is rare. The specter of possible enforcement action hanging over a company is fundamentally inconsistent with finality and accountability. Prompt issuance of closing letters would mirror the approach of agencies such as the SEC.[85]

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[81] *See* Fed. R. Crim. P. 16(a); *Brady v. Maryland*, 373 U.S. 83 (1963); *see also, e.g.*, Cal. Penal Code § 1054.1(e); N.Y. Crim. Proc. Law § 245.20(1)(k).

[82] *See* 47 C.F.R. § 1.80(g)(3).

[83] Enforcement Overview at 10 (emphasis added).

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

[85] *See* 17 C.F.R. § 202.5(d); *see also* 12 C.F.R. § 1080.11(b) (CFPB to issue closing letters).

2. Establish a Backstop for Independent Review of Letters of Inquiry.

The lack of any independent oversight of the investigative process, or any meaningful opportunity to challenge the substance or deadlines associated with LOIs, leads to a lack of consistency and accountability. The Commission needs a mechanism for independent review of LOIs and disputes regarding them.[86] Enforcement targets must have a right to object to LOI questions on grounds such as relevance, vagueness, and burden, using the FRCP as a guide, and to object to unreasonable deadlines. For example, targets should be able to object to (1) LOIs that did not conform to the new proposed rule requiring that requests be relevant to the subject matter of the inquiry, (2) the Bureau's failure to grant a reasonable request for an extension, or (3) an allegation in the LOI that is based on a novel interpretation of a rule.

As previously noted, other agencies are subject to internal or external oversight of their investigative processes. CIDs issued by FTC staff can be challenged to the full FTC.[87] Further, the FTC must file in federal court to enforce a CID.[88] The Commission's procedures should allow for similar review of investigative processes.

The Commission should designate an existing agency official (or officials) in an ombudsman-like role over Bureau "discovery" practices. The Commission should then create a detailed process for handling objections. For example, it should require objections to be served in a timely fashion on the Bureau. If the Bureau and the party do not reach agreement through a "meet and confer"-like process such as the FTC's,[89] the enforcement target could elect to seek

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[86] *See Jarkesy*, 603 U.S. at 142 (Gorsuch, J., concurring).

[87] *See* 15 U.S.C. § 57b-1(f); 16 C.F.R. § 2.10.

[88] 15 U.S.C. § 57b-1(e).

[89] *See* 16 C.F.R. § 2.7(k).

review of the objections before the ombudsman. The ombudsman should take into account the reasonable constraint factors identified for the discovery process discussed above, as well as estimated cost of compliance, number of requests, deadline for response, and objective metrics defining the scope of requests (such as timeframe of materials sought). Either party should be permitted to appeal ombudsman decisions to the full Commission, and the Commission should state that it will evaluate the same factors the ombudsman must consider, with its adherence to those factors reviewable in court on appeal. LOI response deadlines would be tolled during the pendency of any appeals to the ombudsman or Commission.

C. Where a Penalty is Warranted, Act Promptly and Disclose the Penalty's Basis Clearly.

The Commission should take key steps to make Forfeiture Orders and the NAL process leading up to them fair, predictable, and consistent. First, the Commission should codify a process that enables NAL recipients to provide an initial response to a draft NAL before the final NAL becomes public. Doing so would (1) treat NAL recipients fairly, as they should have the benefit of responding to the Commission's accusations, asserted facts, and legal arguments before suffering the reputational harm of an NAL, and (2) benefit the Commission by ensuring that its factual findings have been subject to review for accuracy before becoming public.

In addition, the Commission should require each NAL and Forfeiture Order to state whether and to what degree, in the agency's view, the subject entity engaged in intentional wrongdoing or failed to exercise a reasonable duty of care. The Commission should make clear that it will pursue penalties based only on intentional wrongdoing or failure to exercise reasonable care. This approach would remedy the practice of penalizing parties for violations they could not reasonably prevent.

Further, the Commission should codify a deadline for acting on NALs, making clear that an NAL will expire if the Commission has not issued a Forfeiture Order to resolve it within a reasonable time.

Next, the Commission should require all NALs and Forfeiture Orders to provide itemized penalties with a list of each apparent rule violation accompanied by the specific proposed penalty for each violation. The Commission showing its work in this manner will shine a light on how proposed penalties are calculated and, in the case of NALs, facilitate more informed responses. Section 503 instructs the Commission to consider factors including "the nature, circumstances, extent and gravity of the violations," the degree of culpability of the violator, "and such other matters as justice may require" in determining forfeiture amounts.[90] The Commission should adopt clear, objective standards and quantitative guidelines delineating how it will apply these factors to improve predictability and consistency in enforcement actions and ensure it is providing the requisite "fulsome" explanation for the penalty and not "'merely parrot[ing] the language of the statute'" or advancing "threadbare assertions."[91]

Finally, to promote consistency and demonstrate accountability to courts, the Commission should codify that a violation is not "continuing" merely because it has continuing effects, consistent with prior judicial determinations. The Communications Act and Commission rules establish forfeiture amounts for "any single act or failure to act" and allow for higher forfeitures for "continuing violations."[92] The Commission has sometimes asserted that a

[90] 47 U.S.C. § 503(b)(2)(E); *see also* 47 C.F.R. § 1.80(b)(11).

[91] *Gray Television*, 130 F.4th at 1224.

[92] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(b). Whether a violation is "continuing" also affects the application of the statute of limitations. *See* 47 U.S.C. § 503(b)(6).

violation was ongoing because it had continuing effects, a view that is in conflict with judicial precedents finding that the ongoing effects of a violation *do not* create a continuing violation.[93] Instead, the Commission should confirm that a violation is continuing only if the violation itself continues (and not merely its effects). In addition, the Commission should make clear that something may constitute either a single violation or multiple violations but not both at the same time. The Commission should not be able to doublespeak its way into both longer deadlines and bigger fines by claiming that the same set of actions constitutes a *single* continuing violation for purposes of evaluating the statute of limitations and *multiple* violations for purposes of calculating the forfeiture.

Furthermore, the Commission should exercise its discretion to make clear that it will treat a violation as no longer "continuing" once an entity has discovered and begins taking steps to remediate the violation, even if the violation may technically persist while the entity is in the process of remedying it.

D. Bar Misuse of Enforcement Actions in Other Proceedings.

Beyond making changes *within* its enforcement procedures, the Commission should adopt safeguards against inappropriate use of enforcement actions or investigations in *other* proceedings and contexts.

NALs are not precedent. The Commission should codify the principle that an NAL may not serve as precedent, as an NAL does not constitute a final agency action and is instead merely

[93] *See, e.g.*, *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977) (finding that when evaluating a continuing violation, "the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists"); *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980); *Moseke v. Miller and Smith, Inc.*, 202 F. Supp. 2d 492, 507 (E.D. Va. 2002) (holding that "it is clear that the continuing effects of a previous discriminatory act do not constitute a continuing violation").

a preliminary "charging document."[94] This rule would conform with the Administrative Procedure Act and reenforce Section 504(c)'s bar on the use of NALs to the prejudice of the subject entity.[95]

Pending enforcement matters should not delay other Commission approvals. The Commission should confirm by rule that pending enforcement matters may not serve as a basis for delaying or not approving license or authorization applications and/or renewals, including transactions. Delaying application review is a form of punishment and therefore should not be imposed in the absence of a final order determining that a party has violated the law. Holding an NAL against a party to a transaction or renewal violates Section 504(c).[96] And because consideration of an NAL is "off limits," consideration of the antecedent investigation should be too.

Terminated investigations are not proof of wrongdoing. The Commission should codify a rule prohibiting the Bureau from considering prior investigations of a target that ended in no final enforcement action in subsequent investigations and enforcement proceedings of that target. Enforcement targets should not be treated as if they have done something wrong where there has been no finding of wrongdoing. And again, this prohibition on punishing a party based on a mere investigation follows from Section 504(c)'s ban on using an NAL to the prejudice of the subject entity.

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[94] Enforcement Overview at 15. A Forfeiture Order is not required in the instances where a party pays the proposed forfeiture penalty in the NAL in full. 47 C.F.R. § 1.80(g)(4).

[95] 47 U.S.C. § 504(c).

[96] *Id.*

Consent decrees are limited by their express terms. The Commission should codify a rule barring reliance on a Consent Decree to establish precedent of past wrongdoing or to establish a specific factual or legal conclusion. A Consent Decree is a settlement, and the Commission should not treat its counterparty as having agreed to something it did not. Moreover, by its nature, a Consent Decree does not involve any adjudication of matters in dispute. Accordingly, relying on facts or conclusions not agreed to violates fundamental due process principles.

E. Establish Enforcement Bureau Metrics to Facilitate Ongoing Accountability.

The Commission should require transparency that can help ensure that its enforcement operations align with key due process values on an ongoing basis. Specifically, the Commission should codify Bureau performance reporting requirements that are aligned with the Government Performance and Results Act ("GPRA"), as enhanced by the GPRA Modernization Act of 2010, which require agencies to "develop objective, measurable, and quantifiable performance goals and related measures and to report progress in performance reports in order to promote public and congressional oversight as well as improve agency program performance."[97] These reporting requirements should clearly define intended program outcomes and establish measures that are concrete, observable conditions that clearly allow the Commission to assess, track, and show the progress being made.

The Commission developed enforcement-related quantifiable goals and related measures during Chairman Pai's tenure following a 2017 GAO Report, which recommended their adoption

[97] United States Government Accountability Office, GAO-17-727, Telecommunications: FCC Updated its Enforcement Program, but Improved Transparency Is Needed (2017), at 14 (Sept. 2017) https://www.gao.gov/assets/gao-17-727.pdf (2017 GAO Report); 31 U.S.C. § 1115(b).

along with the development of a communications strategy for external stakeholders outlining the agency's enforcement program.[98] For example, for fiscal year 2019, the Commission set a goal to investigate allegations of spectrum interference and take appropriate enforcement action on 95 percent of apparent rules violations within one year.[99] However, in recent years the Commission has not reported any identifiable enforcement performance indicators, reverting back to its pre-GAO Report practice of merely describing enforcement actions taken against companies,[100] a practice that the GAO specifically found to be insufficient to satisfy legal requirements and inconsistent with other similarly situated agencies such as the SEC, FTC, and CFTC.[101] As a result, once again "Congress does not have information needed to fulfill its oversight role, and industry and consumers lack information that would provide transparency regarding [the] FCC's enforcement priorities."[102]

To ensure that the Commission retains consistent and proportional enforcement practices over time that promote accountability and finality, and consistent with GAO direction, the Commission should codify Bureau performance reporting requirements that, at a minimum, include information regarding: (1) lengths of investigations; (2) times to close investigations and enforcement actions; (3) the volume of open proceedings (including open LOIs and NALs); and (4) consistency and use of close-out letters. Importantly, the Commission should *not* adopt the dollar value of NALs or final enforcement actions as a performance reporting metric, as doing so

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[98] 2017 GAO Report at 27-28.

[99] *Fiscal Year 2019: Budget Estimates to Congress*, Federal Communications Commission, at 68-69 (2019), https://docs.fcc.gov/public/attachments/DOC-349145A1.pdf.

[100] *See* FCC 2024 Annual Performance Report at 19-21, 23-27.

[101] 2017 GAO Report at 14, 16.

[102] *Id.* at 27.

would perversely encourage seeking maximum penalties regardless of whether they are warranted.

IV. CONCLUSION.

For the reasons set forth above, Petitioners urge the Commission to act promptly to initiate a rulemaking proceeding to reform the agency's enforcement rules and process.

Respectfully submitted,

/s/ *Umair Javed*

Umair Javed
Scott K. Bergmann
Mike Beirne
CTIA – The Wireless Association®
1400 Sixteenth Street, NW
Washington, DC 20036
(202) 736-3200
www.ctia.org

/s/ *Russell Hanser*

Russell Hanser
Loretta Polk
NCTA – The Internet & Television Association
25 Massachusetts Avenue, NW
Washington, DC 20001
(202) 222-2300
www.ncta.com

/s/ *Angela Simpson*

Angela Simpson
Alexandra Mays
Competitive Carriers Association
601 New Jersey Avenue, NW, Suite 820
Washington, DC 20001
(202) 747-0711
www.ccamobile.org

/s/ *Nirali Patel*

Nirali Patel
USTelecom – The Broadband Association
601 New Jersey Avenue, NW, Suite 600
Washington, DC 20001
(202) 326-7300
www.ustelecom.org

/s/ *Mike Saperstein*

Mike Saperstein
Stephen Keegan
WIA – The Wireless Infrastructure Association
2111 Wilson Blvd., Suite 210
Arlington, VA 22201
(703) 739-0300
www.wia.org

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APPENDIX

ABOUT THE PETITIONERS

CTIA – The Wireless Association® ("CTIA") (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless providers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. CTIA represents a broad diversity of stakeholders, and the specific positions outlined in these comments may not reflect the views of all individual members. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

Competitive Carriers Association ("CCA") (www.ccamobile.org) is the nation's leading association for competitive providers and stakeholders across the United States. Members range from small, rural carriers serving fewer than 5,000 customers to regional and nationwide providers serving millions of customers, as well as vendors and suppliers that provide products and services throughout the communications ecosystem.

NCTA – The Internet & Television Association ("NCTA") (www.ncta.com) is the principal trade association of the cable industry in the United States, which is a leading provider of residential broadband service to U.S. households. Its members include owners and operators of cable systems serving more than 80 percent of the nation's cable television customers, as well as more than 200 video program networks and services. Cable service providers have invested more than $335 billion over the last two decades to deploy and continually upgrade networks and other infrastructure – including building some of the nation's largest Wi-Fi networks.

USTelecom – The Broadband Association ("USTelecom") (www.ustelecom.org) is the premier trade association representing service providers and suppliers for the communications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks. Its broad membership ranges from international publicly traded corporations to local and regional companies and cooperatives, serving consumers and businesses across the country.

WIA – The Wireless Infrastructure Association (www.wia.org) represents the businesses that build, develop, own, and operate the nation's wireless infrastructure. Members include infrastructure providers, wireless carriers, and professional services firms that are responsible for telecommunications facilities around the globe.