

FCC Flexes Muscle: T-Mobile to Pay \$48 Million for Failing to Disclose Limits on ‘Unlimited’ Data

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Showing that it's not about to slow down its aggressive enforcement of its open Internet regulations, the Federal Communications Commission (FCC) announced a [settlement](#) yesterday resolving claims that T-Mobile USA Inc. (T-Mobile) failed to adequately disclose material restrictions on T-Mobile and MetroPCS data plans that were advertised as “unlimited” from August 2014 to June 2015. Specifically, the FCC’s investigation found that T-Mobile failed to adequately disclose that it would significantly slow the speed of its customers’ “unlimited” data after they reached preset, undisclosed thresholds for data usage.

The FCC’s settlement requires T-Mobile to pay a total of \$48 million. It further requires T-Mobile to clearly and conspicuously disclose any material limitations on the amount and speed of mobile data for its “unlimited” plans, and includes reporting and training obligations.

Facts and Law Underlying Liability

According to the FCC, T-Mobile advertised “unlimited” mobile data service without adequately disclosing that during times of high network usage characterized as “contention”—defined as network stress that does not rise to the level of “congestion” (*i.e.*, where Internet access begins failing altogether)—an algorithm would limit the data speed of its customers who had used more than a certain, preset amount of data. Customers whose data was de-prioritized or throttled by T-Mobile experienced network speeds even slower than other users connected to the same cell site. T-Mobile received hundreds of complaints from consumers whose data service was affected by these throttling practices. In considering whether T-Mobile violated the FCC’s *2010 Open Internet Order*, the FCC pointed to the Transparency Rule that requires Internet service providers (“ISPs”) to publicly disclose accurate information about the technical and financial terms under which they offer

services. The purpose of this rule is to enable consumers to make informed choices about which services to buy and how to use them. While ISPs may be permitted to implement data management practices (*e.g.*, throttling) to address network congestion, the Transparency Rule requires that ISPs provide specific information related to their practices such as the types of traffic subject to practices; purposes served by practices; practices' effects on end users' experience; criteria used in practices, and the typical frequency of congestion usage limits and the consequences of exceeding them. At a minimum, ISPs must prominently display or provide links to these disclosures "on a publicly available, easily accessible website that is available to current and prospective end users."

In addition to requiring the disclosure of information related to data management practices, the [FCC's 2015 Open Internet Order](#) made clear that the Transparency Rule requires an ISP's advertising to be accurate and consistent with its disclosed practices. As noted by the FCC, "a provider making an inaccurate assertion about its service performance in an advertisement, where the description is most likely seen by consumers, could not defend itself against a Transparency Rule violation by pointing to an 'accurate' official disclosure in some other public place." "Allowing such defenses," according to the FCC, "would undermine the core purpose of the Transparency Rule." In its investigation as to whether T-Mobile violated the Transparency Rule, the FCC determined that several necessary disclosures were missing in T-Mobile's advertising. Specifically, the FCC determined that from August 2014 until June 12, 2015, T-Mobile's disclosures did not inform consumers of (i) the specific data threshold that triggered the de-prioritization; (ii) how application of the de-prioritization could impact consumers' ability to use data services; (iii) the specific speed reductions that consumers could face; and (iv) the types of apps and data services that could be adversely affected.

Terms of the Consent Decree

Under the terms of the settlement, T-Mobile has agreed to pay a total of at least \$48 million and to adhere to certain conduct provisions. Key terms of the monetary payment include:

- **Civil Penalties:** T-Mobile will pay a \$7.5 million civil penalty to the FCC.
- **Consumer Benefits:** T-Mobile will spend up to \$35 million in consumer benefits, including (i) giving a discount of 20%, up to \$20, on the price of any in-stock accessory to certain customers with "unlimited" data plans and (ii) giving a 4 GB upgrade to "unlimited" plan customers who subscribe to a mobile data service line under the T-Mobile or MetroPCS brands.
- **Broadband Service and Devices to Schools:** T-Mobile will spend at least \$5 million in providing mobile broadband service and devices to students at low-income schools. To the extent that the \$35 million in consumer benefits is not spent, the unspent money will be added to the \$5 million in broadband service and devices to schools.

Key terms of the conduct provisions of the consent decree include:

- **Update Disclosures:** T-Mobile will update its disclosures to clearly explain how the "Top 3 Percent Policy" works and the impact it has on consumer data speeds.
- **Unlimited Clarification:** If T-Mobile continues to advertise data service as "unlimited," it must clearly and conspicuously disclose all material restrictions (including its "Top 3 Percent Policy") on the amount and speed of mobile data.
- **Notice:** T-Mobile must notify consumers when they are approaching the threshold before the "Top 3 Percent Policy" goes into effect.

- **Consumer Broadband Label:** T-Mobile must adopt the FCC's "Consumer Broadband Label" in conjunction with its other Open Internet disclosures within 90 days.

T-Mobile also must appoint a compliance officer and submit semiannual compliance reports to the Commission for the next four years.

Observations:

This latest FCC enforcement action demonstrates the agency's continuing commitment to aggressive and high profile enforcement in the consumer protection arena. Last June, the FCC [proposed to fine](#) AT&T \$100 million for similar conduct related to unlimited data plans. Further, the FCC recently released guidance on complying with the Transparency Rule (raising [challenges](#) from industry) and consumer-facing broadband disclosures. The FCC also continues to examine the permissibility of sponsored data plans under its open Internet rules.

In the wake of the [FCC's 2015 Open Internet Order](#), which reclassified broadband services as common carrier services (taking those services outside the scope of the FTC's jurisdiction), and the [Ninth Circuit's recent decision in FTC v. AT&T, which found that the common carrier exception to the FTC's jurisdiction is status based rather than activity based \(eliminating the FTC's jurisdiction over ISPs\)](#), the FCC's role as a consumer protection watchdog is likely to continue to grow.

As a result, broadband providers should reexamine their network management practices, advertising, and transparency statements to ensure compliance with FCC rules and guidance.

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