

**DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *BellSouth Telecommunications, LLC, d/b/a AT&T Southeast*, File No. EB-IHD-14-00017954.

FCC rules state that an E-Rate provider “shall not . . . charge schools . . . a price above the lowest corresponding price for supported services,”¹ meaning a provider may not charge schools more than “the lowest price [the] service provider charges to non-residential customers who are similarly situated to a particular school . . . for similar services.”² I agree with my colleagues that AT&T may have violated that rule in Florida. But the Enforcement Bureau’s handling of the investigation has fatally compromised our ability to impose a lawful forfeiture upon the carrier.

Here’s the problem: We have issued this *Notice of Apparent Liability (NAL)* too late. The Communications Act imposes a one-year statute of limitations.³ Like most other statutes of limitations,⁴ it runs from when a violation is complete—in this case, when AT&T “charge[d]” Dixie County and Orange County “a price above the lowest corresponding price.” According to our records, AT&T last charged Dixie County for the relevant services on July 1, 2014, and Orange County for the relevant services on June 1, 2015.⁵ And the last relevant form AT&T filed in conjunction with these charges was October 27, 2014.⁶ So even in the best-case scenario, the statute of limitations ran out 56 days ago, on June 1, 2016.⁷

That’s a shame because the Enforcement Bureau became aware of AT&T’s conduct two full years ago,⁸ just as the statute of limitations was beginning to run and long before it expired. That means we could have imposed a lawful forfeiture had we acted with alacrity (or even a modicum of urgency).

In contrast, the *NAL* claims that these “violations are continuing because the forms have not been corrected and AT&T has retained the excessive reimbursements.”⁹ That cannot be right. As I have written before, this theory “stretches the concept of a continuing violation past the breaking point. For example, under this theory, the statute of limitations for theft would begin to run not when an item is stolen or even when it is discovered that an item has been stolen, but rather when that item is returned to its rightful owner. Needless to say, that is not the law and neither do I believe that a court would find our

¹ 47 C.F.R. § 54.511(b).

² 47 C.F.R. § 54.500(f).

³ Communications Act § 503(b)(6)(B).

⁴ See *Gabelli v. S.E.C.*, 133 S. Ct. 1216, 1220 (2013) (“Thus the ‘standard rule’ is that a claim accrues ‘when the plaintiff has a complete and present cause of action.’”).

⁵ See USAC Report “Request 110615.xlsx” dated November 12, 2015 (on file in EB-IHD-14-00017954).

⁶ See AT&T LOI Response at ATT017174–ATT017184, ATT017189–ATT017199, ATT001272–ATT001273, ATT001292–ATT001293, & ATT001312–ATT001313.

⁷ What is more, even if this action had been brought by June 1, 2016, the proposed forfeiture would necessarily be minimal since the total amount AT&T apparently charged Orange County that month was only \$37.50—and indeed, AT&T has not apparently charged Orange County more than \$37.50 per month for the relevant services since October 1, 2014. See USAC Report “Request 110615.xlsx” dated November 12, 2015 (on file in EB-IHD-14-00017954).

⁸ See *NAL* at para. 27 (“In July 2014, the Bureau received a referral on the issue from USAC.”).

⁹ See *Notice* at para. 67.

reasoning in today's item to be persuasive."¹⁰

One last point. Under the *NAL*'s theory, the FCC could pursue potential rule violations dating back to 2012—or even back to 1996—but instead “exercis[es] its discretion to limit the forfeiture determination only to overcharges in the most recent funding year.”¹¹ Now, I don't agree with this theory. But if I did believe that these claims were not time-barred, I would not endorse this exercise of discretion. If the Commission can impose lawful forfeitures on a company in this situation, then we should; the *NAL* does not explain, and I cannot think of, any non-legal reason to excuse a service provider that overcharges schools.

For all these reasons, I dissent.

¹⁰ *Intelsat License LLC f/k/a Intelsat North America, LLC*, File No. EB-11-IH-1376; NAL/Acct. No. 201432080001; FRN 0009308008, Notice of Apparent Liability, 28 FCC Rcd 17183, 17194 (2013) (Statement of Commissioner Ajit Pai, Dissenting).

¹¹ See *Notice* at para. 68.