Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of
Forfeiture Methodology for Violations of Rules Governing Payment to Certain Federal Programs

PETITION FOR RECONSIDERATION

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SUMMARY

The Policy Statement adopts a new treble damages formula for calculating forfeitures for telecommunications service providers’ failure: (1) to timely pay their assessments for the federal Universal Service Fund (“USF”), Telecommunications Relay Service (“TRS”) Fund, local number portability (“LNP”), North American Numbering Plan (“NANP”), and regulatory fee programs; and (2) to file data required to assess payment obligations for these programs. The Commission makes clear that it intends to apply this new formula in all future enforcement proceedings. While the goals of transparency and clarity in forfeiture standards reflected in the Policy Statement are laudable, the Policy Statement is a substantive rule that must be promulgated with notice and comment under the Administrative Procedure Act (“APA”), 5 U.S.C. § 553. Because the Commission did not use notice and comment procedures in promulgating the Policy Statement, the Policy Statement is invalid and must be vacated, just as the D.C. Circuit set aside Commission’s 1991 forfeiture policy statement for lack of notice and comment.

In any event, and as a matter of substance, the Policy Statement’s new treble damages methodology is arbitrary and capricious. It is a results-oriented effort by the Commission to drive the relevant forfeiture amounts as high as possible. In doing so, however, the Commission improperly abandons the flexible approach to setting forfeitures mandated by section 503(b) of the Communications Act. Instead, the Commission appears intent on applying a one-size fits all treble damages approach to each and every potential violation, leading to potentially draconian results.

As a final matter, the Commission’s assertion that such payment and reporting violations are continuing violations for purposes of the statutory maximum forfeiture amounts is fundamentally inconsistent with the one-year statute of limitations in section 503(b)(6) of the Act. Indeed, the Commission’s theory of continuing violation appears to expose telecommunications service providers to potential forfeiture liability in perpetuity. There would never be “repose,” no claims ever would be “stale,” and the Commission could selectively prosecute potential violations at any time it saw fit.

For these reasons, the Commission should set aside the Policy Statement. Further, and for the reasons set forth in the accompanying Petition for Stay, the Commission should stay the Policy Statement pending action on this Petition for Reconsideration.
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PETITION FOR RECONSIDERATION

CTIA – The Wireless Association®, National Cable & Telecommunications Association, United States Telecom Association, and COMPTEL (collectively, the “Associations”)1 hereby petition for reconsideration of the above-captioned Policy Statement.2 The goals of transparency and clarity in forfeiture standards reflected in the Policy Statement are laudable. But the Policy Statement goes astray both on process and the merits.

The Policy Statement’s inflexible treble damages base forfeiture constitutes a substantive rule that requires notice and comment under the Administrative Procedure Act (“APA”), 5 U.S.C. § 553(b). The Commission did not follow these procedures and the Policy Statement must be vacated, just as the D.C. Circuit set aside the Commission’s original 1991 forfeiture policy statement for lack of notice and comment.3 As a matter of substance, the Policy

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1 The Associations are trade associations whose members include telecommunications service providers obligated to pay assessments for federal the Universal Service Fund, Telecommunications Relay Service Fund, local number portability, North American Numbering Plan, and regulatory fee programs, and to file data required to assess payment obligations for these programs.

2 Forfeiture Methodology for Violations of Rules Governing Payment to Certain Federal Programs, Policy Statement, FCC 15-15 (rel. Feb. 3, 2015) (the “Policy Statement”). This Petition is timely under 47 C.F.R. 1.4. The Petition was due March 5, 2015, 30 days after the Commission released the Policy Statement. See 47 U.S.C. § 405(a); 47 C.F.R. § 1.4(b)(2). The federal government, however, was closed on that day due to inclement weather. The Associations, therefore, are filing the Petition on the next business day, March 6, 2015. See 47 C.F.R. § 1.4(j).

3 See United States Telephone Ass’n v. FCC, 28 F.3d 1232 (D.C. Cir. 1994) ("USTelecom").
Statement's new treble damages methodology is an arbitrary and capricious effort by the Commission simply to drive forfeiture amounts for payment and reporting violations in connection with certain federal regulatory programs as high as possible. Apparently for the same reason, the Commission incorrectly asserts that such payment and reporting violations are continuing violations for purposes of the one-year statute of limitations.

For these reasons, the Commission should vacate its Policy Statement. Further, and concurrently with this Petition for Reconsideration, the Associations are seeking a stay of the Policy Statement pending Commission action on this Petition for Reconsideration.

I. THE POLICY STATEMENT VIOLATES THE NOTICE AND COMMENT REQUIREMENTS OF THE APA AND SHOULD BE SET ASIDE.

The Commission uses the Policy Statement to establish a treble damages formula for calculating forfeitures for telecommunications service providers’ failure: (1) to timely pay their assessments for the federal Universal Service Fund (“USF”), Telecommunications Relay Service (“TRS”) Fund, local number portability (“LNP”), North American Numbering Plan (“NANP”), and regulatory fee programs; and (2) to file data required to assess payment obligations for these programs.\(^4\) The Commission makes clear that this new formula replaces its existing methodologies for calculating forfeitures for violations of USF and other programs in all future enforcement proceedings.\(^5\) The Commission did not use APA notice and comment procedures\(^6\) in adopting the Policy Statement.

The APA requires that before an agency promulgates, modifies, or revokes a substantive rule, it must publish a notice of the proposed rule and provide interested persons an opportunity

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\(^4\) Policy Statement ¶¶ 1-2.

\(^5\) Id. ¶ 2.

\(^6\) See 5 U.S.C. § 553(b).
to comment.\textsuperscript{7} Substantive rules adopted in violation of these requirements are invalid and must be set aside.\textsuperscript{8} While "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" are exempt from the notice and comment requirements,\textsuperscript{9} it is well-settled that an agency may not escape the notice and comment requirements merely by labeling a document as policy statement.\textsuperscript{10} Rather, the question of whether a given agency action is a substantive rule change subject to notice and comment or an exempt policy statement turns on whether the agency intends to bind itself to a particular legal position; a policy statement, unlike a substantive rule, must ""genuinely leave[] the agency . . . free to exercise discretion.""\textsuperscript{11}

The D.C. Circuit has encapsulated this distinction as follows:

"If a document expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect, the agency may not rely upon the statutory exemption for policy statements but must observe the APA’s legislative rulemaking procedures."\textsuperscript{12}

\begin{itemize}
  \item \textsuperscript{7} Id. § 553(b).
  \item \textsuperscript{8} See \textit{USTelecom}, 28 F.3d at 1236.
  \item \textsuperscript{9} 5 U.S.C. § 533(b)(A).
  \item \textsuperscript{10} See, e.g., \textit{Appalachian Power Co. v. EPA}, 208 F.3d 1015, 1024 (D.C. Cir. 2000) (citing \textit{Paralyzed Veterans v. D.C. Arena L.P.}, 117 F.3d 579, 588 (D.C. Cir. 1997)).
  \item \textsuperscript{11} \textit{Alaska v. U.S. Dep’t of Transp.}, 868 F.2d 441, 445-46 (D.C. Cir. 1989) (quoting \textit{Cmty. Nutrition Inst. v. Young}, 818 F.2d 943, 945-46 (D.C. Cir. 1987)). \textit{See also Appalachian Power Company}, 208 F.3d at 1024 (""We must still look to whether the interpretation itself carries the force and effect of law . . . .""); \textit{USTelecom}, 28 F.3d at 1234 (The court noted that is has ""said repeatedly"" that the line between an invalid legislative rule and a valid policy statement ""turns on an agency’s intention to bind itself to a particular legal position."); \textit{Pub. Citizen, Inc. v. NRC}, 940 F.2d 679, 681-82 (D.C. Cir. 1991) (""In determining whether an agency statement is a substantive rule, which requires notice and comment, or a policy statement, which does not, the ultimate issue is the agency’s intent to be bound."") (quoting \textit{Vietnam Veterans of Am. v. Sec’y of the Navy}, 843 F.2d. 528, 538 (D.C. Cir. 1988)).
\end{itemize}
Moreover, if the agency document is "couching in mandatory language, or in terms indicating that it will be regularly applied, a binding intent is strongly evidenced."\(^{13}\)

The language of the *Policy Statement* is more than sufficiently definitive to demonstrate that the Commission intended for the document to be binding on future enforcement proceedings. The Commission repeatedly states that it is *adopting* a new treble damages methodology.\(^{14}\) The Commission likewise states that it "*will replace* the current methodologies with a treble damages approach that, [it] believe[s], *will be* more efficient and effective."\(^{15}\) The Commission’s repeated use of the word "*will*" clearly "suggests the rigor of a rule, not the pliancy of a policy."\(^{16}\) Nowhere in the *Policy Statement* does the Commission state or even imply that implementation of this new methodology is uncertain or discretionary; it will be applied in all future cases.\(^{17}\)

In short, there can be no dispute that the Commission intends to use the treble damages framework to "cabin its discretion"\(^{18}\) in calculating forfeitures for violations of the USF and other federal program payments. As such, the *Policy Statement* simply does not fit the legal paradigm of a policy statement that is exempt from notice and comment requirements and the Commission cannot evade the notice and comment requirements of the APA here.

\(^{13}\) *Id.* at 383 (quoting with approval, *Interpretive Rules*, 41 Duke L.J. at 1328-29).

\(^{14}\) See *Policy Statement* ¶ 2 ("We therefore adopt a treble damages methodology to assess forfeitures for violations of federal program payment Rules."); *id.* ¶ 6 ("[T]oday we adopt for future enforcement actions a simpler and more straight-forward method of calculating base forfeitures for contribution and regulatory fee violations.").

\(^{15}\) *Id.* ¶ 6 (emphasis added).

\(^{16}\) See *Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320-21 (D.C. Cir. 1988); *Am. Bus Ass’n v. United States*, 627 F.2d 525, 532 (D.C. Cir. 1980) (noting that the so-called policy statement "repeatedly says and implies ‘the Commission will’; it nowhere says or implies ‘the Commission may.’").

\(^{17}\) *Policy Statement* ¶ 6 ("[T]oday we adopt for future enforcement actions a simpler and more straight-forward method of calculating base forfeitures for contribution and regulatory fee violations.").

\(^{18}\) *USTelecom*, 28 F.3d at 1234.
Indeed, the Commission tried once before to establish a substantive framework for assessing forfeitures under section 503(b) of the Act through a policy statement without notice and comment and failed. In 1991, the Commission decided to abandon its traditional case-by-case approach to implementing section 503(b) in favor of “more specific standards for assessing forfeitures.”\(^\text{19}\) Apparently mindful of its notice and comment obligations under the APA, the Commission “labeled the standards as a policy statement and reiterated 12 times that it retained discretion to depart from the standards in specific applications.”\(^\text{20}\)

The D.C. Circuit was unconvinced, however. The Court emphasized that the so-called policy statement set forth “a detailed schedule of penalties applicable to specific infractions as well as the appropriate adjustments for particular situations.”\(^\text{21}\) The Court found it “rather hard to imagine an agency wishing to publish such an exhaustive framework for sanctions if it did not intend to use that framework to cabin its discretion.”\(^\text{22}\) The Court, therefore, held that the Commission violated the APA when it promulgated the new schedule of penalties without notice and comment rulemaking and set aside the Commission’s policy statement.\(^\text{23}\) The Commission ultimately adopted a revised version of the 1991 forfeiture policy statement through a notice and comment rulemaking process.\(^\text{24}\)


\(^{20}\) USTelecom, 28 F.3d at 1234.

\(^{21}\) Id.

\(^{22}\) Id.

\(^{23}\) Id. at 1236.

\(^{24}\) The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, 12 FCC Rcd 17087, 17087 ¶ 1 (1997) (“1997 Forfeiture Policy Statement”) (“By this rule making proceeding, we adopt, with revisions, the Forfeiture Policy Statement and guidelines that were vacated by court’s decision in [USTelecom].”).
The same rationale applies to this case. Here the Commission does not offer even a pretense that the new treble damages methodology is discretionary and is not intended to be binding. The Policy Statement is clear – the Commission has found its previous methodologies to be “cumbersome,” “time-consuming” and “resource-intensive,” and is replacing these approaches with a one-size-fits-all forfeiture model for administrative efficiency. Because the Commission is obviously intending to “cabin its discretion” in this way and because the Commission chose to proceed without APA notice and comment, the Policy Statement must be set aside under the D.C. Circuit’s USTelecom decision.

To the extent the Commission intends for its treble damages base forfeiture amount to have the same weight as the base forfeiture amounts adopted through notice and comment rulemaking in the 1997 Forfeiture Policy Statement, the Policy Statement effectively modifies 47 C.F.R. § 1.80, which codifies those current base forfeiture amounts. Thus, the Policy Statement must also be set aside because an existing rule also cannot be modified without APA notice and comment.

Further, the Commission’s treble damages methodology is readily distinguishable from the U.S. Department of Interior Table of Penalties, which the Federal Circuit Court found to be

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25 Policy Statement ¶ 2 (“[O]ur current methodologies are unnecessarily cumbersome and therefore prevent us from resolving investigations quickly and efficiently, which in effect constrains our ability to deter non-compliance.”); id. ¶ 4 (“[T]he current methodologies for calculating forfeitures for violations of these Rules are overly cumbersome, requiring Commission staff to devote large amounts of time to each individual enforcement effort.”); id. (“To determine a delinquent contributor’s forfeiture liability, Commission staff must therefore engage in a time-consuming and resource-intensive process similar to forensic accounting, gathering and analyzing large amounts of data that are difficult to track, and usually involve multiple entities over multiple years.”).

26 USTelecom, 28 F.3d at 1234.

27 5 U.S.C. § 553(b); see also Am. Tort Reform Ass’n v. OSHA, 738 F.3d 387, 395 (D.C. Cir. 2013) (“Notice and comment rulemaking procedures are required under the APA when substantive rules are promulgated, modified, or revoked.”); United States Telecom Ass’n v. FCC, 400 F.3d 29, 30 (D.C. Cir. 2005) (A rule that “constitutes a substantive change in a prior rule” is subject to the APA’s notice and comment requirements.).
exempt from APA notice and comment requirements.\(^{28}\) In that case, the Table of Penalties “contain[ed] no mandatory language,” but merely provided “a range of penalties . . ., sometimes without indication of how the penalty should be determined.”\(^{29}\) The Table of Penalties did “not replace supervisory judgment” and made clear that a penalty “‘may vary from those contained in the’” table.\(^{30}\) Here, by contrast, there is nothing to suggest that the Commission may deviate from the treble damages formula when calculating forfeitures for USF and other federal program violations or to indicate that the new methodology does not supplant general Commission discretion in this area. To the contrary, retaining such discretion and flexibility in this area would deprive the Commission of the efficiency gains it seeks through implementing the treble damages methodology.

In sum, the Commission’s implementation of a treble damages methodology for calculating forfeitures is a substantive rule subject to APA notice and comment. Because the Commission adopted the Policy Statement without notice and comment, the Policy Statement must be set aside.

II. \textbf{THE COMMISSION’S TREBLE DAMAGES METHODOLOGY IS ARBITRARY AND CAPRICIOUS.}

The treble damages methodology is arbitrary and capricious and could lead to unfair and draconian results for numerous reasons. First, it is a departure from the Commission’s statutory obligation with regard to monetary forfeitures. Section 503(b) of the Act authorizes the Commission to impose a forfeiture against any entity that “willfully or repeatedly fail[s] to comply [substantially] with any of the provisions of [the Communications Act] or of any rule,

\(^{28}\) \textit{John Farrell v. DOI}, 314 F.3d 584 (Fed. Cir. 2002).

\(^{29}\) \textit{Id.} at 591-92.

\(^{30}\) \textit{Id.} at 592.
regulation, or order issued by the Commission. . .” 31 In exercising this authority, the Commission must consider the “nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.” 32 To meet these obligations, the Commission established base penalties for certain violations and specific criteria for adjusting up or down the base forfeiture amount to account for these statutory considerations. 33

The Commission now apparently finds the process of considering matters such as the “nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability” to be unduly burdensome in connection with violations of the USF and other federal program payment rules. For instance, the Commission complains that the current process for determining a delinquent contributor’s forfeiture liability is “cumbersome” and “staff must . . . engage in a time-consuming and resource-intensive process similar to forensic accounting, gathering and analyzing large amounts of data that are difficult to track, and usually involve multiple entities over multiple years.” 34 The Commission’s solution is to abandon its statutory obligation to evaluate such factors as the “nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability” and, instead, treat all such violations alike. Each violator will be subject to a “base forfeiture liability . . . three times the delinquent contributor’s debt to the USF, TRS, LNP, NANP, and regulatory fee programs.” 35

32 Id. § 503(b)(2)(E).
33 47 C.F.R. § 1.80(b)(8) note.
34 Policy Statement ¶¶ 2, 4.
35 Id. ¶ 6.
Treating all violations alike will undoubtedly expedite the enforcement process as the Commission intends.\textsuperscript{36} However, it is difficult to see how this process will actually take into account the “nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability” and other factors as the Act requires. Indeed, the *Policy Statement* makes no reference that the Commission will consider these matters or adjust the base forfeiture amounts to account for such concerns. Consequently, the Commission’s treble damages methodology appears to be in direct conflict with the requirements of section 503(b) of the Act.

Second, the treble damages methodology represents a departure—without explanation—from the more flexible approach that the Commission lawfully adopted (after notice and comment) in the *1997 Forfeiture Policy Statement*. Therein, the Commission asserted:

\begin{quote}
Although we have adopted the base forfeiture amounts as guidelines to provide a measure of predictability to the forfeiture process, we retain our discretion to depart from the guidelines and issues forfeitures on a case-by-case basis, under our general forfeiture authority contained in Section 503 of the Act.\textsuperscript{37}
\end{quote}

There is no similar expression of Commission flexibility and willingness to depart from the new base amount established in the *Policy Statement*, and no explanation of why a uniquely rigid and binding approach is warranted in the context of fund-related violations. The *Policy Statement* does not account, for example, for legitimate mistakes or a reasonable interpretation of ambiguous law such as distinguishing between telecommunications and information services.

\textsuperscript{36} See id. ¶¶ 2, 4.

\textsuperscript{37} *1997 Forfeiture Policy Statement*, 12 FCC Rcd at 17099 ¶ 22 (emphasis added) (citation omitted); id. at 17101 ¶ 29 (“...the Commission retains its discretion to depart from the guidelines where appropriate.”) (emphasis added)). See also 47 C.F.R. § 1.80(b)(8) note (“The Commission and its staff may use these guidelines in particular cases. The Commission and its staff retain the discretion to issue a higher or lower forfeiture than provided in the guidelines....”).
Third, the new treble damages methodology could lead to unduly draconian outcomes. For instance, a telecommunications service provider with a strong history of compliance who, through an innocent error, is late on a $2 million payment deadline will be subject to a $6 million base forfeiture amount. This would be the same base amount as that which would be applied to a telecommunications provider who missed the same $2 million payment for much more egregious reasons. In addition, to a large company with significant revenues to report, treble damages could be wildly disproportionate to the actual harm. Conversely, a base forfeiture amount that may be appropriate for a large company may be unduly harsh for a small company. Also, these new base forfeiture amounts can easily and quickly become so high that any downward adjustment from the base amount would be largely meaningless, even if the Commission were to consider downward adjustments.\(^{38}\) These are hardly the results contemplated by the express language of section 503(b) of the Act.

Fourth, other than asserting that the treble damages methodology will be more efficient to administrate, enabling “the Commission to resolve investigations more quickly and thereby promote increased compliance with the federal program payment Rules,” the Commission makes little effort to justify the sudden change to the treble damages methodology.\(^{39}\) In fact, adoption of the treble damages methodology appears to be driven primarily by the Commission’s desire to

\(^{38}\) The extreme nature of the treble damages methodology is well-illustrated by a comparison to late tax payment or late tax filing penalties imposed by the Internal Revenue Service ("IRS"). The IRS generally imposes a late filing penalty of 5 percent of the unpaid taxes for each month or part of a month that a tax return is late and the penalty will not exceed 25 percent of the unpaid taxes. See generally IRS Tax Tip 2013-58 (Apr. 18, 2013). The failure to pay penalty is typically 0.5 to 1 percent of the unpaid tax. Id.

\(^{39}\) The Policy Statement does imply that such an extreme base forfeiture amount is warranted in part because “many non-contributors collect the required payments from their customers through surcharges and then fail to pay the regulatory programs, the revised forfeiture also corresponds in those instances to three times the amount of economic gain from the violation.” Policy Statement ¶ 6. The Commission, however, fails to make any nexus between this perceived problem and the staggeringly high base amount. Likewise, this rationale does not justify imposing such an extreme forfeiture amount where a “non-contributor” has not collected the required payment amounts from their customers.
make forfeitures as high as possible. The Commission emphasizes that, as it applies this new methodology, it “will not hesitate to exercise [its] maximum forfeiture authority to promote compliance with the federal payment obligations contained in the Act and our Rules.”

The Commission does not otherwise provide a compelling policy justification for the need to extract ever greater forfeiture amounts. To the contrary, the Commission admits that its previous methodologies have been more than adequate to ensure that the number of cases involving “delinquent contributors is a small percentage of the number of contributors fully complying with the payment obligations for the USF and other federal regulatory programs.”

Further, the Commission boasts that it has proposed forfeitures totaling over $20 million since 1998, and that it has imposed increasingly higher forfeitures.

Despite this record of success, the Commission complains that it continues to receive “referrals and complaints alleging federal payment compliance failures.” The fact that the Commission receives and must investigate complaints involving a small number of potentially delinquent contributors, however, is hardly a sufficient justification for abandoning its statutory obligations to evaluate such matters as the “nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability” and to expose all potentially delinquent contributors to draconian forfeiture methodologies.

\[40\] *Id.* ¶ 7.

\[41\] *Id.* n.10.

\[42\] *Id.* ¶ 5.

\[43\] *Id.*

III. TREATING PAYMENT AND REPORTING VIOLATIONS AS “CONTINUING VIOLATIONS” CONFLICTS WITH THE STATUTE OF LIMITATIONS.

In connection with its apparent desire for higher forfeiture amounts, the Commission emphasizes its belief that “each single failure to pay a federal program assessment constitutes a separate violation that continues until the assessment is fully paid.” This assertion fails to acknowledge the effect of the statute of limitations in section 503(b)(6) of the Act and is wrong as a matter of law.

The Act establishes a one-year statute of limitations for violations of Commission rules. Specifically, section 503(b)(6) provides that, in cases that do not involve a broadcast licensee, the Commission may not “determine[] or impose[]” a forfeiture for a violation that “occurred more than 1 year prior to the date of issuance of the required notice [of opportunity for hearing] or notice of apparent liability.” This provision is intended “to bar the imposition of a forfeiture on a ‘stale’ violation.” As the D.C. Circuit has said in analogous circumstances, Congress has not endowed the Commission “with the power to hold a discrete . . . violation over [a company] for years.” The Commission’s characterization of a failure to timely pay USF or other such assessments or to file data in connection with such assessments as continuing violations, however, is an obvious effort to do just that.

The failure to file data or to make a payment by a date certain is a single, discrete violation that does not continue until the failure is cured. While the Act does not define a “continuing violation,” the language of the statute and the legislative history clearly demonstrate that such one-time events are not continuing violations. The term “occurred” as it appears in

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45 Policy Statement ¶ 7 (citation omitted).
48 AKM LLC v. Sec’y of Labor, 675 F.3d 752, 759 (D.C. Cir. 2012) (“AKM”).
section 503(b)(6) necessarily refers to a discrete event that happened in the past.\textsuperscript{49} Moreover, the legislative history makes clear that a “continuing violation” is a “‘one-time’ offense that continues over the duration of the violation.”\textsuperscript{50} By way of example, the legislative history pointed to the Section 310(d) prohibition against transfers of control of a license without FCC approval,\textsuperscript{51} stating that an unauthorized transfer of control is a continuing violation because every day the entity operates without approval it is operating unlawfully.\textsuperscript{52}

Appellate precedent confirms that the failure to meet a specific deadline is a one-time violation under Section 503(b). It is well settled that “the mere failure to right a wrong and make plaintiff whole cannot be a continuing wrong which tolls the statute of limitations, for that is the purpose of any lawsuit and the exception would obliterate the rule.”\textsuperscript{53} As the D.C. Circuit has indicated: “In a country where not even treason can be prosecuted, after a lapse of three years, it could scarcely be supposed, that an individual would remain forever liable to a pecuniary forfeiture.”\textsuperscript{54} “[I]t would be utterly repugnant to the genius of our laws, to allow such prosecutions a perpetuity of existence.”\textsuperscript{55}

\textsuperscript{49} As the D.C. Circuit recently recognized in interpreting a different statute of limitations that similarly is tied to the “‘occurrence of any violation,’” “the word ‘occurrence’ clearly refers to a discrete antecedent event – something that ‘happened’ or ‘came to pass’ ‘in the past.’” AKM, 675 F.3d at 755 (quoting Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 109-10 & n.5 (2002); see also id. (an “‘occurrence’” is an “‘incident or event’”) (quoting Black’s Law Dictionary 1080 (6th ed. 1990)).


\textsuperscript{51} 47 U.S.C. § 310(d).


\textsuperscript{55} Id. (quoting United States v. Mayo, 26 F. Cas. 1230, 1231 (C.C.D. Mass 1813) (No. 15,754)).
In *WIYN*, the United States Court of Appeals for the Fifth Circuit reviewed an FCC forfeiture assessed for a broadcast station’s failure to provide timely notice of a personal attack.\(^56\) The court found that the violation *did not* continue past the due date for the notification. The court reasoned that, for a violation to be continuing, there must “exist[] a continuing or persistent legal duty that the violator steadily fails to fulfill.”\(^57\) When as here “there was but a single, pointed duty, admitting of only a single dereliction . . . , a dereliction of this duty, and therefore a violation, occurs at that point.”\(^58\) This is so regardless of whether “the effect of this failure to act within the prescribed period persists.”\(^59\) Indeed, even if an entity can act after the prescribed period to address the effects of its dereliction, it does not mean that the violation was a continuing violation.\(^60\) There are numerous other cases supporting this conclusion.\(^61\)

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\(^56\) See *United States v. WIYN Radio, Inc.*, 614 F.2d 495, 497 (5th Cir. 1980) (“*WIYN*”).

\(^57\) *Id.* While the Enforcement Bureau has stated that *WIYN* is no longer “controlling” for purposes of what constitutes a willful or repeated violation due to 1982 amendments to the Communications Act, *Bureau D’Electronique Appliquée, Inc.*, 20 FCC Rcd 17893, 17896 ¶ 10 (EB 2005), the Commission itself has continued to rely on *WIYN*. See *ConQuest Operator Services, Corp.*, 14 FCC Rcd 12518, 12525-26 ¶ 16 & n.43 (1999).

\(^58\) *WIYN*, 614 F.2d at 497.

\(^59\) *Id.* (emphasis in original); see *AKM*, 675 F.3d at 757 (“[T]he ‘lingering effect of an unlawful act is not itself an unlawful act,’” and “the ‘mere failure to right a wrong . . . cannot be a continuing wrong which tolls the statute of limitations,’ for if it were, ‘the exception would obliterate the rule.’”) (citations omitted); see also *Felter v. Kemphorone*, 473 F.3d 1255, 1260 (D.C. Cir. 2007) (“As we have held, ‘[a] lingering effect of an unlawful act is not itself an unlawful act.’”) (alteration in original); *Weis-Buy Servs. v. Paglia*, 411 F.3d 415, 423 (3d. Cir 2005) (“‘[A] continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation.’” (citation omitted)); *Dasgupta v. University of Wisconsin Bd. of Regents*, 121 F.3d 1138, 1140 (7th Cir. 1997); *Ocean Acres Ltd. Partnership v. Dare County Bd. of Health*, 707 F.2d 103, 106 (4th Cir. 1983); *Ward v. Caudk*, 650 F.2d 1144, 1147 (9th Cir. 1981); *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241, 249 (5th Cir. 1980).

\(^60\) See *WIYN*, 614 F.2d at 497.

\(^61\) See, e.g., *Toussie v. United States*, 397 U.S. 112 (1970) (The failure to register for the draft within five days of the individual’s 18th birthday is not a continuing violation.); *United States v. Habig*, 390 U.S. 222 (1968) (The limitations period for prosecuting false tax returns begins when the return is filed (or, if later, its due date.)); *AKM*, 675 F.3d at 758 (The failure to prepare an OSHA-mandated incident report and a separate injury log within seven days of receiving information of an injury or illness and to prepare a year-end summary report are not continuing violations.); *United States v. Del Percio*, 870 F.2d 1090, 1094-98 (6th Cir. 1989) (The failure to file plans and schedules for making certain nuclear power plant
For the Commission to manipulate the one-year statute of limitations period by treating one-time events such as a failure to file data or to make a payment by a date certain as a continuing violation conflicts with the statute of limitations and its underlying purpose. Such an interpretation would effectively nullify section 503(b)(6), subjecting telecommunications service providers to liability in perpetuity. As the D.C. Circuit recently explained, "[t]here is truly no end to such madness."\[^{62}\]

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\[^{62}\] *AKM, 675 F.3d at 757-58.*
IV. CONCLUSION

For these reasons, the Commission should set aside the Policy Statement.

Respectfully submitted,

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March 6, 2015
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

) FCC 15-15
) Forfeiture Methodology for Violations of Rules Governing Payment to Certain Federal Programs

PETITION FOR STAY

CTIA – The Wireless Association®, National Cable & Telecommunications Association, United States Telecom Association, and COMPTEL (collectively, the “Associations”)¹ hereby petition the Commission to stay immediately the above-captioned Policy Statement² pending the outcome of the Associations’ Petition for Reconsideration of the Policy Statement.³

I. BACKGROUND

The Policy Statement promulgates a new methodology by which the Commission will calculate monetary forfeitures in cases where telecommunications service providers fail (1) to pay federal regulatory fees and make timely contributions to the Universal Service Fund (USF), the Telecommunications Relay Service (“TRS”) Fund, and the cost recovery mechanisms for local number portability (“LNP”), and the North American Numbering Plan (“NANP”), or (2) to file data required to assess payment obligations for these programs.⁴ The Policy Statement

¹ The Associations are trade associations whose members include telecommunications service providers obligated to pay assessments for the federal Universal Service Fund, Telecommunications Relay Service Fund, local number portability, North American Numbering Plan, and regulatory fee programs, and to file data required to assess payment obligations for these programs.
³ The Associations are filing a Petition for Reconsideration concurrently with this Stay Petition (the “Petition for Reconsideration”).
⁴ Policy Statement at ¶¶ 1-2.
replaces the Commission’s current methodologies “with a treble damages approach” under which “each violator’s apparent base forfeiture liability will be three times the delinquent contributor’s debts to the USF, TRS, LNP, NAMP, and regulatory fee programs.”

The Associations hereby seek a stay of the Policy Statement to maintain the status quo until such time as the Commission acts on their Petition for Reconsideration of the Policy Statement. As discussed below, the four-factor test applied by the Commission and the courts in the stay context is satisfied here.

II. A STAY IS WARRANTED UNDER THE FOUR-FACTOR TEST APPLIED BY THE COMMISSION AND THE COURTS.

The Commission should stay the Policy Statement pending further Commission action.

The Commission has substantial discretion in granting a stay and may stay an order where doing so is “equitable and will serve the public interest.” The Commission typically exercises that discretion in light of the familiar four-factor test applied by both the Commission and the courts.

That test asks:

(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? . . . (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest? . . .

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5 Id. ¶ 6.

6 Tennis Channel, Inc. v. Comcast Cable Commc’n’s, LLC, 27 FCC Rcd 5613, 5616 ¶ 5 (2012); see also 5 U.S.C. § 705 (providing that an agency may grant a stay pending judicial review when it “finds that justice so requires”).

7 Va. Petroleum Jobbers Ass’n v. FPC, 259 F.2d 921, 925 (1958); see, e.g., In the Matter of Brunson Commc’n’s, Inc. v. RCN Telecom Servs., Inc., 15 FCC Rcd 12883, 12883-84 ¶ 2 (CSB 2000) (citing Virginia Petroleum factors).
"[N]o single factor is necessarily dispositive,"\(^8\) and the Commission may grant a stay where a petitioner makes a strong showing as to at least one of the factors, even if there is no showing on another.\(^9\)

A. The Associations Are Likely To Prevail on the Merits.

The likelihood-of-success inquiry does not require the Associations to demonstrate, or the Commission to believe, that the Associations ultimately will prevail. Rather, it is sufficient for the Commission to recognize that "a serious legal question is presented,"\(^10\) and that the issues raised by the petition "bear further analysis."\(^11\) The Association's showing here easily vaults this threshold.

The Administrative Procedure Act ("APA") requires that before an agency adopts a substantive rule it must publish a notice of the proposed rule and provide interested persons an opportunity to comment.\(^12\) Substantive rules adopted in violation of these requirements are invalid and must be set aside.\(^13\) While, "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" are exempt from the notice and comment

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\(^8\) In re AT&T Corp. v. Ameritech Corp., 13 FCC Rcd 14508, 14515-16 (1998); see also In re Comcast Cable Commc'ns, LLC, 20 FCC Rcd 8217, 8217–18 ¶ 2 (MB 2005) (explaining that the degree to which any one factor must favor a stay "will vary according to the Commission's assessment of the other factors").

\(^9\) "The four factors have typically been evaluated on a 'sliding scale.' If the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor." Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1291-92 (D.C. Cir. 2009) (quoting Davenport v. Int'l Blvd. of Teamsters, 166 F.3d 356, 361, 334 U.S. App. D.C. 228 (D.C. Cir. 1999)). See also Washington Metro Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Iowa Util. Bd. v. FCC, 109 F.3d 418, 423 (8th Cir. 1996).

\(^10\) Holiday Tours, 559 F.2d at 844.


\(^12\) See 5 U.S.C. § 553(b).

\(^13\) See United States Telephone Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir. 1994) ("USTelecom").
requirements,\textsuperscript{14} it is well-settled that an agency may not escape the APA notice and comment requirements merely by labeling a document as policy statement.\textsuperscript{15} Rather, the question of whether a given agency action is substantive rule subject to notice and comment or an exempt policy statement turns on whether the agency intends to bind itself to a particular legal position—a policy statement, unlike a substantive rule, must “genuinely leave[] the agency . . . free to exercise discretion.”\textsuperscript{16} The D.C. Circuit has encapsulated this distinction as follows:

“If a document expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect, the agency may not rely upon the statutory exemption for policy statements but must observe the APA’s legislative rulemaking process.”\textsuperscript{17}

Moreover, if the agency document is “couched in mandatory language, or in terms indicating that it will be regularly applied, a binding intent is strongly evidenced.”\textsuperscript{18}

The language of the Policy Statement is more than sufficiently definitive to demonstrate that the Commission intended for the document to be binding on future enforcement proceedings. The Commission repeatedly states that it is adopting a new treble damages

\textsuperscript{14} 5 U.S.C. § 533(b)(A).
\textsuperscript{15} See, e.g., Appalachian Power Co. v. EPA, 208 F.3d 1015, 1024 (D.C. Cir. 2000) (citing Paralyzed Veterans v. D.C. Arena L.P., 117 F.3d 579, 588 (D.C. Cir. 1997)).
\textsuperscript{16} Alaska v. U.S. Dep’t of Transp., 868 F.2d 441, 445-46 (D.C. Cir. 1989) (quoting Cnty. Nutrition Inst. v. Young, 818 F.2d 943, 945-46 (D.C. Cir. 1987)). See also Appalachian Power Company, 208 F.3d at 1024 ("We must still look to whether the interpretation itself carries the force and effect of law. . . ."); USTelecom, 28 F.3d at 1234 (The court noted that is has “said repeatedly” that the line between an invalid legislative rule and a valid policy statement “turns on an agency’s intention to bind itself to a particular legal position.”); Pub. Citizen, Inc. v. NRC, 940 F.2d 679, 681-82 (D.C. Cir. 1991) (“In determining whether an agency statement is a substantive rule, which requires notice and comment, or a policy statement, which does not, the ultimate issue is ‘the agency’s intent to be bound.’”) (quoting Vietnam Veterans of Am. v. Sec’y of the Navy, 843 F.2d. 528, 538 (D.C. Cir. 1988)).
\textsuperscript{17} General Electric Co. v. EPA, 290 F.3d 377, 382-83 (D.C. Cir. 2002) (quoting with approval, Robert A. Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?, 41 Duke L.J. at 1311, 1355 (1992)).
\textsuperscript{18} Id. at 383 (quoting with approval, Interpretive Rules, 41 Duke L.J. at 1328-29).
methodology. The Commission likewise states that it “will replace the current methodologies with a treble damages approach that, [it] believe[s], will be more efficient and effective.” The Commission’s use of the word “will” clearly “suggests the rigor of a rule, not the pliancy of a policy.” Nowhere in the Policy Statement does the Commission state or even imply that implementation of this new methodology is uncertain or discretionary; it will be applied in all future cases.

In short, there can be no dispute that the Commission intends to use the treble damages framework to “cabin its discretion” in calculating forfeitures for violations of the USF and other federal program payments. As such, the Policy Statement simply does not fit the legal paradigm of a policy statement that is exempt from notice and comment requirements and the Commission cannot evade the notice and comment requirements of the APA here.

Indeed, the Commission tried once before to establish a substantive framework for assessing forfeitures under section 503(b) of the Act without notice and comment and failed. In 1991, the Commission decided to abandon its traditional case-by-case approach to implementing section 503(b) of the Act in favor of “more specific standards for assessing forfeitures.”

Apparently mindful of its notice and comment obligations under the APA, the Commission

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19 See Policy Statement ¶ 2 (“We therefore adopt a treble damages methodology to assess forfeitures for violations of federal program payment Rules.”); id. ¶ 6 (“[T]oday we adopt for future enforcement actions a simpler and more straight-forward method of calculating base forfeitures for contribution and regulatory fee violations.”).

20 Id. ¶ 6 (emphasis added).

21 See Steel Prods. Corp. v. Thomas, 838 F.2d 1317, 1320-21 (D.C. Cir. 1988); Am. Bus. Ass’ns v. United States, 627 F.2d 525, 532 (D.C. Cir. 1980) (noting that the so-called policy statement “repeatedly says and implies ‘the Commission will’; it nowhere says or implies ‘the Commission may.’”).

22 Policy Statement ¶ 6 (“[T]oday we adopt for future enforcement actions a simpler and more straight-forward method of calculating base forfeitures for contribution and regulatory fee violations.”).

23 USTelecom, 28 F.3d at 1234.

"labeled the standards as a policy statement and reiterated 12 times that it retained discretion to depart from the standards in specific applications."25

The D.C. Circuit was unconvinced. The Court emphasized that the so-called policy statement set forth "a detailed schedule of penalties applicable to specific infractions as well as the appropriate adjustments for particular situations."26 The Court found it "rather hard to imagine an agency wishing to publish such an exhaustive framework for sanctions if it did not intend to use that framework to cabin its discretion."27 The Court, therefore, held that the Commission violated the APA when it promulgated the new schedule of penalties without notice or comment rulemaking and set aside the Commission’s policy statement.28 The Commission ultimately adopted a revised version of the 1991 forfeiture policy statement through a notice and comment rulemaking process.29

The same rationale applies to this case. Here the Commission does not offer even a pretense that the new treble damages methodology is discretionary and not intended to be binding. The Policy Statement is clear -- the Commission has found the exercise of discretion in this area to be "cumbersome," "time-consuming," and "resource-intensive,"30 and intends to

25 USTelecom, 28 F.3d at 1234.
26 Id.
27 Id.
28 Id. at 1236.
29 The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, 12 FCC Red 17087, 17087 ¶ 1 (1997) ("By this rule making proceeding, we adopt, with revisions, the Forfeiture Policy Statement and guidelines that were vacated by court’s decision in [USTelecom].").
30 Policy Statement ¶ 2 ("[O]ur current methodologies are unnecessarily cumbersome and therefore prevent us from resolving investigations quickly and efficiently, which in effect constrains our ability to deter non-compliance."); id. ¶ 4 ("[T]he current methodologies for calculating forfeitures for violations of these Rules are overly cumbersome, requiring Commission staff to devote large amounts of time to each individual enforcement effort."); id. ("To determine a delinquent contributor’s forfeiture liability, Commission staff must therefore engage in a time-consuming and resource-intensive process similar to
replace this approach in with a one-size-fits-all forfeiture model for administrative efficiency. The Commission’s implementation of a treble damages methodology for calculating forfeitures is therefore a substantive rule subject to APA notice and comment requirements. The Commission, however, failed to satisfy these requirements and the Policy Statement must be set aside.

The Association’s likelihood of success on the merits is further bolstered by the Associations’ strong substantive arguments that the Policy Statement is arbitrary and capricious and inconsistent with the one-year statute of limitations. As demonstrated in the Petition for Reconsideration, the Policy Statement’s new treble damages methodology is a transparent attempt by the Commission to drive forfeiture amounts for payment and reporting violations in connection with certain federal regulatory programs as high as possible and lacks substantial policy justification.\(^{31}\) Furthermore, the Commission incorrectly asserts that such payment and reporting violations are continuing violations for purposes of the one-year statute of limitations in 47 U.S.C. § 503(b)(6). Well-established precedent makes clear that the failure to file data or to make a payment by a date certain is a single, discrete violation and is not a continuing violation.\(^{32}\)

B. The Associations’ Members Will Suffer Irreparable Injury Absent a Stay.

As demonstrated in the Petition for Review, the Commission apparently intends to apply the treble damages methodology to all telecommunications service providers and to treat all potential violations alike without regard to the “nature, circumstances, extent, and gravity of the forensic accounting, gathering and analyzing large amounts of data that are difficult to track, and usually involve multiple entities over multiple years.”\(^{31}\).

\(^{31}\) See Petition for Reconsideration at 7-11.

\(^{32}\) See id. at 11-14.
violation and, with respect to the violator, the degree of culpability” as required by section 503(b) of the Act. Moreover, the treble damages methodology appears intended to result in substantially increased forfeitures. The Commission appears willing even to manipulate the statute of limitations in order to extract the maximum forfeitures from each potentially liable telecommunications provider. The Commission is taking these draconian steps despite the fact that “the number of referrals or complaints concerning delinquent contributors is a small percentage of the number of contributors fully complying with the payment obligations for the USF and other federal regulatory programs.”

As such, the Commission’s action will expose telecommunications service providers to higher forfeiture amounts while simultaneously depriving them of the ability to advocate in favor of lower forfeiture amounts. In fact, the new base forfeiture amounts may be so extreme that any downward adjustment would be largely meaningless, even if the Commission were willing to entertain downward adjustments. Moreover, depending on timing, absent a stay, the subject of a forfeiture calculated based on the Policy Statement could be required by a district court to pay the forfeiture before the Commission or a Court of Appeals vacates the Policy Statement. Thus, absent a stay, the Associations’ members will suffer irreparable injury.

C. A Stay Will Not Harm any Party.

A stay will not harm any party. The only parties to these Commission enforcement proceedings are generally the Commission and the alleged delinquent contributor telecommunications service providers. A stay will not harm the Commission. The Commission has made clear that adopting a new forfeiture calculation methodology is largely a matter of

34 See Petition for Reconsideration at 7-11.
35 Policy Statement at n.10.
administrative efficiency and easing the burden on Commission staff.\textsuperscript{36} A stay will not substantively hamper the Commission’s ongoing enforcement efforts; it will mean only that the Commission’s previous forfeiture calculation methodology will remain in place. As the Commission itself acknowledges this methodology has successfully resulted in proposed forfeitures totaling more than $20 million since 1998.\textsuperscript{37}

D. The Public Interest Favors a Stay.

The balance of the public interest strongly favors a stay of the Policy Statement. As discussed above, there is a strong likelihood that the Policy Statement will be set aside as violating the APA notice and comment requirements. The public will not gain if the Policy Statement remains in place until it is set aside. The Commission already has strong enforcement programs in place and will continue to be able to pursue allegedly delinquent contributors to the Commission’s USF, TRS, LNP, NANP, and regulatory fee programs. Issuing forfeitures based on the legally vulnerable Policy Statement will result in further litigation of such forfeiture proceedings once the Policy Statement is vacated.

III. CONCLUSION

For the foregoing reasons and the reasons stated in the Associations’ Petition for Reconsideration, the Associations requests that the Commission stay the effectiveness of the Policy Statement pending action on the accompanying Petition for Reconsideration. The Associations also request that the Commission issue a ruling on this stay petition expeditiously to

\textsuperscript{36} \textit{Id.} ¶ 4.
\textsuperscript{37} \textit{Id.} ¶ 5.
remove any uncertainty regarding the legal status of the Policy Statement and its treble damages forfeiture calculation methodology.

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